

NO. 34618

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

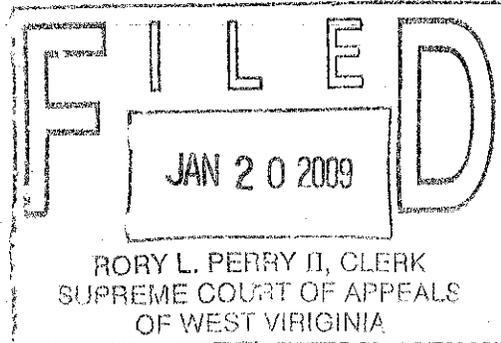
KATHRYN KUTIL and CHERYL HESS,

Petitioners,

vs. Fayette County Juvenile Abuse and Neglect Case No. 07-JA-72

**THE HONORABLE PAUL M. BLAKE JR.,
CIRCUIT JUDGE, TWELFTH JUDICIAL
CIRCUIT, FAYETTE COUNTY and WEST
VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES, and
MARTHA YEAGER WALKER, SECRETARY,**

Respondents.



**GUARDIAN AD LITEM'S BRIEF IN
RESPONSE TO RULE TO SHOW CAUSE WHY WRIT OF PROHIBITION SHOULD
NOT BE AWARDED**

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GUARDIAN AD LITEM

I

INTRODUCTION

Now comes your Guardian *ad litem*, Thomas K. Fast, to show cause why this court should not award a writ of prohibition against the Honorable Paul M. Blake Jr., Judge of the Circuit Court of Fayette County, and the West Virginia Department of Health and Human Resources as requested by the petitioners, Kathryn Kutil and Cheryl Hess, in their amended petition.

II

STATEMENT OF THE CASE AND FACTS

This case arises from a neglect and abuse proceeding filed in December of 2007 in Fayette County Circuit Court because the natural mother of BGC, a newborn baby girl, was drug addicted and unfit to parent. On December 17, 2008, Judge Blake appointed the undersigned, Thomas K. Fast, Guardian *ad litem* of BGC and placed BGC under the care of the Department of Health and Human Resources (DHHR). The DHHR then placed BGC in temporary foster care with the petitioners. The Guardian *ad litem* filed a motion objecting to the foster placement because the petitioners were actively cohabiting in a homosexual relationship. The petitioners moved for and were granted intervention. However, the Guardian *ad litem*'s motion was held in abeyance pending a lengthy improvement period, giving the natural mother an opportunity to overcome her addiction and reunite with BGC. The plan, hope and expectation of all the parties was that in the following months, the mother would reunite with BGC. But after a hearing on October 8, 2008, and with the agreement of the Guardian *ad litem*, Judge Blake terminated the mother's parental rights by Order entered November 5, 2008 because she remained unfit despite an eleven month period to improve. The unknown, natural father's rights were also terminated following notice by publication and no

appearance.

On October 28, 2008, at an MDT meeting, the DHHR clearly stated its intention to have the petitioners adopt BGC. On October 31, 2008 the DHHR issued a *Permanency Plan* advising that BGC was ready for adoption. But the *Permanency Plan* was strikingly unusual because it also advised that the petitioners wanted to adopt BGC and further advised that the adoption by the petitioners would be appropriate. Normally, a *Permanency Plan* would only recommend that adoption be pursued, but would stop short of concluding who should specifically adopt. Judge Blake held a hearing on the *Permanency Plan* on November 6, 2008.

In addition to his concern that the DHHR's *Permanency Plan* had prematurely greased the skids for adoption by the petitioners, the *Permanency Plan* recommendation strongly preferred **both** petitioners for adoption contrary to W. Va. Code § 48-22-201, which allows adoption by a single person or a married couple, but not an unmarried cohabiting couple, as were the petitioners. Judge Blake was also puzzled that the DHHR, before considering other alternative arrangements, had not first made an effort to consider the placement of BGC with a married couple, since a young infant would likely benefit the most in the long run from a loving and stable home consisting of both a mother and a father. (See Order entered November 12, 2008, Ex. B to Motion for Emergency Stay). Thus, at the November 21, 2008 *Permanency Plan* hearing, Judge Blake reiterated that placement of BGC with the petitioners was for *temporary foster care*. (See Order entered December 2, 2008, Ex. A, Amended Petition for Writ of Prohibition). In light of the DHHR's determination that BGC was ready for adoption, Judge Blake determined that it would be in the best interests of BGC to be placed for foster care and that DHHR at least attempt to place BGC with a married mother and father. He ordered DHHR to begin a transition period to place BGC with a married mother and father since she was being readied for adoption and adoption would need to be consistent with §48-

22-201. (Order entered, Nov. 12, 2008, p. 5, ¶ 16). A gradual transfer of BGC was to take place over a two week period.

