

No.: _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

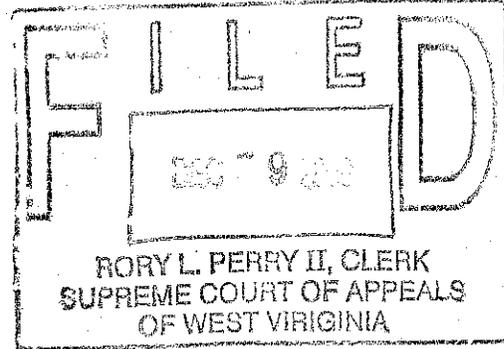
Freddie E. M. [REDACTED] Jr.,

Petitioner,

vs.

HONORABLE N. EDWARD EAGLOSKI, III,
Judge of the Circuit Court of Putnam County,
West Virginia,

Respondent.



FROM THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA
Case No.'s: 08-JA-14, 15, 16, 17

PETITION FOR A WRIT OF PROHIBITION

SAMMONS, OLIVERO & PARASCHOS
Noel M. Olivero (#6646)
652 Sixth Avenue
Huntington, WV 25701
(304) 522-7730
Fax: 522-7801
COUNSEL FOR THE PETITIONER

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KIND OF PROCEEDINGS AND LOWER COURT RULING

This is a Petition for a Writ of Prohibition from the November 13, 2008, order of the Circuit Court of Putnam County, Judge Eagloski presiding,¹ granting the respondent mother in an abuse and neglect proceeding a six month post-adjudicatory improvement period and unsupervised visitation with the children where the mother admitted to starving at least one of her children; where the mother was captured on video surveillance at CAMC Women and Children's hospital dumping out the six month old infant's formula, squirting the formula on the bed and then telling the hospital staff that the infant ate the formula; where the infant child, Blaine T., weighed 7.07 lbs at birth on November 2, 2007, and when admitted to CAMC Women and Children's hospital six months later on May 9, 2008, weighed only 7.17 lbs, having a net weight gain of only 0.09 lbs; where the medical testimony was that the child Blaine T. was diagnosed with Failure To Thrive due to malnutrition caused by the mother; where two of the respondent mother's other children had previously been diagnosed as Failure To Thrive; where the medical staff at CAMC suspected Munchausen Syndrome by Proxy; and where at the time post-adjudicatory improvement period was granted, no psychological or psychiatric evaluation had been returned to advise the multidisciplinary treatment team or the court whether the mother suffered from Munchausen Syndrome by Proxy or what would otherwise cause her to

¹ As of the date of the filing of this Petition, no written order has been received by counsel for the Petitioner. However, the West Virginia Supreme Court of Appeals has long recognized that **"an order is effective when a court announces it."** Syllabus Point 1, *Moats v. Preston County Commission*, 206 W.Va. 8, 521 S.E.2d 180 (1999); Syllabus Point 6, *State v. Larry M.*, 215 W.Va. 358, 599 S.E.2d 781 (2004). (Emphasis added). Moreover, **"[a]n oral order has the same force, effect, and validity in the law as a written order. In other words, the actual physical possession of a written order is not required to effectuate said order."** Syllabus Point 2, *Moats v. Preston County Commission*, 206 W.Va. 8, 521 S.E.2d 180 (1999); *State ex rel. Brooks v. Zakaib*, 214 W.Va. 253, 266, 588 S.E.2d 418, 498 (2003); Syllabus Point 7, *State v. Larry M.*, 215 W.Va. 358, 599 S.E.2d 781 (2004). (Emphasis added).

intentionally starve her child/children.

STATEMENT OF FACTS

That Kari L. T. is the mother of four (4) children who are the subjects of an abuse and neglect petition filed in the Circuit Court of Putnam County, West Virginia: Kaitlyn R. (DOB 9-10-1995); Blaine T. (DOB 11-2-2007); Lyllian M. (DOB 12-29-2004); and, Sydnee M. (DOB 8-30-2001). Freddie M., Jr., is the father of Lyllian M. and Sydnee M.

Freddie M., Jr., and Kari L.T., were previously married but on September 27, 2005, and by Final Divorce Order entered September 29, 2005, the parties were granted a divorce. Pursuant to the Final Divorce Order, Kari L.T. was designated as the primary custodian of the minor children and Freddie M., Jr., was granted parenting time pursuant to the Parenting Plan adopted by the parties and approved by the Court.

On or about May 23, 2008, the West Virginia Department of Health and Human Resources filed an Abuse and Neglect Petition against Kari L.T. in the Circuit Court of Putnam County, West Virginia, alleging as follows:

1. The conduct constituting abuse and/or neglect is as follows:
 - A. On May 9, 2008, the infant child, Blaine T. [REDACTED], was admitted to CAMC Women and Children's Hospital due to what appeared to be a diagnosis of "failure to thrive." Upon admittance, the child was a forty-five (45%) percent of his expected growth and development rate. The infant child, Blaine T. [REDACTED], was born on November 2, 2007, and weighed 3.22 kg (7.08lbs.)
 - B. Birth to Three service providers worked with the respondent mother and the infant child, Blaine T. [REDACTED], and according to their records on March 5, 2008, the child weighed 8lbs. 4oz. and on April 1, 2008, the child weighed 8lbs. 8oz.²

² This is the third time that Kari L.T. received services from Birth to Three for a child diagnosed with Failure to Thrive, having previously received Birth to Three services for

C. Hospital staff at CAMC Women and Children's Hospital report that all blood work done in order to determine if the child, Blaine T [REDACTED], was "failure to thrive" came back normal. The child, Blaine T [REDACTED], was also tested for growth hormone deficiency which was ruled out by Dr. Fereydoun Zangeneh. The infant child was also tested for a thyroid deficiency which was negative.

