

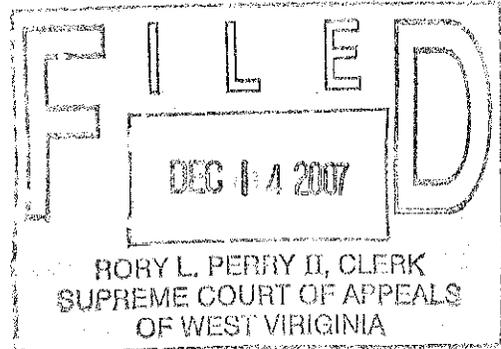
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No. 33716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

IN THE MATTER OF: Abbigail Faye B.

[REDACTED]



FROM THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA
Civil Action No.: 07-CIGR-1

BRIEF OF APPELLANTS

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KIND OF PROCEEDING AND NATURE OF RULING

On February 20, 2007, the Petitioners filed a *pro se* Petition For Appointment of Guardian, pursuant to West Virginia Code §44-10-3 in the Family Court of Cabell County, West Virginia. Thereafter the Petitioners hired counsel and filed an Amended Petition. The Family Court of Cabell County appointed a guardian ad litem for the minor child. On March 2, 2007, this matter came on for hearing in the Family Court at which time the Family Court removed this matter to the Circuit Court of Cabell County pursuant to Rule 48a of the Rules of Practice and Procedure for Family Court.

This matter came on for hearing in the Circuit Court on May 7, May 25, and June 8, 2007, at which time the Court heard the evidence and testimony of the parties and their witnesses and the arguments of counsel and recommendations of the guardian ad litem.

By Order entered July 9, 2007, the Circuit Court denied the Petition for Guardianship finding: "After having reviewed all of the testimony and the recommendations of the parties, this court finds that the Petitioners have failed to meet their burden in this matter to show that Abbigail [F. B.] . . . is an abused or neglected child as defined by the West Virginia Code, nor that Autumn [S.], . . . the natural mother of Abbigail, is not capable of being a fit parent."

Josh B., the father of Abbigail, had not legally acknowledged paternity at the time the guardianship petition was filed. Immediately prior to the Family Court hearing, Josh B. legally acknowledged paternity. The pleadings in this matter were not amended to name Josh B. as a party, although the issue was recognized by the Circuit Court and he participated in

each hearing personally and was represented by the same attorney representing Autumn S.

STATEMENT OF FACTS

Abbigail B. was born on August 3, 2006, in Cabell County, West Virginia. Her mother, Autumn S., born December 2, 1988, was seventeen years old at the time and resided with her mother, Gala P. and her stepfather, Brent P. Abbigail's father, Josh B. did not legally acknowledge paternity until February 2007, despite the fact that several months prior to Abbigail's birth the Petitioners permitted him to move into rooms above their shop on their property and he continued to live there until Abbigail was about three weeks old. (Tr. May 7, 2007, pp. 27-28).

The parties dispute why Josh was not listed on Abbigail's birth certificate at the time of her birth. Gala P. testified that Autumn did not want Josh on the birth certificate because she was afraid that Josh would take Abbigail from her. (Tr. May 7, 2007, p. 26). The Respondents contend that Gala P. simply would not allow Josh to be listed as the father.

After her birth, Abbigail, Autumn and Josh continued to reside at the Petitioners. When Abbigail was about three weeks old, Autumn and Josh decided to go to Paducah, Kentucky, leaving Abbigail in the care of the Petitioners. (Tr. May 7, 2007, pp. 11-12). Despite the fact that the Petitioners tried to encourage Autumn to care for Abbigail, she seldom took the initiative. (Tr. May 25, 2007, pp. 69-70). Accordingly, it was at this time that the Petitioners began exercising more control over Abbigail's care. "They was getting ready to diagnose her or give her failure to thrive. She was very sick. She wasn't gaining

weight. She wasn't eating. What little she did eat, she vomited right back up. And I got up one morning, I just thought, you know, it's going to come to the point that we're going to have to take over and take care of this baby or she's not going to make it. And at the point of about three weeks, when . . . [Autumn left for Paducah, Kentucky] we took over." (Tr. May 25, 2007, p. 68).

When Autumn and Josh returned from Kentucky, Josh moved out of the rooms above the Petitioner's shop and off of their property. (Tr. May 25, 2007, p. 72). Autumn subsequently reported to her mother that Josh violently raped her while they were in Paducah, Kentucky. (Tr. May 7, 2007, pp. 31-32). In January 2007, Autumn also reported to Ellen Cundiff of Team for West Virginia Children that Josh raped her when they went to Paducah when Abbigail was three weeks old. (Tr. May 25, 2007, p. 27). Autumn cried when she told Ellen about the rape and indicated that she was afraid of Josh. (Tr. May 25, 2007, p. 28). Autumn later denied that Josh had raped her and even denied saying she had been raped, "I'm really not sure where she [Ellen Cundiff] got the idea, because the only thing I told Ellen was he didn't pull out when I told him he needed to. . ." (Tr. June 8, 2007, p. 15). "Q. Did you tell either your mother or any of the workers that Josh had raped you? A. Huh-uh. No." (Tr. June 8, 2007, p. 15). Ellen Cundiff suggested that Autumn obtain counseling from Contact, a rape counseling center, but Autumn has not attended counseling. (Tr. May 25, 2007, p. 28). In fact, while Autumn testified that she is willing to participate in counseling and therapy (Tr. June 8, 2007, p. 18), she admits that Ellen Cundiff had referred her to

counseling but, "I never made the appointment," and that Ellen Cundiff referred her to counseling at Branches Domestic Violence Shelter several times but "I never followed up on that." (Tr. June 8, 2007, pp. 23-24).

Prior to moving from the Petitioner's property, Josh provided very little care for Abbigail and the care he provided was often not appropriate. Josh expressed that he did not believe Abbigail had reflux, despite her diagnosis, and did not follow the feeding procedure in that regard. (Tr. May 7, 2007, pp. 37-38). Alice F., the maternal great grandmother, had a few occasions to see Josh feed Abbigail and testified that he did not follow proper feeding procedures for a baby with reflux. He would not hold her upright while feeding or for thirty minutes after feeding despite being told to do so. (Tr. May 25, 2007, pp. 83-84).