The petitioners then filed their Motion for Emergency Stay and their first Petition for Writ of Prohibition challenging the November 12, 2008 order on the grounds that they had not presented evidence on their position. Judge Blake stayed his own order until the parties had an evidentiary hearing on the *Permanency Plan*, the transfer order, and the Guardian *ad litem*'s motion, which was held on November 21, 2008. Before the hearing, DHHR submitted a new answer to the Guardian *ad litem*'s renewed motion and in it agreed that BGC should be removed from the petitioners' home because it was over capacity and that BGC had visited with a married couple during the preceding two weeks as ordered, and that the couple was willing to adopt. On November 21, 2008, a five and one-half hour evidentiary hearing was held.

The Guardian *ad litem* called Trayce L. Hansen, Ph.D., a licensed and practicing clinical and forensic psychologist, and knowledgeable about child growth and development. Dr. Hansen opined that the optimal family environment for children is in a stable home with a mother and father. Nov. 21, 2008, Tr. 87 Among other data, Dr. Hansen cited four (4) comprehensive longitudinal studies, the most recent of which was completed in 2008. These studies were not single review studies but a professional compilation of multiple studies, yielding the best and most reliable information and conclusions available. *Id.* at 96

The Child Trends Study (covering the entire 20th Century) concluded that children reared without fathers have more cognitive difficulties and behavioral problems. *Id.* at 90 The American College of Pediatrics study (conducted by medical doctors who specialize in treatment of infants, children and adolescents) concluded that when possible, children should be placed in the optimal family structure consisting of a loving, stable, married mother and father.

Dr. Hansen stated: "The American College of Pediatrics determined that the traditional family structure provides the best physical and mental health and superior educational attainment for children and decreases the likelihood that they will use or abuse drugs or alcohol, less likely to be promiscuous and to be involved in criminal behavior." *Id.* at 94 And, "One of the quotes from the American College of Pediatrics states, quote, Whenever possible, children to be adopted should be placed in the optimal family structure of a loving, stable, married mother/father unit, end quote."

Id.

The Family Matters Study conducted by the Alabama Policy Institute, spanned several decades of research and thousands of individuals. It showed that children reared without a father living in the home tend to have negative and significant poorer academic and social development compared to children reared with a father in the home. *Id.* at 92

The Swedish Study, consisting of twenty-four (24) comprehensive studies, covered over twenty-two thousand (22,000) individuals from infancy to adulthood over a period of twenty years. It emphatically concluded that children raised with fathers present performed better in a variety of areas and that without fathers, young boys had more behavioral problems, and girls had more difficulty achieving cognitive development, had higher rates of delinquency and achieved a lower economic status. *Id.* at 98

In focusing on the literature, Dr. Hansen said: "And what's interesting about the studies they looked at is they found that fathers uniquely contribute to the development of their children over and above anything mothers do. There's a unique contribution that fathers make. And what they said that fathers uniquely contribute to, as we talked about, the social development, cognitive development, gender role development and academic achievement of children." *Id.* at 90

On the other hand, petitioners expert, Dr. Cooper-Lehki, testified that some literature contradicted Dr. Hansen. However, Dr. Cooper-Lehki could not refer to any specific contradictory study. Nov. 21, 2008, Tr. 169 Moreover, Dr. Cooper-Lehki agreed with Dr. Hansen on the central point that fathers, or at least a male role model, are very important to the nurture and care of children and that they provide important parenting that a female mother cannot. *Id* at 170, 174, 175

At the conclusion of the hearing held on November 21, 2008, the Court again ruled it was in BGC's best interests to place her in a home consisting of a married mother and father and because transition had already begun to take place, the move should be completed the following day. In his written order, Judge Blake made various findings of fact including, but not limited to:

15. The Court FINDs that *Permanency Plan* of transition to the DHHR Adoption Unit is appropriate and should be accepted by this Court.

16. The Court Finds that [BGC] is presently in the intervenors' home, however, the DHHR has found the intervenors' home is over capacity and has asked the Court to remove the child with a transitional period, based up that reason. Thus, the Court FINDS that [BGC] should be moved immediately. The Court FINDS that placement of [BGC] in a home with a married mother and father pending such adoption process is most appropriate for the child's well being.

(See Order entered December 2, 2008, p. 24, attached as Exhibit A to the Amended Writ of Prohibition).

The Court further made several *Conclusions of Law* including, but not limited to:

1. The Court CONCLUDES that the intervenors can not adopt this child as a couple because of statute. The intervenors argue that *they* are the only proper parties to be considered for the adoption of [BGC]; however, under West Virginia law §48-22-201, only married couples,

married persons with the consent of their spouse, or single persons may petition to adopt a child. For this reason, the Court CONCLUDES that the intervenors cannot lawfully petition *together* to adopt [BGC], *only one* of the two intervenors may petition for adoption.