D. On May 14, 2008, hospital staff became suspicious that the respondent mother was not feeding the infant child, Blaine T [REDACTED]. The hospital's physical therapist gave the respondent mother a 4 1/2 oz. bottle which the child began eating while the physical therapist was present in the room. The physical therapist left the room and less than ten minutes later returned and the entire 4 1/2 oz. bottle was empty. The hospital was suspicious due to the child's eating patterns from the previous days since hospital notes indicate that when the mother would feed the child a 3oz. bottle it would typically take the child twenty to thirty minutes to finish the entire bottle. Also, the infant child, Blaine T [REDACTED], gained a significant amount of weight over the first day the child was at the hospital when the child weighed 3.68 kg/8.096lbs. and then the next two days, the child did not gain any weight, weighing 3.64kg/8.008lbs. on May 11, 2008 and 3.66kg/8.052lbs. on May 12, 2008 which alarmed hospital staff.

E. On May 14, 2008, the hospital obtained clearance from their legal department to begin video surveillance of the respondent mother without the respondent mother's knowledge.

F. On May 15, 2008, the respondent mother was video taped on two occasions squeezing a small amount of the formula onto the child's bed. On the same date the respondent mother was taped taking the child's full bottle of formula into the bathroom and returning to the room with an empty bottle. The child, Blaine T [REDACTED] did not go to the bathroom with the respondent mother. The progress notes kept by hospital staff report that the respondent mother reported to hospital staff that the child [REDACTED] had taken the formula by mouth. When the respondent mother was questioned by the CPS worker as to why she disposed of the formula, the respondent mother reported that she did it because the formula makes him sick.

G. On May 17, 2008, the respondent mother was arrested by the Hurricane Police Department and charged with felony child abuse leading to bodily injury.³ CPS initiated a Safety Plan with the

Lyllian M. and Sydnee M. for their Failure to Thrive.

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On June 25, 2008, the criminal charges against the Respondent were dismissed

respondent mother which will remain in effect until May 27, 2008. The Safety Plan described the following present dangers: "#1-actions were not impulsive, enough time to insure child was hurt, does not acknowledge guilt or wrong doing, intended to hurt child, #3-acknowledges condition but plead ignorant as to how they came to be, facts related to condition contradict explanations, #12-food is only provided sporadically." These present dangers were explained to the respondent mother and she signed the Safety Plan placing the children with other family members and agreeing to no contact with said children.

H. There is no medical explanation as to why the child is at current low weight. According to the medical professionals, a child of his age should weigh approximately 8kg (17.6lbs) Dr. Evans reported that the child, Blaine T [REDACTED], is failure to thrive due to malnutrition and further that it is poor nutrition per the parent. Dr. Evans was present when Dr. Zangana saw the child and reported that the child does not have a growth hormone problem, his binding protein was a little low due to the child not having enough protein in his body to make protein due to poor nutrition. Dr. Fox reported that the child is severely malnourished and that the mother reported to them that she was breast feeding the child. Dr. Fox further reported the child is now on a high calorie formula and he is gaining weight. Dr. Fox reported that the respondent mother minimizes how malnourished the child is and that the mother is a medical assistant and is in the medical field. Dr. Fox stated that the respondent mother tried to breast feed and only got 10cc out of both breasts. Dr. Fox reported that if the respondent mother was breast feeding on a daily basis that she would have had more milk. Dr. Fox stated that someone from this respondent mother's church came to the hospital and told staff that they were afraid that the respondent mother was not feeding the child and that the respondent mother would work ten hours a day and not pump her breasts. The same individual also told the hospital staff that the respondent mother told the church that the hospital was feeding him too much.

I. The infant child, Blaine T [REDACTED] weighed 3.26kg (7.17lbs.) when he was admitted to the hospital and as of May 21, 2008 he weighs approximately 4.38kg.

J. The respondent father, Freddie M [REDACTED], told the CPS

upon the motion of the State "to conduct further investigation." (A copy of the Motion to dismiss is attached hereto as Exhibit 1). The Petitioner does not know the status of the State's investigation.

worker that the respondent mother took the kids to a lot of doctors and that all the kids had different doctors and that the respondent mother would switch their doctors about every year. The respondent father reported that when he looked back now that it does look suspicious. The respondent father reported that the respondent mother's home is really bad. The respondent father reported that it seems like each child is more severe than the last and that all of the children get really sick around six to eight months of age when they are put in the hospital.

K. The DHHR received a referral on July 20, 2005 regarding the respondent mother and the infant child, Lyllian M. The allegations were "extremely malnourished child, cannot sit up, pull self up, no/poor muscle tone. Can hardly hold head up, eyes sunken in. Needs formula mother brings bottles to work, child is not gaining weight, if child see's food she wants it." The referral indicated that the child's doctor stated that the child has been hospitalized for her weight and that they have run all tests and blood work on child and completed a spinal tap on the child to try to find something wrong with her. The doctor stated that she does not know why the child is failure to thrive and that there is no organic reason for the child's weight.

(See, Petition to Institute Child Abuse And Neglect Proceedings, attached hereto as Exhibit

2). (Emphasis added).

On May 29, 2008, the abuse and neglect petition came on for a preliminary hearing in the Circuit Court of Putnam County, West Virginia. On that date, the Circuit Court found:

There exists imminent danger to the physical well being of the children and there are no reasonably available alternatives to removal of the children.

Continuation in the home is contrary to the welfare of the children because the respondent mother has been captured on video pouring out the infant child, Blaine Thomas', bottles and the child was admitted to the hospital extremely malnourished. The respondent mother has been arrested and charged with child abuse by a parent leading to bodily injury. [. . .] The Court FINDS probable cause with regard to the allegations against the respondent mother as to all four children and DENIED the respondent mother's motion to dismiss Case Nos. 08-JA-14, 08-JA-15, and 08-JA-16.

