

BEFORE THE WEST VIRGINIA SUPREME COURT
OF APPEALS
AT CHARLESTON

STATE OF WEST VIRGINIA
PETITIONER BELOW,

V.

DOCKET NO. 07-130

FAYE ANN S.
JOE S.

RESPONDENTS BELOW,

MABEL T. AND JOHN T.
MATERNAL GRANDPARENTS,
INTERVENORS BELOW,

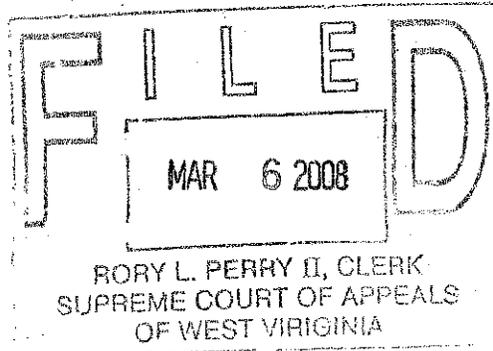
LARRY S. AND DEBRA S.
PATERNAL GRANDPARENTS,
APPELLANTS/INTERVENORS BELOW.

IN THE INTEREST OF THE MINOR CHILDREN:

SAMANTHA S.
HOPE S.

D.O.B. 01-06-00
D.O.B. 06-05-01

APPELLANTS' REPLY TO RESPONSE OF
WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES



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**THE ISSUES PRESENTED IN
THE PETITION FOR APPEAL
HAVE NOT BEEN MOOTED**

The response filed by the Respondent West Virginia Department of Health and Human Resources (hereinafter referred to as DHHR), for the most part, accurately sets forth the troubling history of this case. The Court below repeatedly ignored the requests of the Respondent's Mingo County representatives and the negative findings of one individual and one team of Court appointed psychologists in order to preserve the alleged rights of Intervenor Mable T. and John T. to visit with their grandchildren.

The Court's action reflects a misunderstanding of the intent behind Rule 15 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings which codified the holdings of this Court in In Re: Christina L. 194 W.Va. 446, 460 S.E.2d 692 (W. Va. 1995), and in In Re: Jonathan G. 482 S.E.2d 893, 482 S.E.2d 893 (W. Va. 1996). The lower Court's decision misinterprets or ignores this Court's clearly specified condition upon which the authority to grant post-termination visitation rests, that the visitation must serve the long range best interests of the children.

All indicators presented to the lower Court, including the reports of Respondent's case workers, were disregarded by the Court in its decision to subject the children to ongoing unsupervised visitation with their grandparents Mabel T. and John T., despite the cost to the children. There is no reasonable explanation for the Court's action other than it was an effort to compensate Mabel T. and John T. for their loss of custody of the children. Appellants argue this was an ill advised and improper use of the Court's discretion.

Respondent DHHR argues that the issue is mooted by the Court's termination of its prior visitation Order subsequent to the filing of the Petition for Appeal herein. At the Judicial Review on September 24, 2007, DHHR case workers informed the Court that Mabel T. and John T. voluntarily surrendered their privileges to visitation when they failed to exercise them. The Court terminated future visitation privileges. Yet when the Petition of Appellants Larry S. and Debra S. to adopt Samantha S. and Hope S. was subsequently brought before the Court below, it deferred action on the adoption until this Court issued a decision on this Petition for Appeal. This suggests that the lower Court wishes to leave open the option of Ordering continued visitation between the children and Mabel T. and John T. following adoption of the children by Appellants Larry S. and Debra S. If it found this Court's decision in this case provided that authority or, at least, did not prohibit its exercise, the lower Court is left with the discretion to maintain jurisdiction of the children and Order visitation at a time it deemed appropriate, despite the potential for harm to the children visitation would create.

The inappropriate balancing of priorities which resulted in Court Ordered visitation below between children who were victims of abuse and neglect and caretakers who have contributed to their abuse, following termination of any claim of legal right by the caretaker to their custody, is not unique to the Court below or to that District of the Court system. Standing Orders for visitation, for as long as the Court chooses to exercise continuing jurisdiction over the child's status, have created the need for "open adoption". That is, prospective candidates for adoption must agree to the burden which will be placed on them to facilitate visits between these damaged children and their abusers. This burden often acts as a deterrent to adoption and a barrier to permanency. Most

important, it denies these children the security, safety and consistency which they so richly deserve.

