

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**NO. 34618**

**KATHRYN KUTIL and CHERYL HESS,**

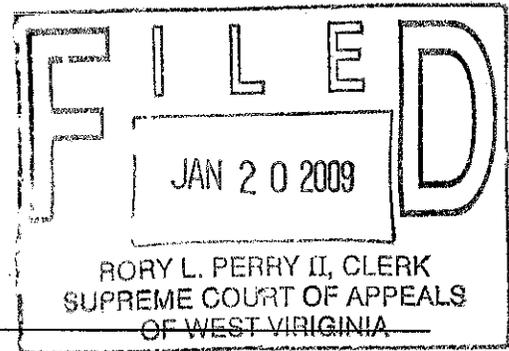
**Petitioners,**

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.**



---

**BRIEF *AMICUS CURIAE* OF THE FAMILY POLICY COUNCIL  
OF WEST VIRGINIA IN SUPPORT OF RESPONDENTS,  
URGING DENIAL OF PETITION FOR WRIT OF PROHIBITION**

---

**James A. Campbell\***  
(OH Bar No. 0081501)  
ALLIANCE DEFENSE FUND  
15100 North 90th Street  
Scottsdale, Arizona 85260  
Telephone: (480) 444-0020  
Facsimile: (480) 444-0028

*\* Pro hac vice motion pending*

**Jeremiah G. Dys**  
(WV Bar No. 9998)  
THE FAMILY POLICY COUNCIL  
OF WEST VIRGINIA  
P.O. Box 566  
Charleston, WV 25322  
Telephone: (304) 982-2803  
Facsimile: (304) 720-3257

*Attorneys for Amicus Curiae  
The Family Policy Council  
of West Virginia*

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
ARGUMENT .....	3
I.    The Extraordinary Writ Petitioners Seek May Only Be Granted if the Circuit Court Exceeded its Legitimate Powers By Making a Substantial, Clear-Cut, Legal Error that Plainly Contravenes a Clear Statutory, Constitutional, or Common Law Mandate .....	3
II.   The Circuit Court Did Not Exceed Its Legitimate Powers in Ordering the Removal of BTC from Her Temporary Foster Placement .....	3
A.   The Circuit Court Properly Focused Not on the Alleged Rights of the Foster Parents But on the Best Interests of the Child.....	4
B.   The Circuit Court Followed the Law for Determining BTC's Best Interests as Set Forth By the Statutes and Common Law of the State of West Virginia. ....	6
1.   The Court Properly Considered BTC's Interest in Continued Temporary Foster Care with Petitioners.....	6
2.   The Circuit Court Properly Considered BTC's Strong Interest in Being Placed in a Permanent Adoptive Home.....	8
3.   The Circuit Court Properly Considered BTC's Interest in Being Adopted by a Legal Mother and a Legal Father.....	10
4.   The Circuit Court Properly Considered the Recommendations of Both the Guardian <i>Ad Litem</i> and the DHHR Regarding the Overcapacity of Petitioners' Home.....	13

CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	17

## TABLE OF AUTHORITIES

Cases	<u>Page</u>
<i>Clifford K. v. Paul S. ex rel. Z.B.S.</i> , 217 W. Va. 625, 619 S.E.2d 138 (2005) .....	5
<i>Commonwealth ex rel. Martino v. Blough</i> , 201 Pa. Super. 346, 191 A.2d 918 (1963) .....	7, 8
<i>Hinkle v. Black</i> , 164 W. Va. 112, 262 S.E.2d 744 (1979) .....	3, 13
<i>In re Jonathan</i> , 198 W. Va. 716, 482 S.E.2d 893 (1996) .....	6, 7
<i>In re Visitation &amp; Custody of Senturi N.S.V.</i> , 221 W. Va. 159, 652 S.E.2d 490 (2007) .....	5
<i>State ex rel. Caton v. Sanders</i> , 215 W. Va. 755, 601 S.E.2d 75,(2004) .....	3
<i>State ex rel. Ohl v. Egnor</i> , 201 W. Va. 777, 500 S.E.2d 890, (1997) .....	3
<i>State ex rel. Packard v. Perry</i> , 221 W. Va. 526, 655 S.E.2d 548 (2007) .....	3
<i>State ex. Rel. Treadway v. McCoy</i> , 189 W. Va. 210, 429 S.E.2d 492 (1993) .....	6
<i>State v. Michael M.</i> , 202 W. Va. 350, 504 S.E.2d 177 (1998) .....	1, 8, 9
<i>West Va. Dep't of Human Servs. v. La Rea Ann C.L.</i> , 175 W. Va. 330, 332 S.E.2d 632 (1985) .....	4, 7
<i>Wheeling Dollar Sav. &amp; Trust Co. v. Hanes</i> , 160 W. Va. 711, 237 S.E.2d 499 (1977) .....	9