(Order Following Preliminary Hearing, from the Circuit Court of Putnam County, attached hereto

as Exhibit 3). On May 9, 2008, the West Virginia Department of Health and Human Resources placed Lyllian M. and Sydnee M. with Freddie M., Sr. and Shelly M, the paternal grandparents of the children, with whom the Petitioner, Freddie M., Jr., was living. Kaitlyn R. was placed with her maternal grandmother, and upon his release from CAMC, Blaine T., was placed in foster care.

On or about August 20, 2008, Kari L.T. entered into a "RULES 25 & 26 STIPULATED ADJUDICATIONAL AGREEMENT" wherein she admitted as follows:

That the respondent mother admits to the abuse and/or neglect of the infant children, specifically: (1) On May 9, 2008, the infant child, Blaine T [REDACTED], was admitted to CAMC Women and Children's Hospital due to what appeared to be a diagnosis of "failure to thrive." Upon admittance, the child was at forty-five (45%) percent of his expected growth and development rate. The infant child, Blaine Thomas, was born on November 2, 2007, and weighed 3.22 kg (7.08lbs.) And upon admittance to the hospital on May 9, 2008, the child weighed 3.26 kg (7.17lbs.);⁴ (2) Birth to Three service providers worked with the respondent mother and the infant child, Blaine T [REDACTED] and according to their records on March 5, 2008, the child weighed 8lbs. 4oz and on April 1, 2008, the child weighed 8lbs. 8oz.;⁵ (3) hospital staff at CAMC Women and Children's Hospital report that all blood work done in order to determine if the child, Blaine T [REDACTED] was "failure to thrive" and came back normal. The child, Blaine T [REDACTED] was also tested for growth hormone deficiency which was ruled out by Dr. Fereydoun Zangeneh. The infant child was also tested for a thyroid deficiency which was negative; (4) on May 14, 2008, hospital staff became suspicious that the respondent mother was not feeding the infant child, Blaine T [REDACTED]. The hospital's physical therapist gave the respondent mother a 4 ½ oz. bottle which the child began eating while the physical therapist was present in the room. The physical therapist left the room and less than ten minutes later returned and the entire 4 ½ oz. bottle was empty. The hospital was suspicious due to the child's eating patterns from the previous days

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The child's net weight gain in the first six (6) months was only 0.09 lbs.

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From April 1, 2008, to May 9, 2008, the child actually lost 1.63 lbs.

since hospital notes indicate that when the mother would feed the child a 3oz. bottle it would typically take the child twenty to thirty minutes to finish the entire bottle. Also, the infant child, Blaine T [REDACTED], gained a significant amount of weight over the first day he child was at the hospital when the child weighed 3.68 kg/ 8.096lbs. and then the next two days, the child did not gain any weight, weighing 3.64kg/8.008lbs. on May 11, 2008 and 3.66kg/8.052lbs. on May 12, 2008 which alarmed hospital staff; (5) on May 14, 2008 the hospital obtained clearance from their legal department to begin video surveillance of the respondent mother without the respondent mother's knowledge; (6) on May 15, 2008, the respondent mother was video taped on two occasions squeezing a small amount of the formula onto the child's bed. On the same date the respondent mother was taped taking the child's full bottle of formula into the bathroom and returning to the room with an empty bottle. The child, Blaine T [REDACTED], did not go to the bathroom with the respondent mother. The progress notes kept by hospital staff report that the respondent mother reported to hospital staff that the child, Blaine T [REDACTED], had taken the formula by mouth. When the respondent mother was questioned by the CPS worker as to why she disposed of th formula, the respondent mother reported that she did it because the formula makes him sick; (7) according to the medical professionals, a child of his age should weigh approximately 8kg (17.6lbs.)⁶ Dr. Fox testified that the child, Blaine T [REDACTED] is failure to thrive due to malnutrition and further that it is poor nutrition per the parent; (8) the infant child, Blaine T [REDACTED] weighed 3.26kg (7.17lbs.) When he was admitted to the hospital and as of May 21, 2008, he weighs approximately 4.38kg; [. . .]

("RULES 25 & 26 STIPULATED ADJUDICATIONAL AGREEMENT" attached

hereto as Exhibit 4). (Emphasis added). The Petition and Stipulation also included the following allegations:

(9) the DHHR received a referral on July 20, 2005, regarding the respondent mother and the infant child, Lyllian M [REDACTED]. The allegations were "extremely malnourished child, cannot sit up, pull self up, no/poor muscle tone. Can hardly hold head up, eyes sunken in. Needs formula mother brings bottles to work, child is not gaining weight, if child

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The child weighed only 7.17 lbs when admitted to the hospital.

see's food she wants it." The referral indicated that the child's doctor stated that the child has been hospitalized for her **weight and that they have run all tests and blood work on child and completed a spinal tap on the child to try to find something wrong with her. The doctor stated that she does not know why the child is failure to thrive and that there is no organic reason for the child's weight.** (Emphasis added).

The Petitioner apparently did not admit to these allegations as they were crossed out in the signed Stipulation. The Circuit Court of Putnam County found pursuant to the Petitioner's admission and pursuant to West Virginia Code §49-1-3, that there was clear and convincing evidence that the Petitioner had neglected all of her children:

With respect to the respondent mother, Kari T. [REDACTED] the Court adjudicated the respondent mother and **FINDS** the respondent mother neglected the child, Blaine, and the other three children, who were at risk to suffer similar neglect due to them residing in the home with the respondent mother, specifically, **the Court FINDS the respondent mother failed to provide the child, Blaine, with necessary food and nourishment, thus threatening the physical health of the child. The Court FINDS that this failure by the respondent mother is not due to a lack of financial means on the part of the respondent mother, Kari Thomas.**

(Adjudication Order attached hereto as Exhibit 5). (Emphasis added).⁷

As set forth in the "Petition To Institute Child Abuse And Neglect Proceedings" as well as the Stipulated Adjudication, prior to it being crossed out, Blaine T. is not the first of the Respondent's children to be diagnosed with failure to thrive. The Respondent has four (4) children,

⁷ West Virginia Code §49-1-3, defines "neglected" child as follows:
(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; [. . .]. (Emphasis added).

at least three of whom have been diagnosed as failure to thrive despite their being no medical reason for their inability to gain weight. As set forth below, both Lyllian M. and Sydnee M. were diagnosed as "Failure to Thrive."