At the time Autumn and Josh returned from Kentucky, Autumn was still enrolled in high school and the care of Abbigail was left to Gala P. and the maternal great-grandmother Alice F. (Tr. May 7, 2007, p. 12).¹ However, even when Autumn was not in school, Gala P. and Alice F. continued to provide most of the care. (Tr. May 7, 2007, p. 13). Gala P. testified that Autumn would only "take care of Abbigail, if we made her." (Tr. May 7, 2007, p. 13). Autumn only occasionally fed Abbigail and the majority of feeding was done by the Petitioners and maternal great grandmother. (Tr. May 7, 2007, p. 13-14). While the Petitioners tried to encourage Autumn to provide more care to Abbigail, their efforts were

¹ Autumn dropped out of highschool after leaving the Petitioner's residence and has not enrolled in a GED program. (Tr. June 8, 2007, p. 9 and 21).

unsuccessful. Alice F. testified that she and Brent P. and Gala P. tried to encourage Autumn to care for Abbigail, because Autumn did not show any initiative to care for her on her own, and if Autumn was not reminded to care for Abbigail the care was not provided unless they did it. (Tr. May 25, 2007, pp. 78-79). Gala P. testified that Abbigail was taken to physical therapy at Cabell Huntington Hospital in January 2007 for a problem with her right leg and was given exercises to preform at home. Despite the fact that Autumn continued to live at the Petitioner's home until February 20, 2007, she did not preform any of the daily home physical therapy with Abbigail. (Tr. May 7, 2007, pp. 18-20). Brenda Wright, of Child Protective Services, confirmed during her investigation that, "it did seem that she [Autumn] was not necessarily the primary caregiver of the child when she lived with her mom." (Tr. May 25, 2007, p. 88). Rather, it appeared that Gala "provided a good bit of the care" of Abbigail essentially since her birth. (Tr. May 25, 2007, pp. 88-89). According to Alice F., the maternal great-grandmother, Autumn simply "didn't have that much interest in her." (Tr. May 25, 2007, p. 79).

Despite the efforts of Gala P., Brent P., Alice F., and Ellen Cundiff from Team for West Virginia Children, Autumn's ability to care of Abbigail from the time of her birth until February 2007, did not improve, she was not interested in caring for Abbigail and always required encouragement from Alice or Gala to care for Abbigail. (Tr. May 25, 2007, pp. 80-81). Brent P. testified that Autumn moved out in February 2007, but from the time of Abbigail's birth until Autumn moved out Brent did not notice any significant improvement

in Autumn's ability or desire to care for Abbigail. (Tr. May 25, 2007, p. 70). Alice F. testified that she does not believe that Autumn has the ability to care for Abbigail. (Tr. May 25, 2007, p. 81). Ellen Cundiff of Team for West Virginia Children Testified that she does not believe Autumn or Josh are capable of taking care of Abbigail at this time. (Tr. May 25, 2007, p. 35). The Guardian Ad Litem also concluded, "I'm not convinced that they would be able to care appropriately for the child." (Tr. June 8, 2007, p. 75).

Autumn's lack of interest and initiative in caring for Abbigail, or learning how to care for Abbigail, is echoed by Ellen Carol-Cundiff, a family support worker with Team for West Virginia Children who works with first time mothers on child development. (Tr. May 25, 2007, pp. 14-15). Mrs. Cundiff began working with Autumn every two weeks in March 2006, prior to Abbigail's birth in August, 2006, and later increased to every week and continued to work with her through May 25, 2007. (Tr. May 25, 2007, pp. 16-17). Throughout this time period Mrs. Cundiff testified that: she did not "see a lot of bond." (Tr. May 25, 2007, p. 18); that she did not see a lot of initiative by Autumn (Tr. May 25, 2007, p. 18); that she brought literature on child development which Autumn did not read (Tr. May 25, 2007, p. 20); that Autumn was not anxious to participate in learning from Ellen and on a few occasions even fell asleep during their meetings (Tr. May 25, 2007, p. 32); that in the ten months since Abbigail was born, she did not see any true bond between Abbigail and Autumn (Tr. May 25, 2007, p. 20); that in the ten months since Abbigail was born she did not see any significant improvement in Autumn's ability to care for Abbigail. "[N]othing has

improved for her to be a better caretaker of the baby, no.” (Tr. May 25, 2007, p. 20-21). Contrary to the testimony of Ellen Cundiff, Gala P., Brent P., Alice F., and the findings of Child Protective Services, Autumn contends that she provided all of the care for Abbigail except when she was attending school. (Tr. June 8, 2007, pp. 27-28). The overwhelming evidence is, however, that Abbigail has not formed any bond with either of the biological parents. Gala P. testified that Abbigail is not bonded to Autumn. (Tr. May 7, 2007, p. 20), and that Autumn has never bonded with Abbigail and has never been able to console her or soothe her. (Tr. May 25, 2007, p. 5). Brent P. also testified that Abbigail does not have any significant bond with Autumn. (Tr. May 25, 2007, pp. 71-72). Ellen Cundiff likewise testified that she has not observed any bond between Abbigail and Josh. (Tr. May 25, 2007, p. 24).