2. The Court CONCLUDES that the DHHR's request for removal based upon the fact that intervenors' home is overcapacity should be GRANTED as it is in the child's best interest. Further considering the well-being of the child, the Court CONCLUDES and ORDERS that the child be removed for the intervenors' home by 12:00 noon November 22, 2008.

Id. 24-25

BGC was transferred to the foster home of a willing married couple on November 22, 2008. The Guardian *ad litem* visited BGC on Monday, November 24, 2008, where she seemed very content and was playing with age-appropriate toys. At no time was she visibly upset or appeared to be suffering any substantial trauma as argued by the petitioners.¹ BGC, however, was returned to the petitioners per this Court's November 26, 2008 order.

* III

STANDARD OF REVIEW

The petitioners' burden on their writ of prohibition is virtually insurmountable because they must show that the circuit court's order is clearly erroneous as a matter of law. *Denise L.B. v. Burnside*, 209 W.Va. 313, 317, 547 S.E.2d 251, 255 (2001). Because prohibition is "a drastic remedy to be invoked only in extraordinary situations," *Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994), it will issue only if the lower court's orders clearly exceed its legitimate powers. *Burnside*, 209 W.Va. at 317, 547 S.E.2d at 255; W.Va. Code § 53-1-1. It will not issue to

¹ Due to unusual circumstances of the new foster mother's brother being placed on life support, BGC had to be transitioned to another adoptive home with a married mother and father.

prevent a simple abuse of discretion by a trial court. *Thrasher Engineering, Inc. v. Fox*, 218 W.Va. 134, 138, 624 S.E.2d 481, 485 (2005). Prohibition is used only to correct 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. *Id.* at 138, 624 S.E.2d at 485. (citations and quotations omitted).

IV

ARGUMENT

On the undisputed material facts here, Judge Blake did not plainly contravene any clear statutory, constitutional, or common law mandate. Rather, at the polar extreme from clearly erroneous, his decision to transfer the foster care of BGC was clearly consistent with W.Va. Code §48-22-201, which does not authorize a joint adoption by an unmarried cohabiting couple, consistent with the relevant evidence that a married mother and father is the optimal environment for children, and with the DHHR *Permanency Plan* recommending removal of BGC because the petitioners' home was overcapacity.

Contrary to petitioners' claims here, Judge Blake did not base his decision on the petitioners' sexual orientation. And petitioners have no substantive due process right or due process liberty interest to demand or maintain custody of a foster child. Petitioners' claim for relief is predicated on the notion that their provision of temporary foster care and emotional attachment to BGC grants them a constitutional right to maintain custody and adopt BGC. But foster parenting is by definition temporary and here, where ten of the twelve months of the entire foster period was aimed at reuniting

BGC with her natural mother, petitioners had no reasonable expectation that they alone could foster or adopt BGC.

Petitioners do not have a liberty interest to either continued or permanent custody of BGC as they claim. Rather, not allowing BGC to take advantage of the chance to be raised in an optimum family environment by both a mother and father threatens her best interest. In fact, petitioners' requested relief would violate BGC's due process liberty interest arising out of W. Va. Code § 48-22-201, which provides for children to be adopted by a married mother and father when possible. Based on the record and the law, Judge Blake's decision anticipating BGC's imminent adoption in no way is clearly erroneous and the Writ must be denied.

The Petitioners' Petition for Writ of Prohibition and Amended Petition makes the following claims:

- The Circuit Judge "acted outside of his discretionary authority by ordering the Department of Health and Human resources (hereinafter DHHR) to remove the infant respondent ... from their DHHR approved foster home to a 'traditionally defined home with both a mother and a father within two weeks from November 6, 2008.'" (Petition for Writ of Prohibition, p. 2.) The Circuit Judge's "ruling is also clearly erroneous as a matter of law because the Court has disregarded the best interests of the infant child, the status of the Petitioners as psychological parents, and the Petitioners' right to continue to associate with a child with whom they have established a strong emotional bond." (Amended Writ of Prohibition, pp. 12-13, ¶ 43).
- That the Circuit Judge violated the Petitioners' "fundamental constitutional rights to family, privacy and equal protection under the law ..." that amounted to a violation

of “procedural due process of the law in violation of the Fourteenth Amendment to the United States Constitution.” (Petition for Writ of Prohibition, p. 2 and p. 6, ¶ 13)

- That, “the Petitioners’ evidence was cut short, thereby depriving the Petitioners of their fundamental rights to family, privacy and equal protection without affording them meaningful due process. (Amended Writ of Prohibition, p. 12, ¶ 43).