While the Petition sets forth that Freddie M. informed the DHHR about Sydnee and Lyllian's prior diagnoses of Failure to Thrive, and while the Petition alleges Lyllian's prior diagnosis of Failure to Thrive without any organic reason, and while Freddie M. testified that both Lyllian and Sydnee were diagnosed with Failure to Thrive, were both hospitalized for Failure to Thrive and had no medical reason for being Failure to Thrive, neither Lyllian's nor Sydnee's hospital records, pediatrician records or Birth to Three records were admitted as evidence at the adjudication.

Lyllian M.'s medical records from CAMC show that despite being very healthy at birth (12-29-04) (APGAR 9 after one minute and 10 after five minutes, Exhibit 6), she was admitted to CAMC on March 8, 2005, and diagnosed as "Failure to Thrive." (Exhibit 7). Lyllian was again admitted to CAMC on July 29, 2005, and again diagnosed as "Failure to Thrive." (Exhibit 8). Lyllian M.'s medical records from her pediatrician, Dr. Criniti, show that on January 6, 2005, shortly after her birth she had "good wt gain." (Exhibit 9). However, by February 21, 2005, Lyllian had "poor wt gain." (Exhibit 10). By March 8, 2005, Dr. Criniti diagnosed Lyllian with "Failure To Thrive." (Exhibit 11). Despite being referred to West Virginia Birth To Three, Dr. Criniti continued to diagnose Lyllian as "Failure To Thrive" and on October 4, 2005, noted that she "Continues to be <5th % for weight." (Exhibit 12). It is not until January 25, 2006, that Dr. Criniti finally opined "FTT - improved."

As set forth in the "Petition To Institute Child Abuse And Neglect Proceedings," the DHHR received a referral concerning Lyllian M.'s failure to thrive in July 2005. The DHHR at that time,

however, determined that while "There is risk of maltreatment," that no maltreatment has occurred and the case was not opened for ongoing services. (See, Initial Assessment and Safety Evaluation Worksheet and Conclusion" attached hereto as Exhibit 13).

Sydnee M's medical records from CAMC demonstrate that she was diagnosed with "Failure To Thrive" with an onset date of September 21, 2001. (Exhibit 14). Sydnee was subsequently diagnosed with an "unspecified lack of normal physiologic development" on October 31, 2001. (Exhibit 15). Sydnee was later admitted to CAMC from November 16, 2001, to November 19, 2001, because of, **"Failure to thrive, patient decreasing on the growth chart has gone down at least two significant standard deviations,"** and was diagnosed with, **"Failure to thrive, thought to be a functional etiology due to feeding time decreased from 1 hour to about 15 minutes to take 4 ounces once nipples with larger holes were used."** (Exhibit 16). (Emphasis added).

Pursuant to the Stipulated Adjudication, the mother, Kari L.T. has admitted to abusing/neglecting her children. And, pursuant to the Adjudication Order, the Circuit Court of Putnam County has found by clear and convincing evidence that the Petitioner has neglected all of her children:

With respect to the respondent mother, Kari T. [REDACTED] the Court adjudicated the respondent mother and FINDS the respondent mother neglected the child, Blaine, and the other three children, who were at risk to suffer similar neglect due to them residing in the home with the respondent mother, specifically, the Court FINDS the respondent mother failed to provide the child, Blaine, with necessary food and nourishment, thus threatening the physical health of the child. The Court FINDS that this failure by the respondent mother is not due to a lack of financial means on the part of the respondent mother, Kari Thomas.

In other words, Kari L.T. intentionally starved at least one child and exposed all of the

children to a similar risk. Moreover, the medical records of Sydnee M. combined with the medical records of Lyllian M. and Blaine T. as well as Kari L. T.'s own admissions contained in the Stipulated Adjudication, demonstrate that Kari L. T. has engaged in a pattern of undernourishing at least three (3) of her four (4) children, causing them to be diagnosed as "failure to thrive" and be severely underweight and causing three (3) of the children to be hospitalized for severe malnutrition. It is a sad testament to Kari L. T.'s secretiveness and ability of persuasion that neither Freddie M., nor any of the children's pediatricians or Birth to Three providers, nor even the DHHR concluded that Kari L. T. was deliberately undernourishing the children until she was caught on video intentionally depriving Blaine T. of food and subsequently admitted to starving Blaine T..

While Kari L. T.'s admitted starvation of at least one of her children is difficult to grasp, the Child Abuse Reporting Form from CAMC provides a possible explanation for her conduct, manipulation and lying: "Munchenhausen by Proxy Suspected." (See Child Abuse Reporting Form attached hereto as Exhibit 17). Unfortunately, while the Circuit Court Ordered Kari L. T. to undergo a psychological evaluation, at the October 14, 2008, Multidisciplinary Treatment Team Meeting, the DHHR reported that it had not yet scheduled that evaluation. While the psychological evaluation was subsequently scheduled, the results of the psychological evaluation, diagnosis, prognosis for treatment, and recommendations had not yet been received when the circuit court granted the post-adjudicatory improvement period.