Ellen Cundiff, of Team for West Virginia Children who worked with Autumn through May 25, 2007, testified that Abbigail “has become very attached to the Packs. I mean - - and the whole family unit out there, they’re very attached to the baby and the baby’s very attached to them. They provide for the baby. It’s been them who’s taking care of the baby, so - - it’s a safe environment for the baby.” (Tr. may 25, 2007, p. 33). Based upon her observations, Mrs. Cundiff testified that Abbigail is bonded to Gala P., Brent P., and Alice F., the maternal great-grandmother. (Tr. May 25, 2007, pp. 33-34). Ellen Cundiff testified that, “I didn’t see a lot of bond” between Autumn and Abbigail. (Tr. May 25, 2007, p. 18). Moreover, Ellen Cundiff testified that Josh Bolen’s interaction with Abbigail “it’s a little odd

to me, because he doesn't speak to the baby. He just gets really close to her, almost invasion of her personal space. . . . He doesn't say anything. He doesn't say I miss you, I love you, you're daddy's girl, you're pretty today, nothing like that. It's just staring." (Tr. May 25, 2007, pp. 22-23). Brent P. also testified that Josh had very little involvement in caring for Abbigail prior to moving out and very little after he moved out. (Tr. May 25, 2007, p. 72). And, that during visits Josh stares at Abbigail and does not try to play with her or talk to her. (Tr. May 25, 2007, p. 73).

Sometime between 2:00 a.m. and 5:00 a.m on the morning of February 20, 2007, Autumn left her mother's residence, without notice to her mother or stepfather, leaving Abbigail in the care of her mother and stepfather. (Tr. May 7, 2007, pp. 7 - 9). Autumn testified that when she left Brent and Gala's home she left Abbigail with them because, "She was better off at that moment." (Tr. June 8, 2007, p. 28). Not knowing where Autumn went or when she would return, Gala P. and Brent P. filed a *pro se* Petition For Appointment Of Guardian in the Family Court of Cabell County, on the afternoon of February 20, 2007, alleging that the mother had run away and left Abbigail with the Petitioners and that the mother's whereabouts were unknown.

The Petition was scheduled for hearing on February 27, 2007, before Family Court Judge Patricia Keller. Judge Keller was recused from the matter due to her prior representation of Gala P. and this matter was reassigned to Family Court Judge Ronald Anderson and rescheduled for hearing on March 2, 2007. Prior to the hearing, the Petitioners

hired counsel and filed an Amended Petition For Guardianship alleging: that the biological parents are unfit; that the child has lived with the Petitioners since her birth; that the mother abandoned the child to the Petitioners on two occasions; that the biological father has had very little contact with the child; that Autumn S. reported to her family and a service provider that the biological father had raped her and been violent towards her; that the biological father has used illegal drugs; that despite Autumn's allegations of rape, violence, and drug use against the biological father she has chosen to live with him; that neither biological parent is bonded with the child; that the child suffers from medical conditions requiring special care; that the biological father's driver's license was revoked in connection with criminal charges; and, that Autumn has never attempted to obtain a divers's license.²

At the March 2, 2007, hearing, the Family Court granted the Petitioners temporary guardianship of the child, granted the biological parents supervised visitation and removed this matter to the Circuit Court pursuant to Rule 48a of the Rules of Practice and Procedure for Family Court.

² Autumn still does not have a driver's license or a learner's permit. (Tr. June 8, 2007, p. 9 and 20). Autumn testified that Josh has smoked pot and drank alcohol and that she knew Josh gave incomplete or untruthful information to the CPS worker about his substance abuse. (Tr. June 8, 2007, pp. 25-27). Josh B. testified that he had been arrested for driving on a suspended license, possession and obstructing justice as well as additional charges of driving on a suspended license, speeding and an unsigned registration card. (Tr. June 8, 2007, p. 44). Josh admits smoking pot as recently as January 2007, although he did not tell the CPS worker that he had done so nor did he admit to his past illegal use of alcohol. (Tr. June 8, 2007, p. 60).

Gala P. testified that Abbigail suffers from several medical conditions including severe reflux and auditory and tactile sensory issues such that she has problems with textures on her feet and hands as well as the textures of food which make her gag. She has problems going out in public and going to strange places and was sick for two days after going to Wal-Mart. (Tr. May 7, 2007, p. 14). As a result of these problems, Abbigail was referred to West Virginia Birth to Three.

Joan Bellis, a developmental therapist employed by Developmental Therapy Center and working for West Virginia Birth to Three, evaluated Abbigail, prepared a written evaluation and had made two therapy visits by the time of the hearing. (Tr. May 25, 2007, pp. 47-48).³ Joan Bellis provided testimony about Abbigail's developmental issues: "We call it being defensive. Her skin is defensive. If you place her on the floor in bare feet, she brings her knees up, because that is too stimulating, the rug. If you put something that's like a cheerleading shaker in front of her, it is like don't touch that. She doesn't want to touch it. Another way is her ears. If there are sudden loud noises or strange noises, she becomes really frightened. More than is typical. More than is typical. . . . She doesn't even like much food. That's a problem. That's also a defensiveness. It is oral defensiveness not to accept, by her age, several different foods." (Tr. May 25, 2007, pp. 49-50). "It's not just preferences. It is something that she has to learn to increase her tolerance for those

³ Joan Bellis has a masters degree in preschool children with developmental delays, "Special needs" and has worked with West Virginia Birth to Three for sixteen years (Tr. May 25, 2007, pp. 47-48).

situations, and that will be difficult for her.” (Tr. May 25, 2007, p. 50).⁴

Joan Bellis testified about the tremendous importance of Abigail’s care givers being involved in her therapy and being motivated to provide the therapy on their own every day. “[Y]ou want the caregivers to be involved, because you’re modeling things to do and discussing ideas to try. . . . You can’t just do it an hour a week won’t do it. The family has to do it every day.” (Tr. May 25, 2007, p. 53). “How important is it for the caregiver to actually be involved and participate in the therapy that you’re providing for a child? A. It’s - it’s the key. Because one hour a week won’t do anything unless it’s followed through. It won’t. The caregiver has to take an interest, understand what to do next and do it. Several times a day.” (Tr. May 25, 2007, p. 54). Significantly, Joan Bellis testified that while the Gala P., Brent P., and Alice F. are very willing to participate in Abigail’s therapy, she had never met the biological mother or father. (Tr. May 25, 2007, p. 56).