All of petitioners’ claims fail under the writ of prohibition standard.

a. JUDGE BLAKE DID NOT ACT OUTSIDE HIS AUTHORITY AND COMMIT CLEAR ERROR BY ORDERING THAT BGC BE PLACED WITH A MARRIED MOTHER AND FATHER

1. THE LAW PERMITS MARRIED COUPLE TO ADOPT, IT DOES NOT PERMIT UNMARRIED COHABITING COUPLES TO ADOPT

Nowhere does the Court’s orders of November 12, 2008 or November 21, 2008 state that BGC was removed from the petitioners custody based upon the sexual orientation of the petitioners. The Court’s orders, in fact, are not based on the petitioners’ sexual orientation at all. Rather, the Court’s order was based squarely on West Virginia law that petitioners as an unmarried couple cannot lawfully adopt a child in the State of West Virginia. W.Va. Code § 48-22-201 states:

Any person not married or any person, with his or her spouse’s consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners.

Here, the petitioners made a joint motion with the Circuit Court to become intervenors and represented that both of them were seeking to adopt BGC. In the original Petition for Writ of Prohibition pending before this Court, the petitioners alleged that, “The Petitioners are a same-sex couple who are approved by the DHHR as foster parents and adoptive parents.” (Petition for Writ of Prohibition, p. 3, ¶ 3, (emphasis added).) The Petition further states, “The Permanency Plan

prepare[d] by DHHR and provided to the parties and the lower Court recommended adoption of the infant respondent as the Permanency Plan and the DHHR further stated in the Permanency Plan that DHHR believed that adoption by the Petitioners would be appropriate for the enumerated reasons stated therein. (Petition for Writ of Prohibition, p. 5, ¶ 11; *see* Petition, Exhibit C.)

Further, the petitioners allege that BGC was ordered removed “after an expectation has been created by the DHHR that they would be considered as an adoptive family...” (Petition for Writ of Prohibition, p. 8, ¶ 22, *emphasis added*). The Circuit Court did not commit clear error by holding that the petitioners could not adopt BGC under West Virginia law. Consequently, the court did not err when he ordered that BGC should be placed in a home consistent with her foreseeable adoption.

Petitioners ignore the logic of § 48-22-201, for example, that requires one spouse to secure the consent of their spouse before adopting a child. When married, both spouses must be committed to raising the child. The spouse will be involved in the care of the child and be bound by certain legal responsibilities due to the marital relationship. The statute clearly implies that adoption is not permitted in a home with two cohabiting individuals. It permits adoption only by a man and woman secured in matrimony, or a single person unencumbered by a cohabiting relationship. The purpose is obvious and pointedly rational: children must be adopted into a secure family structure, to the extent the state can so provide, either secured by marriage or with a person unhampered by the potential instability of a cohabiting partner. This scheme provides the adoptive child the benefit of a stable and committed family structure; either through marriage or a single person. Unmarried cohabiting relationships are more susceptible to change and may entwine the adoptive child in an unpredictable, less stable, less committed “parental” relationship.

This theme of stability is conjoined with West Virginia’s recognition of marriage as a legal and stable commitment between a man and a woman. W.Va. Code § 48-2-104, specifically

provides, "Every application for a marriage license must contain the following statement: "Marriage is designed to be a loving and lifelong union between a woman and a man."

The legislature plainly determined that married couples consisting of a mother and father are the preferred homes for adoptive children because of their traditional and legally enhanced stability. Judge Blake's decision was consistent with state law and cannot be said to have transgressed BGC's best interests. On the contrary, his decision was in BGC's best interests.

2. IT IS IN BGC'S BEST INTERESTS TO BE PLACED IN A SETTING THAT FACILITATES ADOPTION

BGC's best interests are met by prompt placement in an adoptive home. This Court recognizes that the chief concern in every such case "is the welfare of the child and...in a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." *Treadway v. McCoy*, 189 W. Va. 210, 213, 429 S.E.2d 492, 495 (1993) (internal quotations omitted). An adoptive home is preferred to any other option for a child whose natural parent's right have been terminated. *State v. Michael M.*, 202 W. Va. 350, 358, 504 S.E.2d 177, 185 (1998). If for no other reason, Judge Blake's decision facilitated the key policy objective recognized by this Court in holding that adoption is the only way to allow a child without natural parents to achieve a legal and economic status equal to that of natural children. *Id.* at 358, 504 S.E.2d at 185 (citing *Wheeling Dollar Sav. & Trust Co. v. Hanes*, 160 W. Va. 711, 716, 237 S.E.2d 499, 502 (1977)). This undoubtedly is more "consistent with the child's best interests," W.Va. Code § 49-1-1(b), than any of petitioners' personal preferences.

Consistent with the purpose of the statute, the circuit court also determined that the infant's best interest would be served by identifying a married couple, where the child would have the full benefit and advantages of being raised by both a mother and a father. In its most recent Order entered December 2, 2008, the Circuit Court relied on ample expert testimony from Dr. Trayce

Hansen who testified without any specific contradiction that children raised with a mother and father in the home provides the best and ideal family structure for a child. (Order, entered December 2, 2008, p. 11, attached as Exhibit A to the Amended Writ of Prohibition.; see also Nov. 21 Tr. 90, 92, 94, 96 and 98) Even plaintiffs' expert, Dr. Christine Cooper-Lehki, agreed that it would be ideal for a child to be raised by her mother and father and that a male's influence and involvement was important and could provide things that females cannot. *Id.* at 171 and 175. On this testimony, even if only one of the petitioners had represented that she were seeking to adopt BGC, the circuit court could still have determined that it would be in the best interest of the infant to be provided with an opportunity to be adopted by a married mother and father.