On November 13, 2008, the Petitioner argued against granting Kari L. T. a post-adjudicatory improvement period and unsupervised visitation with the children, arguing that the conduct amounted to "aggravated circumstances" where the DHHR is not required to make reasonable efforts to reunify the family; that Blaine T. is the third of Kari L. T.'s children to be diagnosed with Failure to Thrive

and the third of her children to be hospitalized for Failure to Thrive; that Kari L.T. had previously worked with Birth to Three to address Sydnee and Lyllian's Failure to Thrive, including most recently with Lyllian M. from May 2005, to July 2007, for a period of 26 months, finally discontinuing Birth to Three services just four months prior to Blaine T.'s birth. Incredibly, just six months after that, Blaine T. was hospitalized with Failure to Thrive, having gained only 0.09 lbs. in the first six months of his life. Having just prior to Blaine T.'s birth worked with Birth to Three for 26 months to address Lyllian M.'s Failure to Thrive, and then soon after begin to intentionally malnourish Blaine T., the petitioner argued that there is no reasonable likelihood that the conditions that led to the filing of the petition could be substantially corrected during a six month improvement period particularly where, without the results of the psychological evaluation, no cause for the mother's behavior was identified.

On the bright side, Sydnee and Lyllian are thriving with their father and grandparents and at the October 14, 2008, MDT, Blaine T.'s foster parents reported that he is doing very well and was even released from Birth to Three services.

ASSIGNMENTS OF ERROR

1. The Circuit Court Erred In Granting The Respondent Mother A Post-Adjudicatory Improvement Period Where She Had Not Filed A Written Motion Requesting The Improvement Period.
2. The Circuit Court Erred In Granting The Respondent Mother A Post-Adjudicatory Improvement Period Where The Hospital Staff At CAMC Suspected That Her Intentional Starvation Of Blaine T. Was Caused By Munchausen Syndrome By Proxy And Where The Results Of The Psychological Evaluation On The Mother, Which Might Rule In Or Rule Out MSBP, Were Not Available To The Multidisciplinary Treatment Team Or The Court At The Time The Improvement Period Was Granted.
3. The Circuit Court Erred In Failing To Find That The Intentional Starvation Of An Infant Is An "Aggravated Circumstance" Where The DHHR Is Not Required To Exercise Reasonable Efforts To Reunify The Family And Which Finding Justifies The Denial Of An Improvement Period.

POINTS AND AUTHORITIES

Case Law:

<i>In Re: Emily and Amos B.</i> , 208 W.Va. 325, 540 S.E.2d 542 (2000)	20, 21, 24
<i>In re Katie S.</i> , 198 W.Va. 79, 479 S.E.2d 598 (1996)	24
<i>In Re: R.J.M.</i> , 164 W.Va. 496, 266 S.E.2d 114 (1980)	19, 25
<i>In the Interest of Carlita B.</i> , 185 W.Va. 613, 408 S.E.2d 365 (1991)	24
<i>James M. v. Maynard</i> , 185 W.Va. 648, 408 S.E.2d 400 (1991)	26
<i>Moats v. Preston County Commission</i> , 206 W.Va. 8, 521 S.E.2d 180 (1999)	3
<i>State ex rel. Brooks v. Zakaib</i> , 214 W.Va. 253, 588 S.E.2d 418 (2003)	3
<i>State Ex Rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor</i> , __, W.Va. __, __ S.E.2d __ (Slip Op. 33809)	18
<i>State v. Larry M.</i> , 215 W.Va. 358, 599 S.E.2d 781 (2004)	3

Constitutions and Statutes:

<i>West Virginia Constitution</i> , Article VIII, §3	17
<i>West Virginia Code</i> §49-1-3	10
<i>West Virginia Code</i> §49-6-2	20
<i>West Virginia Code</i> §49-6-5	25
<i>West Virginia Code</i> §49-6-12	20
<i>West Virginia Code</i> §53-1-1	17

Articles:

<u>Munchausen Syndrome by Proxy</u> , The Cleveland Clinic Foundation, 1995-2008. Http://my.clevelandclinic.org/disorders/FactitiousDisorders/hicMunchausenSyndrome	23
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STANDARD FOR ISSUANCE OF A WRIT OF PROHIBITION

The West Virginia Supreme Court of Appeals has original jurisdiction over writs of prohibition by virtue of Article VIII, §3, of the *West Virginia Constitution*, which states, in relevant part, “The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari.” Further, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” *West Virginia Code* §53-1-1.

The issue in the case sub judice is not whether the circuit court has jurisdiction, but rather whether the circuit court exceeded its legitimate powers in granting the respondent mother a post-adjudicatory improvement period and unsupervised visitation with the children where she had not filed a written motion for a post-adjudicatory improvement period; where, despite her admission to intentionally starving at least one of her children, there was apparently no explanation offered as to why she starved this child nor had the psychological evaluation of the mother which would presumably rule in or rule out Munchausen Syndrome By Proxy, been received by the DHHR or the circuit court; where two of her other children had been previously diagnosed with, hospitalized for and worked with Birth to Three for their Failure to Thrive; where without the results of the psychological evaluation there was no way for the DHHR or the circuit court to determine whether the conditions that caused Kari L.T. to starve at least one of her children could be substantially corrected within six months; and, where intentional starvation of an infant arguably amounts to “aggravated circumstances.”

The standard for the consideration and issuance of a writ of prohibition by this Court is set

forth in Syllabus Points 1 and 2 of *State Ex Rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, ___ W.V.a. ___, ___ S.E.2d. ___ (Slip Op. 33809):

In determining whether to entertain and issue the writ of prohibition for cases not involving the absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syllabus Point 1, *State Ex Rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, ___ W.V.a. ___, ___ S.E.2d. ___ (Slip Op. 33809). (Quoting Syllabus Point 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

In determining whether to grant a writ of prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