**Constitutional Provisions; Statutes; Rules of Procedure**

W. Va. Code § 49-1-1(a) [2008] .....	8, 12
W. Va. Code § 49-6-5(a)(6) [1996].....	10

## INTRODUCTION

The aim of West Virginia's laws concerning the placement of abused and neglected children is to provide these children with a legal and economic status "on a par with natural children."<sup>1</sup> Many things change in this world, but nature remains the same. Despite all the modern advances in medical technology, it still ultimately takes a mother and a father to produce natural children. Inherent in the State's policy, then, is the common sense notion that it is in the best interests of all children to be brought up, as natural children are, in a home with a married mother and father. The Family Policy Council of West Virginia, which advocates in favor of public policies that will enrich marriage and families, has an interest in seeing that this ideal of married mother-father adoption continues to be promoted in the State of West Virginia.

The petitioners in this case have chosen to establish a home in which an adopted child could never obtain more than one legal parent and could never obtain a legal father. That has been their choice. But petitioners here are not just asking for the right to establish such a home; they are not merely asking for the right to adopt children into such a home. What petitioners seek—indeed, what they *demand*—is no less than for the courts of this State to be forced to treat their home as just as good as any other.

But this cannot be. When it comes to determining the most appropriate placement for children, a court is bound by law to discern not just between the bad

---

<sup>1</sup> *State v. Michael M.*, 202 W. Va. 350, 358, 504 S.E.2d 177 (1998).

and the good, but also between the good and the better, the better and the best. And this Court has declared that, when it comes to the placement of abused or neglected children, "best" means "on a par with natural children." No court of this state, then, should be made to act as if having two legal parents is no better than having only one, or as if having only a mother is just as good as having both a mother and a father.

The Family Policy Council of West Virginia fears that if the Court grants this petition, the courts of this state will be paralyzed from acting in a child's best interests. They will lose the ability to make these determinations based on the sound recommendations of a child's guardian *ad litem* or even of the Department of Health and Human Resources. They will instead have to make such decisions based on the claims of any and every arrangement of unmarried foster caregivers who claim to provide a childrearing environment equal to a household where children have a legal mother and legal father.

It is consistent with the policy of this State (as announced in both the statutes and the common law) to hold that it is in a child's best interests to be placed for adoption with a married mother and father, even when such placement requires a child to be moved from a temporary foster home in which the infant child has previously been placed. The Circuit Court followed this policy in issuing the order that petitioners have challenged in this case, and thus the court did not exceed its legitimate powers. This being so, your *amicus* urges the Court to deny the writ of prohibition.

## ARGUMENT

I. *The Extraordinary Writ Petitioners Seek May Only Be Granted if the Circuit Court Exceeded its Legitimate Powers By Making a Substantial, Clear-Cut, Legal Error that Plainly Contravenes a Clear Statutory, Constitutional, or Common Law Mandate.*

Writs of prohibition are “drastic and extraordinary remedies ... reserved for really extraordinary causes.” *State ex rel. Ohl v. Egnor*, 201 W. Va. 777, 784, 500 S.E.2d 890 (1997). Such writs “will not issue to prevent a simple abuse of discretion by a trial court” but only “where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.” *State ex rel. Packard v. Perry*, 221 W. Va. 526, 531, 655 S.E.2d 548 (2007).

In writ cases “where it is claimed that the lower tribunal exceeded its legitimate powers,” substantial weight is given to the presence or absence of “clear error as a matter of law.” *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 759, 601 S.E.2d 75 (2004). A Court must only use prohibition to correct “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate, [errors] which may be resolved independently of any disputed facts.” *Hinkle v. Black*, 164 W. Va. 112, syllabus pt. 1, 262 S.E.2d 744 (1979).