Judge Blake carefully considered the claims of the petitioners. But the petitioners' custody of BGC had always been temporary and could not provide BGC with the advantages of being raised by a married mother and father. Judge Blake recognized that BGC's adoption was plainly imminent and placed her in a home with a married couple, where she would not only have the legal and economic status on par with natural children, but she would have the benefit of being raised with the perspective and wisdom of both a mother and father. Judge Blake's decision was imminently rational and certainly not clearly erroneous.

b. THE PETITIONERS ARE NOT PSYCHOLOGICAL PARENTS

It is noteworthy that the Petitioners frame the basis of their relief for writ of prohibition on their alleged status as psychological parents. But neither of the petitioners are psychological parents as defined in West Virginia law. Petitioners' citation to *In re Clifford K*, 217 W.Va. 625, 619 S.E.2d 138 (2005) does not justify an issuance of a writ of prohibition. It should be noted at the outset, that *In re Clifford K* granted intervener status to the partner of the deceased biological mother

of a child to participate in a custody proceeding; it is not a decision transferring a child from temporary foster parent custody as is the case here. In *Clifford K*, the partner and the deceased biological mother planned to raise the child together and planned the pregnancy with the necessary assistance of the biological father. The nature of the relationship to the child was permanent and substantial; it was not a temporary situation as is the foster parent relationship of the Petitioners here.

This is plainly evident in that, in this case, the biological parents' rights were not terminated until October 8, 2008, because an expectation to reunite the child with the biological mother pervaded the duration of the Petitioners' foster care. In addition, neither one of the Petitioners is related to the infant. As foster parents in this context, the Petitioners had no expectation of permanency to establish Petitioners as psychological parents.

As recognized in *Clifford K*, a psychological parent emerges only when the parent provides financial support, is substantial and not temporary, and, most importantly, the relationship with the child must have begun with the consent of the child's legal parent or guardian. *In re Clifford K*, at 644, 157. Here, neither of the Petitioners was required to nor provided financial support to the child. The DHHR has provided the financial support for the child while the Petitioners have served as foster parents. The Petitioners were fully aware that the law required the trial court to make every attempt to reunite the infant with her biological mother, and, accordingly, the relationship was plainly temporary. The biological mother's rights were only terminated three months ago and only after it became clear that the biological mother was not fit to parent her child.

In addition, the foster relationship of the Petitioners to the infant did not begin with the consent of the infant's legal parent or guardian. The relationship began only to provide temporary foster care to permit the biological mother an opportunity to demonstrate her fitness to parent the child and until the court could determine a parenting situation in the infant's best interests. Under

Petitioners' logic, every foster parent providing temporary care while awaiting a resolution of the biological parents' fitness could assert rights as a psychological parent, effectively removing the discretion of the Court to make decisions concerning permanent placement in the child's best interests.

It cannot be said that the court abused its discretion in placing the child with adoptive parents consisting of a husband and wife, where placement with a husband and wife was available as is the case here. The soundness of the trial court's discretion would still hold even if unmarried cohabitating adults were permitted to adopt children in West Virginia because the trial court determined it was in the infant's best interest to be raised by both a mother and a father. The petitioners are foster parents, without biological bonds and without psychological parent status. That they are dissatisfied with the circuit court's decisions to place the infant in a mother and father family setting rather than with them, does not equate to clear error under the facts and § 48-22-201.

c. PETITIONERS' TEMPORARY FOSTER STATUS DOES NOT GIVE THEM A FUNDAMENTAL RIGHT TO MAINTAIN CUSTODY OF AND ADOPT BGC AGAINST ALL OTHERS

Petitioners' due process claim regarding their rights to parent the infant because they have served as foster parents must fail. Petitioners, as foster parents of the infant, have no fundamental right to family and privacy which allows them to assert and maintain custody or to adopt the infant based on their status as foster parents. As foster parents to the infant here, petitioners simply do not have any federal or state fundamental right to the custody or adoption of a child, which exist for fit natural families.

Fundamental rights are those that are "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). These "fundamental rights"

exist “[i]n addition to the specific freedoms protected by Bill of Rights,” and are those “‘implicit ‘in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’” *Id.* at 720-21 (citing *Palko v. Connecticut*, 302 U. S. 319, 325, 326 (1937)). Neither custody of or adopting foster children is one of these “fundamental” rights. *See Procopio v. Johnson*, 994 F.2d 325 (7th Cir. 1993); *Lindey v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989); *Mullins v. State of Oregon*, 57 F.3d 789 (9th Cir. 1995).