Syllabus Point 2, *State Ex Rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor*, ___ W.V.a. ___, ___ S.E.2d. ___ (Slip Op. 33809). (Quoting Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).) Addressing these five factors, the Petitioner does not have another adequate means to obtain the desired relief, which is the denial of the post-adjudicatory

improvement period and denial of unsupervised visitation with the children; while the Petitioner himself is not directly subject to damage if the requested relief is not granted, the children are certainly subject to damage and additional harm that is not correctable on appeal in that they are exposed to the dangers of unsupervised visitation and continue without a permanent placement for an additional six months where they have already been out of Kari L.T.'s home for more than six (6) months at the time of the filing of this Petition, and will be out of Kari L.T.'s home for more than one year by the conclusion of the post-adjudicatory improvement period; the lower court's ruling is clearly erroneous where the improvement period was granted without the filing of a written motion; the Petitioner cannot state whether this error is oft repeated; and, with respect to the fifth factor, the lower court's ruling does raise an issue of first impression, namely whether the intentional starvation of an infant amount to "aggravated circumstances" which obviates the DHHR's obligation to make reasonable efforts to reunify the family and requires the denial of the improvement period and unsupervised visitation. This Court has previously stated that, "Starvation is a particularly insidious type of child abuse; if the parents in the case before us had routinely flogged their child to within an inch of her life the legitimacy of the trial court's action [termination of parental rights and denial of an improvement period] would never have been questioned." *In Re: R.J.M.*, 164 W.Va. 496, 501, 266 S.E.2d 114 (1980).

ARGUMENT

1. The Circuit Court Erred In Granting The Respondent Mother A Post-Adjudicatory Improvement Period Where She Had Not Filed A Written Motion Requesting The Improvement Period.

Pursuant to West Virginia Code §49-6-2, "In any proceeding brought pursuant to the provisions of this article, the court may grant any respondent an improvement period in accord with the provisions of this article." The granting of a post-adjudicatory improvement period is governed by West Virginia Code §49-6-12(b), which provides as follows:

After finding that a child is an abused or neglected child pursuant to section two of this article, a court may grant a respondent an improvement period of a period not to exceed six months when:

(1) The respondent files a written motion requesting the improvement period;

(2) The respondent demonstrates, by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding, on the record, of the terms of the improvement period [. . .] (Emphasis added).

As set forth in West Virginia Code §49-6-12(b), the right to an improvement period is not self executing. The Respondent is required to make the request in writing. Implicit in the requirement of a written motion is that the circuit court cannot grant the improvement period in the absence of a written motion. In the absence of a written motion for a post-adjudicatory improvement period, the circuit court exceeded its legitimate powers in granting the post-adjudicatory improvement period. As this Court has previously held, "At all times pertinent thereto, a dispositional improvement period is governed by the time limits and eligibility requirements provided by W.Va. Code §49-6-2(1996) (Repl.Vol.1999), W.Va. Code §49-6-5(1998) (Repl.Vol.1999), and W.Va. Code §49-6-12 (1996) (Repl.Vol.1999)." Syllabus Point 6, *In Re Emily and Amos B.*, 208 W.Va. 325, 540 S.E.2d 542 (2000). While not previously addressed by the Court, this syllabus point should be equally applicable

to all improvement periods including post-adjudicatory improvement periods.

2. The Circuit Court Erred In Granting The Respondent Mother A Post-Adjudicatory Improvement Period Where The Hospital Staff At CAMC Suspected That Her Intentional Starvation Of Blaine T. Was Caused By Munchausen Syndrome By Proxy And Where The Results Of The Psychological Evaluation On The Mother, Which Might Rule In Or Rule Out MSBP, Were Not Available To The Multidisciplinary Treatment Team Or The Court At The Time The Improvement Period Was Granted.

“Typically, an improvement period in the context of abuse and neglect proceedings is viewed as an opportunity for the miscreant parent to modify his/her behavior so as to correct the conditions of abuse and/or neglect with which he/she has been charged. ‘The goal of an improvement period is to facilitate the reunification of families whenever that reunification is in the best interests of the children involved.’ *State ex rel. Amy M. V. Kaufman*, 196 W.Va. 251, 258, 470 S.E.2d 205, 212 (1996).” *In Re Emily and Amos B.*, 208 W.Va. 325, 334, 540 S.E.2d 542, 551 (2000).

“[H]owever, a parent charged with abuse and/or neglect is not unconditionally entitled to an improvement period. For example, when the award of an improvement period would jeopardize the best interests of the subject child, the parent requesting such relief ordinarily will not be accommodated.

‘[C]ourts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened...’ Syl. Pt. 1, in part, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. Pt. 7, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).”

In Re Emily and Amos B., 208 W.Va. 325, 336, 540 S.E.2d 542, 553 (2000).

The terms of the post-adjudicatory improvement period incorporate the terms of the family case plan which essentially require only parenting education, visitation with the children, and participation in a psychological evaluation. With respect to parenting, presumably with an emphasis on nutrition and the need to feed your children, it is hard to conceive that he mother will gain any substantial insight or benefit where she has previously worked with Birth to Three to address Failure

to Thrive in two other children, including with Lyllian M. For 26 months, and within months thereafter started to systematically starve Blaine T.. Parenting education is focused on providing knowledge and training to the parent to care for the child appropriately. In light of her prior involvement with Birth to Three to address Failure to Thrive with both Lyllian M. And Sydnee M., and in light of Lyllian and Sydnee's prior hospitalizations for Failure to Thrive, it is hard to imagine that Kari L.T. lacked the knowledge necessary to know how, how often, and how much to feed her child. Indeed, considering her prior experiences with Sydnee and Lyllian, as well as the fact that Kari L.T. is herself a medical assistant, it is hard to conceive of a parent having more knowledge of the proper feeding and nutritional requirements of infants and children. Thus, to the extent that the post-adjudicatory improvement period is an opportunity for Kari L.T. to increase her knowledge of the proper feeding and nutrition of infants and children, it is a false objective. Clearly Kari L.T.'s lack of knowledge is not the issue.