Joan Bellis testified about the impact of removing Abigail from the home of Gala and Brent P. “Q. With respect to a child like Abigail that has these aversions, would you recommend her suddenly changing her whole environment, living in a different home? A. She has to feel safe and loved wherever she is. She has to feel secure. And there has to be consistency and there has to be involvement and interaction and looking at and I love you and touching. The home she’s in now provides that. Whatever environment she would be in

⁴ Joan Bellis testified that Abigail is also being treated by a physical therapist who conducted her evaluation on May 24 as well as a speech therapist. (Tr. May 25, 2007, p. 55).

would have to provide that, because that is how she will progress otherwise she is going to -

- Q. But in terms of - - would it be at all detrimental to Abbigail's development if she were suddenly uprooted and taken out of the Pack's home and put in a whole different environment? A. Yes, it would. It would be a setback." (Tr. May 25, 2007, pp. 58-59).

Accordingly, she did not recommend removing Abbigail from the Pack's home and placing her in a new environment with new care givers. "[S]tick her in a new environment, no, that sounds crazy." (Tr. May 25, 2007, p. 62). Additionally, Joan Bellis testified that placing Abbigail into a home with care giver to whom she is not bonded would adversely affect her. (Tr. May 25, 2007, p. 61).

Brenda Wright is a Child Protective Services Worker with the West Virginia Department of Health and Human Resources who conducted an investigation pursuant to the order of the Family Court. (Tr. May 25, 2007, p. 85). Brenda Wright testified:

"The allegations were that the mother, Autumn, had abandoned her child at her mother's home, the child's grandmother. And that she was just - - basically had not been providing appropriate care for the child.

I really couldn't confirm what the circumstances really were when she left her mother's home - - when Autumn left her mother's. I'm not sure how that came about. But during my assessment, what I did come up with was that Autumn and Joshua were both very cooperative with me, worked with me, were willing to do whatever to get the assessment done.

But I did find a lot of concerns in my collateral information. Things such as both parents are young. They're only 18, I believe. Joshua already has had some brushes with the law at his young age. Some collateral information indicates that he's had some temper outbursts, maybe some anger control issues.

Apparently Autumn had alleged at one point - - this is according to collateral information I've gotten. That Autumn had at one point alleged he was violent and had raped her. She recanted. Just a lot of red flags came up.

And the information after - - the grandmother had providers in the home, too, so I got some information indicating that when the parent saw the child, Joshua was not - - he did not interact always appropriately with the child, sometimes holding her upside down, causing her to throw up because she has a reflux problem.

Some information that when she - - when she was living with her mom, that she sometimes would just want to leave most of the care to the other family members. So, I felt like that if these young parents were to ever provide a home for this child again, I think they should have a lot of support services in place for them.” (Tr. May 25, 2007, pp. 86-87).

While Brenda Wright testified that she believed both Autumn and Josh had been cooperative, she was concerned about the inconsistency between Autumn reporting to other people that Josh had raped her (including both her mother and Ellen Cundiff from Team for West Virginia Children) but then denying it to Child Protective Services. (Tr. May 25, 2007, p. 94). Moreover, Brenda Wright did not know that while Autumn denied any history of mental illness to CPS, she had previously suffered from panic attacks (Tr. May 7, 2007, p. 25); and had been prescribed Zoloft (Tr. June 8, 2007, p. 25); that while Josh denied the use of illegal drugs and alcohol to CPS, he testified that he had smoked marijuana as recently as January 2007, and had illegally used alcohol (Tr. June 8, 2007, p. 60); and, that while Autumn knew that Josh had given incomplete or untruthful information to Brenda Wright about his alcohol and substance abuse, she did not correct this misinformation with Brenda Wright. (Tr. June 8, 2007, pp. 25-27).

As a result of her investigation Brenda Wright testified, “I think the parents really would benefit greatly from working with these services. Either [sic] before the child would even go into their home. And if I might even venture another opinion. I had even thought

maybe a psychological evaluation on both parents, might even be helpful.” (Tr. May 25, 2007, p. 87).

Even without knowing about Josh B.’s recent substance abuse and Autumn S.’s past history of mental illness, Child Protective Services nevertheless found the risk of harm to the child sufficient to recommend that Autumn and Josh participate in services prior to Abbigail being placed in their home:

“[T]he [final risk rating] number came out to be an eight, which falls within the moderate range. That’s something that we normally would recommend services for. For the family. If we did not already have the case.

Q. And in terms of this evaluation or this report, you’re looking at recommending services for Autumn and Josh if Abbigail were to be placed in the home?

A. Yes. Yes.

Q. If Abbigail continues to stay where she is, are you recommending any additional services?

A. No additional services.” (Tr. May 25, 2007, p. 90).

* * * *

“Q. Based on that information and the investigation you did, do you have a recommendation as to whether or not Abbigail should continue to remain in the [P.] home or should she be placed in the home of Autumn and Josh?

A. If you’re talking about immediately?

Q. Yes.

A. As I stated before, I think she’s in a safe home at this point. If at some point the child is going to return to the parents home, I think that it would be a good idea to have the services with the parents before the child returns to their home.

Q. Including the psychological evaluations you indicated?

A. I think that would be an excellent idea.” (Tr. May 25, 2007, p. 93).

Brenda Wright testified that the case is not being opened for services because Abbigail is in a safe environment with Gala and Brent P. However, if Abbigail were placed

with Autumn and Josh, then community services would be required, or it would be opened as a child protective services case, or both, and in either event she did not recommend the immediate placement of the child with her parents:

“Q. You’ve indicated in your report that this case was not going to be open for ongoing services; is that correct?

A. Yes.

Q. Is that because this child is in the [P.] home?

A. Because the child is in a safe environment. There are no safety issues at this time.

Q. If Abigail were placed into the home of Josh and Autumn, would the case be open for ongoing services?

A. It’s a possibility that it would open or they would at least have community services. It would go one way or the other, or both. It could be another CPS case with community services too.

Q. And I understand you haven’t been asked or directed to prepare any sort of preliminary case plan or a case plan for the family. But in terms of your recommendation that the parents work with Abigail prior to any attempts to, I guess an attempt to reunify her with her biological parents, what kind of period of time are you talking about in terms of - -

A. That would have to be determined by the providers. They - - the ones who would be working with the parents I think they would be the ones who would best be able to judge when the time’s right, based on the response of the parents and how well they’re adapting.