The petitioners can point to no constitutional or statutory authority that provides them with a right to maintain custody of or to adopt the infant. The foster relationship is by contract with the state and presumes a temporary relationship between the foster parent and child. It is undisputed that there is no fundamental right to stay a foster parent or to adopt. Moreover, adoption and certainly foster parenting is a privilege created by statute, not by common law. *In re Palmer’s Adoption*, 129 Fla. 630, 176 So. 537 (1937); *Kyees v. County Dep’t of Public Welfare of Tippecanoe County*, 600 F. 2d 693 (7th Cir. 1979). Fundamental “liberty rights do not flow from state laws, which can be repealed by action of the legislature ... [but] have a more stable source in our notions of intrinsic human rights.” *Drummond v. Fulton County Dep’t of Family & Children’s Services, et al.*, 563 F.2d 1200, 1207 (5th Cir. 1977). As such, there is no express constitutional or deeply rooted privilege that would transform the petitioners’ eleven month care of the infant into a fundamental right to insist upon keeping custody of or adopting her.

d. EMOTIONAL BONDS ALONE DO NOT CREATE A PROPERTY INTEREST IN CHILDREN

Additionally, the petitioners’ emotional bond toward the infant does not result in a fundamental right to family association and family integrity. Rather, it is the justified expectation

of enduring companionship that has become the benchmark for protected liberty interest in the family. *Wooley v. City of Baton Rouge*, 211 F.3d 913, 921 (5th Cir. 2000). In *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 841 (1977), the Supreme Court encountered the similar argument that removing a foster child might “constitute a grievous loss.” But the court observed that potential emotional effects of removing foster children did not implicate a liberty interest in maintaining custody of a foster child, stating, “we must look not to the ‘weight’ but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment’s protection of liberty and property.” *Id.* While the court recognized that foster parents may have some right to be heard on the issue of removal, it rejected the contention that foster parents have a liberty interest in claiming custody of the child. Emotional attachment alone does not give rise to constitutional protection as a “family.” Although “family” is broader than just the social units that make up the archetypal nuclear family, the Constitution protects only those social units that share an expectation of continuity justified by the presence of basic features traditionally recognized as characteristic of the family. *See Wooley*, 211 F.3d 913. Throughout the litigation here, petitioners were aware that as foster parents, their role was presumed temporary as the DHHR sought to reunite the infant with her natural parents. The decision to terminate the natural parents’ rights did not occur until October 8, 2008. The petitioners did not have a justified expectation of enduring companionship with the infant and can claim no liberty interest to continued custody of or to adopt the infant.

Petitioners’ claim that their fundamental rights and liberty interests are injured unless they are awarded further custody or achieve a finalized adoption is not supported by fact or law. The circuit court’s placement of the infant with a married mother and father does not intrude upon the petitioners’ fundamental rights or violate their right to equal protection.

e. **THE CIRCUIT COURT'S DETERMINATION TO PLACE THE INFANT IN A FAMILY WITH A MARRIED MOTHER AND FATHER DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE**

The circuit court's decision did not violate the equal protection clause because it was rationally related to the best interest of the child and did not target a protected class or infringe on a fundamental right. All that the circuit court did was to place the child with a married mother and father in anticipation of the child's adoption. Once BGC's natural parents rights were terminated and DHHR submitted its *Permanency Plan*, recommending adoption (See Petition for Writ of Prohibition, Ex. C.), the court recognized that adoption was forthcoming and in BGC's best interests. The circuit court also had a duty to make sure the system was taking proper steps to facilitate a legal adoption for BGC and one that was most suitable to her best interests. Judge Blake reasonably placed the infant in the foster care of a married mother and father in anticipation of the requirements of W.Va. Code §48-22-201, which allows married couples to adopt, but does not allow unmarried cohabiting persons to adopt. And it should be noted again, that petitioners have consistently represented to the trial court that they, as a couple, should be allowed to adopt the infant. This is especially plain from their recorded representations in the *Permanency Plan*. (See Petition for Writ of Prohibition, Ex. C.). But as an unmarried cohabiting couple, they could not adopt a child under § 48-22-201.

Neither § 48-22-201 or the circuit court's decision to place the infant with a mother and father in anticipation of adoption targets a suspect or protected class or infringes upon a fundamental right. As noted above, temporary foster parents have no fundamental right to maintain indefinite custody of or adopt those in their charge. But more to the point, here, nothing in Judge Blake's orders targets a suspect class. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld

against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification.” *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993). Accordingly, it is petitioners’ burden to “negative ‘any reasonably conceivable state of facts that could provide a rational basis for its classification.’” *Board of Trustees v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 964 (2001), quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993).