The issue appears to be more of a question as to whether Kari L.T. acted out of evil intent or as a result of some mental illness. Perhaps, as suspected by CAMC, Kari L.T. even suffers from Munchausen Syndrome by Proxy. "R/O Muchausen by Proxy given pt's severe malnutrition, mother in medical field (MAC Urgent care) & seeming disconcern of severity of pt's nutritional status." (CAMC Progress Notes, 5/14/08; Exhibit 18). "Still have concerns of Muchausen by Proxy as mother noted again today to have full bottle of formula, took bottle to bathroom, returned to room [with] empty bottle, stating that pt took formula by mouth. Will follow video & d/w soc. work." (CAMC Progress Notes, 5/15/08; Exhibit 19). "Pt. significantly malnourished; 45% of growth/development for 6 mo. of age. Suspect mother depriving pt. of nutrition - breast feeds/formula. Mother minimizes Failure To Thrive diagnosis; Reports having F.T.T. sibling to child

w/ previous CPS involvement. Pt./mother currently under surveillance; muchenhausen [sic] by Proxy suspected.” (CAMC Child Abuse Reporting Form; Exhibit 17). In this regard, a complete psychological evaluation, or better yet a forensic psychiatric evaluation with all of the children’s medical and Birth to Three records made available to the examiner, would have gone a long way in determining: (1) whether Kari L.T. suffers from some mental illness that causes her to deliberately starve her child/children, or did she act out of evil intent; (2) whether the mental illness is susceptible to treatment; (3) the nature of the treatment and whether such treatment can actually be successfully completed within the time limits of the six month post-adjudicatory improvement period.⁸

Without at least having the results of the psychological evaluation, the circuit court could not make an informed finding that the conditions that led to the filing of the petition could be substantially corrected in the near future. If, in fact, Kari L.T. does suffer from Muchausen Syndrome by Proxy, the literature suggests that rather than successfully completing her treatment in six months, that it is likely to take years. As this Court has held, “when a parent cannot demonstrate that he/she

⁸ “Diagnosing MSP is very difficult because of the dishonesty that is involved. Doctors must rule out any possible physical illness as the cause of the child’s symptoms, and often use a variety of diagnostic test and procedures before considering a diagnosis of MSP. If a physical cause of the symptoms is not found, a thorough review of the child’s medical history, as well as a review of the family history and the mother’s medical history (many have Munchausen syndrome themselves) might provide clues to suggest MSP. Remember, it is the adult, not the child, who is diagnosed with MSP. Indeed, the most important or helpful part of the work-up is likely to be the review of all old records that can be obtained. Too often, this time-consuming, but critical, task is forgotten and the diagnosis is missed.” “Successful treatment of people with MSP is difficult because those with the disorder often deny there is a problem. In addition, treatment success is dependent on the person telling the truth, and people with MSP tend to be such accomplished liars that they begin to have trouble telling fact from fiction.” “In general, MSP is a very difficult disorder to treat and often requires years of therapy and support.” Munchausen Syndrome by Proxy, The Cleveland Clinic foundation, 1995-2008. <http://my.clevelandclinic.org/disorders/FactitiousDisorders/hic Munchausen Syndrome>. (Exhibit 20).

will be able to correct the conditions of abuse and/or neglect with which he/she has been charged, an improvement period need not be awarded before the circuit court may terminate the offending parent's parental rights." *In Re Emily and Amos B.*, 208 W.Va. 325, 336, 540 S.E.2d 542, 553 (2000). In light of the fact that without the results of a psychological or forensic psychiatric evaluation the circuit court could not know whether the conditions which caused Kari L.T. to starve at least one of her children could be corrected within six months, the circuit court exceeded its legitimate powers in granting the improvement period. If the conditions that caused the abuse cannot be corrected within the time limits of the improvement period, then the children are unnecessarily denied permanency and continually subjected to uncertainty. As this Court has held, "Child abuse and neglect cases must be recognized as being among the highest priority for the court's attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syllabus Point 1, in part, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Moreover, the granting of an improvement period to facilitate reunification should only be granted when such reunification is in the best interests of the children. At the November 13, 2008, hearing, the Petitioner argued that reunification was not in the best interests of the children and that the mother's conduct, deliberate starvation of at least one child, amounted to "aggravated circumstances" where the DHHR is not required to make reasonable efforts to reunify. "Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." Syl. Pt. 3, *In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 598 (1996). In the case *sub judice*, it is not in the best interests, health or welfare of the children to grant unsupervised visitation or plan on reunifying them with a parent who intentionally starved at least one of the children and lied about starving the child to

hospital staff while the child was hospitalized for severe malnutrition.

3. The Circuit Court Erred In Failing To Find That The Intentional Starvation Of An Infant Is An "Aggravated Circumstance" Where The DHHR Is Not Required To Exercise Reasonable Efforts To Reunify The Family And Which Finding Justifies The Denial Of An Improvement Period.

Pursuant to West Virginia Code §49-6-5(a)(7), the Department of health and Human Resources is not required to make reasonable efforts to reunify a family where the child/children have been subjected to aggravated circumstances:

For purposes of the court's consideration of the disposition custody of a child pursuant to the provisions of this subsection, the department is not required to make reasonable efforts to preserve the family if the court determines:

(A) The parent has subjected the child to aggravated circumstances which include, but are not limited to, abandonment, torture, chronic abuse and sexual abuse [. . .] (Emphasis added).

As this Court has previously stated, "Starvation is a particularly insidious type of child abuse; if the parents in the case before us had routinely flogged their child to within an inch of her life the legitimacy of the trial court's action would never have been questioned." *In Re: R.J.M.*, 164 W. Va. 496, 266 S.E.2d 114(1980).

While the intentional starvation of an infant is not particularly delineated in West Virginia Code §49-6-5(a)(7)(A), as an "aggravated circumstance," the list of "aggravated circumstances" set forth in that section is not, by the plain language of that section, exclusive. Thus, the statute provides discretion for not only a circuit court but also this Court to examine a particular set of circumstances and determine whether the parent has subjected a child/children to "aggravated circumstances." Just as abandonment, torture, chronic abuse and sexual abuse are "aggravated circumstances" as a matter of law, so too can this Court hold that the intentional starvation of an infant resulting in his being hospitalized for severe malnutrition is, as a matter of law, "aggravated circumstances."