The authority provided in In Re: Christina L., supra and In Re: Jonathan G. supra, was appropriate in those cases and in many cases of older children who can express to the Court their desire to maintain contact with caretakers with whom they have a meaningful, mutually supportive bond. This bond will not be destroyed by illness or other conditions which have rendered the caregiver unable to maintain the responsibilities of custody. The child's expression of a desire to maintain the relationship would seem to be a clear indicator that supervised maintenance of their contact with these people they love would facilitate the child's adjustment to their new home and new parents and would be in their best interests. Moreover, it could be seen as evidence of the child's lack of anxiety or fear of contact with their former custodians. In the instant case the Court appears to have ignored the reports of statements by the children that they did not wish to have further contact with their grandparents Mabel T. and John T.

Lower Court Judges are asked to make very difficult decisions which will profoundly impact on all of the parties involved when the Court is asked to terminate parental and caretaker rights to the children who have been the victims of their caregivers abuse or neglect. It is understandable that lower Court Judges feel some compulsion to recognize the sense of hurt and loss experienced by the parents and caretakers, many of whom will never fully understand how destructive their behavior has been to their children. If this Court's unwavering principal that the child's best interest must be the "polar star" in any matter involving the custody of a child is to be maintained, however, the lower Courts must be directed to use their discretion to Order continuing visitation following termination of parental rights in a very limited and well supported fashion.

While this Court has clearly stated in its past decisions that an Order of continuing visitation must be shown to be in the best interest of the child, the instant case reflects a misunderstanding of this directive. All evidence presented to the lower Court in this case not only failed to prove the best interests of the children was served by the Court's visitation Order, all evidence presented was that continued visits were contrary to their best interests. Regardless, based solely on his unsupported finding that continued visits would be beneficial to the children, the lower Court awarded continuing unsupervised visitation for Mabel T. and John T.

Mabel T. and John T. chose, after the filing of the Petition herein, to not presently exercise the visitation rights they were awarded.¹ The lower Court has terminated the rights of Mabel T. and John T., but has maintained continuing jurisdiction over the children and the authority to decide what future Order would be in the best interest of Samantha and Hope S.. The Court has deferred action on the Petition of Appellants Larry S. and Debra S. to adopt Samantha and Hope S. until it receives the directive of this Court which will resolve the questions presented by the Appellants. If this Court was to dismiss the appeal, it would not only leave the permanent health and welfare of Samantha and Hope at risk, but it would leave unresolved the questions presented to all of the Courts of this State regarding their obligation under In Re: Christina, supra., In Re: Jonathan G., supra, and W. Va. Rule of Procedure for Child Abuse and Neglect Proceedings, Rule 15. Is it a paramount obligation of the trial Court, before Ordering visitation between abused or neglected children and their former caretakers, to require clear and convincing proof that the visits would be in the best interests of the child? Are

¹ Respondents reported at a recent Judicial Review of this matter that Mabel T. and John T. attempted visits at the school the children attended at a time following the Court's termination of their visitation privileges.

they, moreover, mandated to show that the visits would not impair or delay the child achieving permanency through adoption? These issues are not moot in the instant case nor in cases throughout the State.

Appellants respectfully ask that the Respondent's request to dismiss the Petition for Appeal be denied and the parties be allowed to present oral argument regarding the issues in this case.

**APPELLANTS
LARRY S.
DEBRA S.**

BY COUNSEL FOR APPELLANTS

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CERTIFICATE OF SERVICE

I, Jane Moran, hereby certify that a true and exact copy of the foregoing Appellants' Reply to Response of West Virginia Department of Health and Human Resources by Appellants/Intervenors Larry S. and Debra S. was served on the following persons when true and exact copies thereof were deposited in the U. S. Mail, First Class

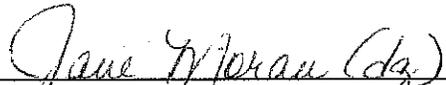
Postage Pre-paid, on this 29 day of February 2008, addressed to:

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