II. *The Circuit Court Did Not Exceed Its Legitimate Powers in Ordering the Removal of BTC from Her Temporary Foster Placement.*

Far from being a clear error as a matter of law, the Circuit Court’s order in this case fully complied with the law governing the placement of abused and neglected children as mandated by all the applicable statutes and common law

decisions of the State of West Virginia. The extraordinary writ of prohibition, requiring “a substantial, clear-cut, legal error[,] plainly in contravention of a clear statutory, constitutional, or common-law mandate,” *id.*, is, therefore, entirely unwarranted in this case.

A. *The Circuit Court Properly Focused Not on the Alleged Rights of the Foster Parents But on the Best Interests of the Child.*

Petitioners argue that the Circuit Court, by determining that BTC’s most appropriate placement was in a home with a married mother and father, and by removing the child from their temporary care on that basis, violated their fundamental constitutional rights to “family, privacy, and equal protection” and their rights as “psychological parents.” (Amended Pet. (“Pet.”), at 3, 9.) Petitioners are mistaken in each of these claims.

Petitioners’ first error is in the assertion that any fundamental constitutional right to continued foster custody or to adoption of particular children even exists. Petitioners have failed to point to a single case recognizing either of these alleged “rights.” At best, Petitioners’ constitutional “rights” are limited to any property interest that may arise out of their contract with DHHR to provide temporary foster care to BTC. *See generally State ex rel. West Virginia Dept. of Public Assistance v. See*, 145 W. Va. 322, 115 S.E.2d 144 (1960) (when parental rights have been terminated, state succeeds to rights of parents and does not surrender any custody or other rights to child except as provided for in contract for temporary foster care).

Petitioners' second error lies in their assertion that they have the right to continued custody and to adopt based on their status as "psychological parents." To begin with, it is far from clear that petitioners in this case would even qualify as BTC's "psychological parents" under West Virginia law. They base their claim to such status entirely on the fact that they have cared for the child for nearly a year and have developed emotional bonds with her. As this Court has said, however,

simply caring for a child is not enough to bestow upon a care giver psychological parent status. Were this the law of the State, any person, from day care providers and babysitters to school teachers and family friends, who cares for a child on a regular basis and with whom the child has developed a relationship of trust could claim to be the child's psychological parent and seek an award of the child's custody to the exclusion of the child's parent.

*In re Visitation & Custody of Senturi N.S.V.*, 221 W. Va. 159, 168, 652 S.E.2d 490 (2007).

Furthermore, the status of psychological parent, even when it is properly found, does not, as petitioners appear to claim, give foster parents an automatic right to adopt a child. Rather, it gives them the right merely to intervene in the child's custody proceedings. *Clifford K. v. Paul S. ex rel. Z.B.S.*, 217 W. Va. 625, 640, 619 S.E.2d 138, 153 (2005). It must be noted that, despite the fact that the Circuit Court did not expressly rule on Petitioners' claim of "psychological parent" status, the Court did, in fact, afford them this right (to intervene), which is the only right such status would have provided.

Petitioners "right" to adopt BTC cannot be based either upon the constitution or upon any claim to status as "psychological parents." Nor is their claim to such a

right even relevant in determining the most appropriate placement for BTC. For in cases in which the rights of biological parents have been terminated, the most appropriate placement of a child is determined, not on the basis of the alleged rights of caregivers, but rather on the basis of the best interests of the child.

As this Court has said, “[t]he controlling principle 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.” *State ex. Rel. Treadway v. McCoy* 189 W. Va. 210, 213, 429 S.E.2d 492 (1993). As elaborated below, the court in this case properly conducted its analysis of BTC’s most appropriate placement based, not upon the rights of petitioners, but rather upon the best interests of BTC. In so doing, it committed no clear error as a matter of law.

- B. *The Circuit Court Followed the Law for Determining BTC’s Best Interests as Set Forth By the Statutes and Common Law of the State of West Virginia.*
  - 1. *The Court Properly Considered BTC’s Interest in Continued Temporary Foster Care with Petitioners.*

In addition to the undue weight which petitioners place upon the significance of their own rights in the determination of BTC’s most appropriate placement, they also assert that removing the infant from their home was against the child’s best interests. As they properly point out, “[a] child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents.” *In re Jonathan*, 198 W. Va. 716, 735, 482 S.E.2d 893 (1996).