Q. And as we sit here today, it’s not - - you’re not recommending that Abigail be immediately returned to the home of Autumn and Josh; is that correct?

A. I guess I would say, yes, that’s correct.” (Tr. May 25, 2007, pp. 97-98).

Despite Brenda Wright’s recommendations, the circuit court appeared to be quite dismissive of her testimony. When Brenda Wright was questioned directly by the Court the following colloquy occurred:

“Q. [The Court] You aren’t make any recommendation, are you?

A. Well, I made a few. Psychological evaluation and services with the parents.

Q. [The Court] Those are all preliminary. But you're a CPS worker. You always make those, right?

A. I would feel - - I would feel more comfortable if I knew that the parents had a lot of services with - - working with them before the child came to their home. And I would feel a lot better if we had the psychological evaluation done before the child went home." (Tr. May 25, 2007, p. 98).

Consistent with the recommendation of Ellen Cundiff of Team for West Virginia Children, Joan Bellis with Developmental Therapy, and Brenda Wright with Child Protective Services, the Guardian Ad Litem for Abbigail, Robert Wilkinson, recommended that Abbigail be placed in the guardianship of the Petitioners, Gala P. and Brent P.:

I really at this point am not convinced that they would be able to care for the child.

Now, whether that is the proper threshold that this Court should consider is up to you, but I'm not convinced that they would be able to care appropriately for the child. I don't think that that necessarily means that they should be written off. [. . .] But at this point, I think it would probably be in the child's best interest to be with the grandparents with a liberal visitation program set up for the parents." (Tr. June 8, 2007, p. 75).

At the conclusion of all testimony in this matter, the circuit court ordered the parties to submit written recommendations to the court for the further disposition of this matter. The Respondents set forth a cursory plan which provided for a quick transfer of custody and did not address the recommendations of the professionals. The Petitioners, however, set forth a detailed proposal which would grant them guardianship but also established a workable and meaningful plan to remediate, to the extent possible, the deficiencies of the biological parents and insure that all concerns were addressed with the eventual goal of placing Abbigail in the

custody of her biological parents upon successful completion of the proposed plan.

ASSIGNMENTS OF ERROR

1. The Circuit Court erroneously concluded that the Petitioners were required to prove that the child was an “abused” or “neglected” child as defined by the West Virginia Code.

2. The Circuit Court erroneously concluded that the Petitioners failed to prove that the biological mother “is not capable of being a fit parent.”

3. That the Circuit Court’s order denying the Petitioners guardianship of Abbigail S., and ordering the return of the child to the biological parents without addressing the recommendations of Child Protective Services, Team for West Virginia Children, Developmental Therapy, and the Guardian Ad Litem, is contrary to the welfare and best interests of the child.

POINTS AND AUTHORITIES

Case Law:

<i>Brown v. Gobble</i> , 196 W.Va. 559, 474 S.E.2d 489 (1996)	20
<i>In Re Randy H.</i> , 640 S.E.2d 185 (2006)	26
<i>Public Citizen, Inc. v. First National Bank in Fairmont</i> , 198 W.Va. 329, 480 S.E.2d 538 (1996)	20
<i>W.V.U. Board of Gov. v. W.V. Higher Ed.</i> , No. 33208, Filed May 24, 2007	22

Statutes:

West Virginia Code §44-10-3	2, 20, 21, 22, 23, 24, 27
West Virginia Code §49-1-3	22, 23, 24
West Virginia Code §49-6-1	23, 25
West Virginia Code §49-6A-9	26
Michigan Compiled Laws §722.23	30

Rules:

Rule 48a <i>Rules of Practice and Procedure for Family Courts</i>	2, 10, 22, 23, 24, 26
Rule 3a <i>Rules of Practice and Procedure for Child Abuse and Neglect</i>	23, 25, 26
...	

Other:

<i>Black's Law Dictionary, Sixth Edition</i>	30
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DISCUSSION OF LAW

1. STANDARD OF REVIEW ON APPEAL

"In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W. Va. 329, 480 S.E. 2d 538 (1996).

"The deference accorded to a circuit court sitting as factfinder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision." Syl. Pt. 1, *Brown v. Gobble*, 196 W. Va. 559, 474 S.E.2d 489 (1996).

2. The Circuit Court Erroneously Concluded That The Petitioners Were Required To Prove That Abbigail Is An Abused Or Neglected Child, Rather Than Proving What Is In The Best Interests And Welfare Of The Child.

West Virginia Code §44-10-3 governs the appointment of guardians for minor children and provides, in relevant part:

The circuit court or family court of the county in which the minor resides . . . may appoint as the minor's guardian a suitable person. The father or mother shall receive priority. However, **in every case, the competency and fitness of the proposed guardian and the welfare and best interests of the minor shall be given precedence** by the court when appointing the guardian. (Emphasis added).

The circuit court's findings in this matter are: "that the Petitioners have failed to meet their burden in this matter to show that Abbigail B. is an abused or neglected child as defined by the West Virginia Code, nor that Autumn S., the natural mother of Abbigail, is not capable of being a fit parent."

Contrary to the circuit court's conclusion, West Virginia Code §44-10-3, does not require the Petitioner's to prove that Abbigail is "an abused or neglected child." While the statute is rather vague, what the statute actually appears to require is proof as to the Petitioners' and Respondents' fitness and, that it is in the best interests and welfare of the child to grant the proposed guardianship. Accordingly, the Petitioners believe the circuit court has incorrectly required the Petitioners to prove that the child was abused or neglected rather than the broader standard of what is in the best interests and welfare of the child. As a practical matter, the child has resided its entire life in the care of the Petitioners and to require them to prove that the child is abused or neglected while in their care is not only antithetical to their Petition but also contrary to the evidence.