Under rational basis review, the circuit court’s decision applying the best interest standard and § 48-22-201 enjoys a presumption that it is reasonably related to the legitimate government interest in acting in the best interests of the child, and therefore valid under Equal Protection Clause. *Beach Communications*, 508 U.S. at 314-15. Petitioners cannot meet their equal protection burden to show that the circuit court’s application of the law to place the infant with a married mother and father is irrational. It plainly is rational. In fact, it is BGC’s due process rights that are stake, not the petitioners’.

f. GRANTING PETITIONERS’ RELIEF WOULD VIOLATE BGC’S LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Cases “involving children must be decided not just in the context of competing sets of adults’ rights, but also with a regard for the rights of the children.” Syl. pt. 7, *In re Brian D.*, 194 W. Va. 623, 461 S.E.2d 129 (1995); *In re Michael Ray T.*, 206 W.Va. 434, 442, 525 S.E.2d 315, 323 (W.Va. 1999). Granting the petitioners’ requested relief would violate BGC’s Fourteenth Amendment Due Process rights. Due process protects persons from deprivations of their interests in life, liberty or property. U.S. Const. amend. XIV. A liberty interest, in particular, may arise from an interest or expectation created by state laws or policies. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Here, West Virginia Code § 48-22-201 affords children an interest and expectation that they will be adopted only by an individual or a married couple. Again, that section reads:

Any person not married or any person, with his or her spouse's consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners.

As such, it is clear that an unmarried, cohabiting couple is unable to adopt a child in the state of West Virginia—only a married couple, a married individual, with consent of his or her spouse, or an unmarried individual, may adopt. Therefore, BGC has a concrete expectation that a single individual or a married couple will adopt her, especially where West Virginia law requires that foster placements should be made with the purpose of facilitating permanent placements. See W.Va. Code § 49-6-5(a) (requiring the Department of Health and Human Resources to create a permanency plan for abused or neglected children that “facilitate[s] the return of the child to his or her own home or the permanent placement of the child”). And, adoption is the preferred form of permanent placement. *State v. Michael M.*, 202 W. Va. 350, 358, 504 S.E.2d 177, 185 (1998).² Thus, there is an expectation that when possible, the state will place BGC in a foster home where she can, ultimately, be adopted. The best permanent placement option for BGC is adoption and she has a liberty interest to be adopted as provided under §48-22-201.

Placing BGC with the petitioners would fly in the face of these expectations. The petitioners, as an unmarried, cohabiting couple, are ineligible to adopt. Placing BGC with the petitioners would only delay her permanent placement into a home where she can be adopted. As the petitioners have acknowledged, children should be given a stable environment where they can develop bonds with their caretakers. And, as there are married couples willing to foster BGC with

² Foster care is stop-gap and is appropriate as a permanent solution only where a suitable adoptive home cannot be found. See *Michael M.*, 202 W.Va. at 358, 504 S.E.2d at 185 (1998).

the purpose of eventually adopting her, she should be placed with one of those couples immediately, to allow her a chance to develop bonds with the individuals who will be her permanent caretakers. She has a liberty interest and expectation in ensuring that she is treated accordingly.

Granting the petitioners' requested relief would violate BGC's liberty interest and expectation that she will be placed in a home with a prospect of permanency. As such, the Fourteenth Amendment forbids the granting of petitioners' requested relief.

g. THE COURT'S TRANSITIONAL PERIOD WAS NOT CLEARLY ERRONEOUS AS A MATTER OF LAW.

There is no proof or evidence that the child was traumatized by being moved from the petitioners' home and petitioners' evidence on that point was purely speculative and was completely without substance. The two week transitional period that occurred violated no rule of law. In fact, the DHHR's official transitional period calls for two to three weeks and to avoid allowing it to linger beyond that time period. (Amended Writ of Prohibition, p. 8; Nov. 21, 2008 Tr. at 41). This makes perfect sense because BGC is very young and has not been in the petitioners' home for years. This court has observed that a child's interest in staying with foster care givers is not as great when the child is young. *West Va. Dep't of Human Servs. v. La Rea Ann C.L.*, 175 W. Va. 330, 332 S.E.2d 632 (1985). In *La Rea*, this Court said that children under the age of two are particularly amenable to removal in contrast with children who spend a number of years with their foster parents. Children younger than two years "will form new attachments quickly if treated kindly by those into whose care it is given. In that respect it resembles a young tree whose roots have not yet taken deep hold in the nourishing earth...." *Id.* at 335, 332 S.E.2d at 636-37 (internal citations and quotations omitted). Here BGC was only eleven months old when the circuit court ordered she be transferred. And it should be noted, that the petitioners' claim that they have a personal emotional attachment are inapposite to deciding what is in the best interest of BGC.