Unfortunately, photographs of Blain T. Were not admitted into evidence and counsel for the Petitioner has thus far been unable to obtain copies of any photos from the DHHR or prosecuting attorney. However, a verbal description of Blaine T.'s condition is provided in his physical examination of 5-9-2008 at CAMC which states: "Weight is 3.58 kilograms, which is less than third percentile, height is 60 cm, which is less than fifth percentile. Head circumference is 39.5 cm which is less than fifth percentile. [. . .] EXTREMITIES: Thin. The patient does has [sic] full range of motion, has decreased muscle mass throughout. The ribs are easily felt as are spinal processes. SKIN: The skin is loose and thin. The patient is pale with a slight yellow tinge." (CAMC History And Physical Examination, dated 05/09/2008; Exhibit 21).

While the issue of whether the intentional starvation of an infant is an "aggravated circumstance," this Court has previously found that intentional starvation can serve as the basis for the denial of an improvement period and termination of parental rights.

We have also previously upheld the termination of parental rights without an improvement period where the evidence indicated potential danger to the children's welfare had they been returned home. *State v. C.N.S.*, 173 W.Va. 650, 319 S.E.2d 775, 779 (1984). This conclusion was reached in *C.N.S.* as a result of evidence which indicated that the children had suffered from improper feeding habits causing their hospitalization, as well as improper supervision and discipline of the children. 173 W.Va. At 653, 319 S.E.2d at 777; see *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (Court upheld denial of improvement period where evidence indicated that parents had starved child and parents had deliberately missed child's doctor appointments and concealed themselves from Department of welfare). We also upheld the denial of an improvement period in the case of *In re Darla B.*, 175 W.Va. At 139-40, 331 S.E.2d at 870-71, where the evidence indicated that the parents had inflicted such serious life-threatening injuries upon the child that termination was the only reasonable course of action.

James M. v. Maynard, 185 W.Va. 648, 655, 408 S.E.2d 400, 407 (1991). While this Court has not previously held that the intentional starvation of an infant is an "aggravated circumstance" justifying

the denial of an improvement period, the Court has previously relied heavily upon such intentional starvation as a basis for not only the denial of an improvement period but also the termination of parental rights.

CONCLUSION

The circuit court exceeded its legitimate powers in granting the respondent mother a post-adjudicatory improvement period where she had not filed a written motion. Further, the circuit court exceeded its legitimate powers in granting the respondent mother a post-adjudicatory improvement period where the medical staff at CAMC suspected that the cause for her intentional starvation of her child was Munchausen Syndrome By Proxy, but no psychological nor psychiatric evaluation was available to the court or MDT at the time the improvement period was granted and accordingly the court could not know whether the conditions which led the respondent mother to starve her child could be substantially corrected within the time constraints of the improvement period. Moreover, the circuit court erred in failing to find that the intentional starvation of an infant is an "aggravated circumstance" justifying and compelling the denial of a post-adjudicatory improvement period.

PRAYER FOR RELIEF

WHEREFORE, your Petitioner, Freddie E. M., Jr., respectfully prays that his Petition for a Writ of Prohibition be granted; that the circuit court be ordered to terminate the respondent mother's post-adjudicatory improvement period; that the circuit court be ordered to terminate any unsupervised visitation between the respondent mother and the children; and, that this Honorable Court find that the intentional starvation and severe malnutrition of an infant is an "aggravated circumstance" justifying the denial of an improvement period, justifying the denial of unsupervised visitation between the respondent mother and the children, and, if appropriate, justifying the

termination of the mother's parental rights.

RESPECTFULLY SUBMITTED
Freddie E. M., Jr.,
By Counsel

SAMMONS, OLIVERO & PARASCHOS

BY:



Noel M. Olivero (#6646)
652 Sixth Avenue
Huntington, WV 25701
(304) 522-7730
Fax: 522-7801

CERTIFICATE OF SERVICE

I, Noel M. Olivero, SAMMONS, OLIVERO & PARASCHOS, counsel for the Petitioner, Freddie E. Mc [REDACTED] Jr., certify that I have served copies of the attached Petition For A Writ of Prohibition upon the following by personal service and/or depositing true copies thereof in the United States mail, postage pre-paid and addressed as follows on this 9th day of December, 2008:

Honorable N. Edward Eagloski, II
Judge of the Circuit Court of Putnam County PERSONAL SERVICE
Putnam County Courthouse
3389 Winfield Road
Winfield, WV 25213

Paige W. Hoffman
Assistant Prosecuting Attorney PERSONAL SERVICE
Putnam County Judicial building
3389 Winfield Road
Winfield, WV 25213

Duane Rosenlieb, Esquire
Guardian Ad Litem
Post Office Box 913
St. Albans, WV 25177

Herbert Hively, Esquire
Counsel for Respondent Mother
3566 Teays Valley Road
Hurricane, WV 25526

Joseph Reeder, Esquire
Counsel for Respondent Father Richard Rider
Post Office Box 1027
Hurricane, WV 25526

Stacy Jacques, CASA
213 Hale Street
Charleston, WV 25301

Amanda Bree Whipp-Ogle
Post Office Box 300
Buffalo, WV 25033
Counsel for Respondent Frankie T [REDACTED]

Elizabeth Kennedy, SW
West Virginia DHHR
Post Office Box 560
Teays, WV 25569

~~SAMMONS, OLIVERO & PARASCHOS~~ .

BY:



Noel M. Olivero (#6646)
652 Sixth Avenue
Huntington, WV 25701
(304) 522-7730
Fax: 522-7801