Significantly, Brenda Wright, CPS worker with the West Virginia Department of Health and Human Resources, testified that the DHHR is not opening a case for services because Abbigail is in a safe environment in the Pack's home. However, if the child were placed with the biological parents it would be opened as a CPS case or at least be opened for community services or both. Moreover, the CPS worker did not recommend the immediate placement of the child with the biological parents and recommended that prior to

the placement of the child with the parents that: "they should have a lot of support services in place for them;" that the parents should have psychological evaluations; that the parents would benefit from working with Birth to Three and Healthy Families even before the child went home; and that the providers are the ones who are best able to judge when the time is right to place Abbigail with her parents based upon the response of the parents. In her written report to the Court, CPS worker Brenda Wright also indicated that both biological parents may benefit from parenting services.

The circuit court erred in concluding that the Petitioners are required to prove that Abbigail is an abused or neglected child as those terms are defined in West Virginia Code §49-1-3. Rather the proper standard for awarding guardianship is set forth in West Virginia Code §44-10-3, and is the fitness of the proposed guardian and the welfare and best interests of the child.

In the case *sub judice*, it appears that the Circuit Court relied exclusively on Rule 48a of the Rules of Practice and Procedure for Family Court, and did not read that rule *in pari materia* with West Virginia Code §44-10-3. "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent." Syllabus Point 10, *W.V.U. Board of Gov. v. W.V. Higher Ed.*, No. 33208, Filed May 24, 2007 (quoting, Syllabus Point 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975).)

Rule 48a of the Rules of Practice and Procedure for Family Courts provides, in relevant part:

a) *Removal by family court to circuit court of infant guardianship cases involving child abuse and neglect.* — If a family court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to W. Va. Code §§ 44-10-3, is an allegation of child abuse and neglect as defined in W. Va. Code §§ 49-1-3, then the family court before whom the guardianship proceeding is pending shall remove the case to the circuit court for hearing. Should the family court learn of such allegations of child abuse and neglect during the hearing, then the family court shall continue the hearing, subject to an appropriate temporary guardianship order, and remove the case to the circuit court for hearing to be conducted within 10 days, for determination of all issues. **At the circuit court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence.** Immediately upon removal, the circuit clerk shall forthwith send the removal notice to the circuit court. Upon receipt of the removal notice, the circuit court shall forthwith cause notice to be served in accordance with W. Va. Code §§44-10-3 and to the Department of Health and Human Resources who shall be served with notice of the petition, including a copy of the petition, and of the final hearing to be conducted before the circuit court. Such notice to the Department of Health and Human Resources shall constitute a report by the family and circuit courts pursuant to W. Va. Code §§49-6A-2.

(b) *Investigation of abuse and neglect.* — Upon removal of the infant guardianship petition, the circuit court may utilize the investigative and mandamus process and related procedures set forth in Rule 3a of the Rules of Procedure for Child Abuse and Neglect Proceedings if the court deems it necessary or appropriate under the circumstances presented. The circuit court shall allow the petitioner for infant guardianship to appear as a co-petitioner on the petition filed by the Department of Health and Human Services pursuant to W. Va. Code §§49-6-1, et seq., if both so agree. Nothing herein shall be construed as either a requirement that the petitioner for infant guardianship be a co-petitioner under W. Va. Code §§ 49-6-1, et seq., or a prohibition against the filing of a W. Va. Code §§ 49-6-1, et seq., petition by the petitioner for infant guardianship should the Department show cause why it will not file such a petition. (Emphasis added).

While Rule 48a requires proof of allegations of abuse and neglect by clear and

convincing evidence, the reality is that the child was never abused or neglected because the child had lived its entire life in the care of the Petitioners. Rather, the allegations were that the biological parents were unfit and that it is in the best interests and welfare of the child to place her in the guardianship of the Petitioners. In this case, where the child never was abused or neglected, it seems clear that the proper standard is the fitness of the proposed guardians and best interests and welfare of the child as required by West Virginia Code §44-10-3.

Indeed, upon examination of the definitions of "abused" or "neglected" child, it is apparent that this child is not "abused" or "neglected" as those terms are defined. West Virginia Code §49-1-3, defines "abused" or "neglected" child as follows:

(a) "Abused child" means a child whose health or welfare is harmed or threatened by: (1) A parent, guardian or custodian who knowingly or intentionally inflicts, attempts to inflict or knowingly allows another person to inflict, physical injury or mental or emotional injury, upon the child or another child in the home; or (2) Sexual abuse or sexual exploitation; or (3) The sale or attempted sale of a child by a parent, guardian or custodian in violation of section sixteen [See editor's notes], article four, chapter forty-eight of this code; or (4) Domestic violence as defined in section two hundred two [§§ 48-27-202], article twenty-seven, chapter forty-eight of this code.

(i)(1) "Neglected child" means a child: (A) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or (B) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;

As the evidence amply demonstrates, Abigail was not an abused or neglected child.

Pursuant to Rule 48a, the Family Court ordered the Department to conduct an investigation

and to file a report on its investigation. The Department complied with the family court's order and did file a written report with the circuit court which found, as the child protective services worker testified, that the child was not abused or neglected because the child was in the care of the Petitioners, but that there is risk that the child would be abused or neglected if placed in the care of the biological parents. If the circuit court disagreed with the findings of the Department, the circuit court could have compelled the Department to file an abuse and neglect petition. Rule 3a of the Rules of Procedure for Child Abuse and Neglect provides, in relevant part:

(b) *Mandamus relief.* – Following review of an investigation report in which the Department concludes that a civil petition is unnecessary, if the circuit court believes that the information in the family court's written referral and the Department's investigation report, considered together, suggest circumstances upon which the Department would have a duty to file a civil petition, the court shall treat the written referral as a petition for a writ of mandamus in the name of and regarding the affected child or children. A show-cause order shall issue by the court setting a prompt hearing to determine whether the respondent Department has a duty to file a civil petition under the particular circumstances set forth in the written referral and investigation report. If it is determined by the court that the Department has a nondiscretionary duty pursuant to W.Va. Code §49-6-5b to file a petition seeking to terminate parental rights, the Department shall be directed by writ to file such petition within a time period set by the court. If it is determined that the circumstances bring the filing decision within the Department's discretionary authority, no such writ shall issue unless the court specifically finds aggravated circumstances, consistent with the meaning and usage of that term in W.Va. Code §49-6-3(d)(1), and that the Department acted arbitrarily and capriciously in the exercise of its discretion. (Emphasis added).