Judge Blake did not commit any legal error when he ordered that the transitional period should occur over two weeks.

h. THE PETITIONERS WERE NOT DENIED AN OPPORTUNITY TO PRESENT RELEVANT EVIDENCE

Petitioners' claim that the trial court cut short their evidence and thus denied them of their fundamental rights to family, privacy and equal protection because the court did not hear evidence from four character witnesses for the petitioners. (Amended Writ of Prohibition, p. 12, ¶ 43) The petitioners are wrong. "The West Virginia Rules of Evidence ... allocate significant discretion to the trial court in making evidentiary ... rulings. Thus, rulings on the admission of evidence ... are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary ... rulings of the circuit court under an abuse of discretion standard." *Love v. Georgia-Pacific Corp.*, 209 W.Va. 515, 518, 550 S.E.2d 51, 54 (2001) (citation omitted). Subject to the trial court's discretion, foster care providers may participate in neglect and abuse proceedings only for the limited "purpose of providing the circuit court with all pertinent information regarding the child." *In re Jonathan G.*, 198 W.Va. 716, 729, 482 S.E.2d 893, 906 (1996).

Here, Judge Blake gave petitioners an ample opportunity to present evidence and both testified about the pertinent information regarding the baby's needs, their home, and the care they provided which was relevant to determining the appropriates of the DHHR's *Permanency Plan*. But Judge Blake correctly ruled that the character witnesses were not relevant to determining the appropriateness of the DHHR's *Permanency Plan* or to the placement of the child for foster care because "no one alleged that the intervenors mistreated the child or disputed the fact that they were good to the children, and in light of those facts character testimony may not be relevant." (Amended Writ of Prohibition, Ex. A, Order, Dec. 2, 2008 p. 16.) Additional character witnesses were also immaterial to continuing foster placement with the petitioners since their home was already filled

to capacity as noted in the *Permanency Plan*. And furthermore, character witnesses were not relevant to transitioning the child for its foreseeable adoption consistent with W.Va. Code §48-22-201, which does not provide for adoption by unmarried couples. In light of the baby's imminent adoption per the *Permanency Plan* recommendations, §48-22-201, and the evidence on the record, the trial court did not abuse its discretion in not hearing further testimony from the petitioners' character witnesses.

V

CONCLUSION

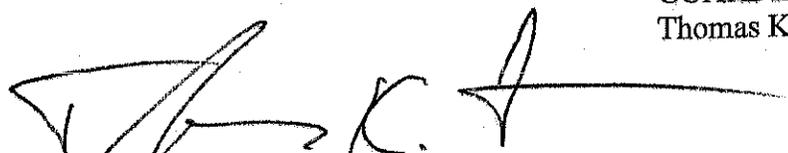
In this case, the petitioners carry the burden to show that the circuit court's orders were substantial and clear cut legal errors plainly in contravention of a clear statutory, constitutional or common law mandate, and there is no high probability that the court will be completely reversed because the circuit court committed no error. *George B.W. v. Kaufman*, 199 W. Va. 269, 483 S.E. 2d 852 (1997). Because the Petitioners are not psychological, adoptive, or biological parents, they cannot claim a right to custody of the child to override the sound discretion of the trial court's decision to facilitate permanent placement of the child where she will have the parenting advantages of both a mother and a father. Based on the undisputed facts here and the applicable law, the writ of prohibition should not issue.

Your guardian ad litem, the only voice for Baby Girl C., respectfully moves this Court to not substitute its judgment for that of the circuit court. This child of 12 months deserves what is best. There is no question that her best interest is that she be raised by two loving parents consisting of a mother and father secured by the bonds of matrimony. There she will have the most favored security. A new transition period would now be appropriate, which the circuit court could oversee

those events.

Dated: January 20, 2009.

Respectfully submitted,
GUARDIAN AD LITEM,
Thomas K. Fast

A handwritten signature in black ink, appearing to read 'T. K. Fast', with a long horizontal line extending to the right from the end of the signature.

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No. 34618

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**KATHRYN KUTIL and
CHERYL HESS,
PETITIONERS,**

vs.

Fayette County Juvenile Abuse and Neglect No. 07-JA-72

**THE HONORABLE PAUL M. BLAKE, JR.,
CIRCUIT JUDGE, TWELFTH JUDICIAL CIRCUIT, and,
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
MARTHA YEAGER WALKER, SECRETARY,
RESPONDENTS.**

CERTIFICATE OF SERVICE

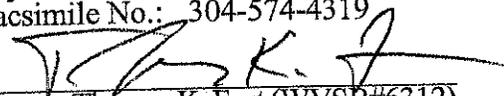
I hereby certify that I have served a true copy of the foregoing *GUARDIAN AD LITEM'S BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE WHY PETITION FOR WRIT OF PROHIBITION SHOULD NOT BE AWARDED* upon the following, by depositing the same in the regular course of the United States Mail, First Class, postage prepaid, at the address indicated, on this the 20th day of January, 2009.

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The Honorable Paul M. Blake, Jr.
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