The duty of the Department to file an abuse and neglect petition is set forth in West Virginia Code §49-6-1, "Petition to court when child believed neglected or abused; notice"

“(a) If the department . . . believes that a child is neglected or abused, the department . . . may present a petition setting forth the facts to the circuit court in the county in which the child resides . . . ;” and, West Virginia Code §49-6A-9, “Establishment of child protective services; general duties and powers; cooperation of other state agencies,” “(c) In those cases in which the local child protective service determines that the best interests of the child require court action, the local child protective service shall initiate the appropriate legal proceeding.” As the child protective services worker testified, the Department found that the child was not abused or neglected because the child was in the care of the Petitioners. However, the Department concluded that there would be a risk of harm in placing the child with the biological parents and that in that event, a petition would be filed or the case would be opened for services or both.

The circuit court did not express any disagreement with the Department’s conclusion that the child was safe because it was with the Petitioners and did not require the Department to file and abuse and neglect petition nor even order that the Department show cause why it should not file a petition. “If the DHHR chooses not to file a petition, but the circuit court believes that the information presented ‘ suggest[s] circumstances upon which the Department would have a duty to file a civil petition,’ the circuit court may then issue a show-cause order to determine whether the DHHR has erred in its choice.” *In Re Randy H.*, 640 S.E.2d 185, ___ (2006). In light of the circuit court’s failure to utilize the procedures available to the circuit court under Rule 48a of the Rules of Practice and Procedure for

Family Courts and Rule 3a of the Rules of Procedure for Child Abuse and Neglect, it seems clear that the circuit court agreed with the findings of the Department that the child was not abused or neglected. Accordingly, where there is no abuse or neglect, the proper standard for the award of guardianship remains that set forth in West Virginia Code §44-10-3, the welfare and best interests of the child and the fitness of the proposed guardian.

3. The Circuit Court Erred In Concluding That The Petitioners Failed To Prove That Autumn S. “is not capable of being a fit parent.”

The Court’s finding that the Petitioner’s failed to prove that Autumn S. “is not capable of being a fit parent” is subject to two interpretations. First, the Court’s finding suggests that Autumn S. is not presently a fit parent but is capable of becoming a fit parent, in which case the services recommended by Child Protective Services should have been ordered prior to the child being placed in the care of the biological parents. Alternatively, the Court’s finding suggests that Autumn S. is a fit parent and is capable of continuing to be a fit parent.

To the extent the Court finds that Autumn S. is presently a fit parent, such a finding is clearly contrary to the evidence. In particular, the Petitioner’s witnesses testified that Autumn provided very little care for Abbigail and that such care was provided only with significant prompting; that Autumn did not perform any of the daily physical therapy ordered by Cabell Huntington Hospital; that Autumn “didn’t have that much interest” in Abbigail; and, that Autumn demonstrated no improvement in either her ability or desire to care for Abbigail over the ten months of her life. Ellen Cundiff from Team for West Virginia

Children testified that over the ten months of the child's life Autumn lacked initiative, wasn't interested in learning from Ellen, demonstrated no significant improvement in her ability to care for Abbigail over the ten months of her life, did not develop any true bond with Abbigail, and is not presently capable of taking care of Abbigail. Significantly, Joan Bellis, the developmental therapist working for West Virginia Birth to Three, testified that she had never met the biological parents. The Guardian Ad Litem also opined that he was "not convinced that they would be able to care for the child."

With respect to the biological father, the Petitioner's witnesses' testimony is similar: that Josh B. provided very little care for Abbigail; Josh B. developed no bond with Abbigail; Josh B. did not interact with Abbigail during visits, other than to stare at her, and did not talk to her, play with her, sing to her or read to her; and, that Josh B. is not capable of taking care of Abbigail at this time. The present lack of parental fitness is also clear in the recommendation of CPS worker Brenda Wright who testified that the child should not be placed with the parents until after they participate in services, in the child's developmental therapy, and the service providers so recommend.

It appears that the circuit court has ignored several significant factors bearing on the fitness of the biological parents: On January 4, 2007, Autumn reported to Ellen Cundiff of Team for West Virginia Children that Josh had raped her but when CPS began investigating in March 2007, Autumn recanted; Josh B. testified that he was arrested for possession and had smoked marijuana as recently as January 2007, however, when questioned by Child

Protective Services, he denied using illegal drugs; Autumn knew that Josh had misled Child Protective Services about his illegal drug and alcohol use, but she did not correct this false information; Autumn admitted during her testimony that when she left the Petitioner's residence on February 20, 2007, Abigail was better off with the Petitioners.

It is also clear that the circuit court ignored the recommendations of Child Protective Services. Despite testifying that the biological parents should participate in services and have psychological evaluations prior to Abigail being placed in their custody, the circuit court dismissed those recommendations as "preliminary" stating and as "a CPS worker. You always make those, right?"

4. The Circuit Court's Order Denying The Petitioners Guardianship Of Abigail S. Is Contrary To The Welfare And Best Interests Of The Child.

The Court's Order is contrary to the welfare and best interests of the child at the present time. While neither "welfare" nor "best interests" are defined in West Virginia law, at least one state, Michigan, has statutorily defined the "best interests" of child:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

- (a) The love, affection, and other emotional ties existing between the parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
- (c) The Capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

- (E) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the parties involved.
- (g) The mental and physical health of the parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.
- (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.
- (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.
- (l) Any other factor considered by the court to be relevant to a particular child custody dispute.

Michigan Compiled Laws §722.23. *Black's Law Dictionary, Sixth Edition*, defines "Welfare" as, "Well-doing or well-being in any respect; the enjoyment of health and common blessings of life; exemption from any evil or calamity; prosperity; happiness."

The testimony from not only the Petitioners, but other family and third parties, is that Abbigail is not bonded with either parent; that Autumn showed little interest in caring for Abbigail; that Autumn lacked the skills to properly care for Autumn and showed no significant improvement in her ability to care for Abbigail over the ten months of her life despite significant help from family and Team for West Virginia Children; that Josh had little contact with Abbigail after leaving the Petitioner's property and that his interaction with Abbigail was "strange" in that he just stared at her and did not otherwise interact with her; that Josh has a history of criminal involvement including possession of marijuana; that Josh has used alcohol illegally; that Josh has used marijuana as recently as January 2007; that Autumn reported a history of violence by Josh against her, including reporting to Ellen

Cundiff of Team for West Virginia Children as recently as January 2007, that Josh had raped her when she and Josh went to Kentucky; that both Autumn and Josh misled or lied to Child Protective Services concerning use of alcohol, illegal drugs and prior mental health history; that Autumn dropped out of high school after leaving the Petitioners' home, has not obtained a drivers' license, and does not have a GED; that Abbigail has significant health and developmental problems that require medication and therapy and that require the caretakers to work with her every day, but that Autumn has never been motivated to care for Abbigail nor has she provided any therapy. Regardless of how one defines the "best interests of the child" and the "welfare" of the child, it is difficult to see how removing Abbigail from the Petitioners is in her best interests or welfare.

Indeed, the Petitioner's opinion that removing Abbigail from their care is not in her best interests is shared by all of the professionals who offered testimony in the case. Brenda Wright, the CPS worker who conducted the Court Ordered investigation, does not recommend that the child be placed with the biological parents until after they have participated in services and the service providers recommend such placement. The Guardian *Ad Litem* did not recommend that the child be placed with the biological parents at the present time stating that he did not believe they are capable of caring for the child at the present time but not ruling out the possibility that they may become capable of providing such care. Ellen Cundiff, who worked with the mother on a weekly basis for the child's entire life did not recommend that the child be placed with the biological parents. Joan

Bellis, developmental therapist provided through West Virginia Birth to Three testified that uprooting Abbigail and placing her in a new environment is detrimental to the child, that placing Abbigail in a home with care givers to whom she is not bonded would affect her adversely, and that she does not recommend moving Abbigail to a new home with different care givers. Moreover, Joan Bellis testified that care giver involvement is the key to the child's development but that despite having made one visit to evaluate Abbigail and two visits for therapy prior to the hearing, Joan Bellis had never met the biological mother or father. There is ample evidence that the biological parents have simply not been significantly involved in Abbigail's care nor interested in providing care. Considering all of the evidence and testimony in this matter, it is clear that the circuit court's order denying the Petitioners guardianship of Abbigail is contrary to her welfare and best interests.

CONCLUSION

The circuit court erroneously concluded that the Petitioners were required to prove that the child was abused and/or neglected, despite the fact that there was nor abuse or neglect of the child because she had lived her entire life in the care of the Petitioners. The Child Protective Services worker was clear in testifying that the case would not be opened for services nor would an abuse or neglect petition be filed because the child was in a safe environment with the Petitioners. If the circuit court disagreed with this assessment and desired the Petitioners to prove allegations of actual abuse or actual neglect, then the court should have required the Department to show cause why an abuse and neglect petition should

not be filed.

Additionally, the circuit court's finding that the Petitioner's failed to prove that Autumn S. "is not capable of being a fit parent" is contrary to the weight of the evidence which demonstrates that neither parent is presently fit and "that if these young parents were to ever provide a home for this child . . . they should have a lot of support services in place for them."

The circuit court's denial of the guardianship petition is clearly contrary to the welfare and best interests of the child and contrary to the recommendations of Child Protective Services, the Guardian Ad Litem, Team for West Virginia Children and Developmental Therapy.

Upon review of the record and the circuit court's order, it is clear that the circuit court applied the incorrect legal standard and abused its discretion in denying the Petitioners' petition of guardianship of Abbigail.

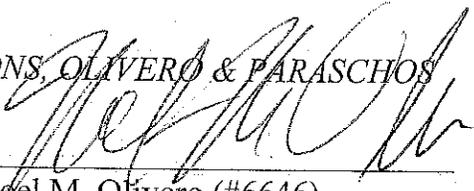
PRAYER FOR RELIEF

Wherefore, your Petitioners respectfully request that their Petition for Appeal be granted; that this Honorable Court reverse the decision of the Circuit Court of Cabell County and Order that guardianship of Abbigail S. be awarded to the Petitioners on a permanent basis with appropriate visitation granted to the biological parents.

Respectfully Submitted
Brent P. and Gala P.
Petitioners by Counsel

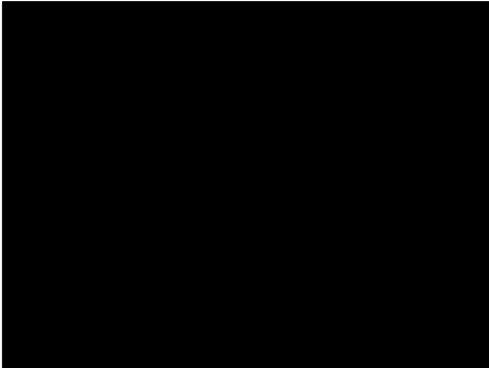
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE MATTER OF: Abbigail Faye B.



CERTIFICATE OF SERVICE

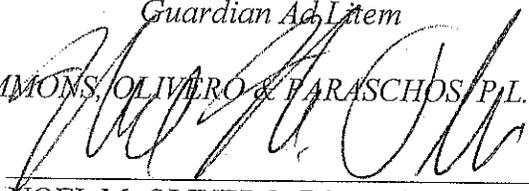
I, Noel M. Olivero, Esq., of *Sammons, Olivero & Paraschos, P.L.L.C.*, counsel for Gala and Brent Pack, hereby certify that I served the foregoing "**Brief of Appellants**" upon the following counsel of record, by depositing a true and correct copy of the same in the United States Mail, postage prepaid, in an envelope addressed to the following this 13th day of December, 2007.

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