It is true that, when determining the best placement for a child, continued association is one of the interests that must be taken into consideration. It is also true, however, that this is just one interest among many others, all of which must be given their proper weight. The interest of children in continued association with certain individuals is subject to the requirement "that such continued contact is in the best interests of the child." *Id.* Therefore, even if an emotional bond is established, the determination of a child's best interests requires further analysis.

BTC's interest in continuing placement with her present caregivers is not strong. In deciding how much weight to place upon this interest, this Court has found that "the length of time that the child has remained with [caregivers] is a significant factor." *Id.* at 736 n.41. At the time of the November 21 hearing, BTC had been with petitioners for less than a year.

Moreover, the Court has indicated that a child's interest in remaining with her caregivers is weaker when a child is very young, particularly under the age of two. *West Va. Dep't of Human Servs. v. La Rea Ann C.L.*, 175 W. Va. 330, 335, 332 S.E.2d 632 (1985). In that case, while taking issue with a Pennsylvania decision on other grounds, the Court approvingly quoted its holding that

If [the child in question] had spent a number of years with the [foster parents] when the father sought custody, the probabilities are that it would not have been advisable to subject her to a changed environment and to remove her from the home to which she had become accustomed. But [the child] was only 19 months old when her father sought custody of her.

*Id.* (quoting *Commonwealth ex rel. Martino v. Blough*, 201 Pa. Super. 346, 191 A.2d 918 (1963)). "A child of two years of age or under," the court continued, "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 the time of the hearing, BTC was only eleven months old, well under the age at which she would have been able to remember being moved. Her bonding with petitioners, therefore, though it was an interest to be weighed, was not one of the stronger interests to be considered under West Virginia law. The Circuit Court considered this interest without assigning it any undue weight, and consequently acted within the scope of its authority, committing no clear error as a matter of law.

2. *The Circuit Court Properly Considered BTC's Strong Interest in Being Placed in a Permanent Adoptive Home.*

Although the law in this case affords little weight to BTC's interest in continuing placement with petitioners, it affords much greater weight to her interest in being placed in a permanent adoptive home rather than temporary foster care. In *State v. Michael M.*, this Court held that “where parental rights have been terminated pursuant to W. Va. Code § 49-6-5(a)(6) [1996], and it is necessary to remove the abused and/or neglected child from his or her family, an adoptive home is the preferred permanent out-of-home placement of the child.” 202 W. Va. 350, 358, 504 S.E.2d 177, 185 (1998). In so holding, this Court recognized the legislature's strong policy preference for adoption: “adoption, with its corresponding rights and duties, is the permanent out-of-home placement option which is most ‘consistent with the child's best interests.’” *Id.* (quoting W. Va. Code § 49-1-1(a)).

“Only through adoption,” the Court explained, “can a child who has been removed from his or her parents achieve a legal and economic status ‘on a par with natural children.’” *Id.* (citing *Wheeling Dollar Sav. & Trust Co. v. Hanes*, 160 W. Va. 711, 716, 237 S.E.2d 499 (1977)).

Indeed, the State’s preference for adoption is so strong that, as this Court ruled in *Michael M.*, a circuit court which orders children to be placed in foster care “without first trying to secure for each of them a suitable adoptive home” commits reversible error. This case was remanded with an order directing DHHR to transfer the children into the adoption unit. *Id.* at 360.

West Virginia law views adoption as a very strong interest, and it was in full accord with this strong preference for adoption that the Circuit Court initially decided, on November 12, to transfer BTC from the petitioners’ home, which was merely a temporary foster home, to an adoptive placement. (Order at 21.) It was not until the time of the hearing that petitioners ever informed the court of their desire to adopt her. As the court stated in its findings of fact, “[a]t no point was the Court informed that the [petitioners] would argue that because of their service as foster parents they were entitled to adopt [BTC].” (Order at 22.) Well before the petitioners had informed the court of any interest in becoming an adoptive home for the infant, DHHR had already begun to transition BTC into another home, specifically for the purpose of her being adopted.

The Circuit Court’s treatment of petitioners’ home as merely a temporary foster placement for BTC and its preference of having her placed for adoption in

another home were especially fitting in light of petitioners' legal inability to adopt her together. As the court properly stated in its order,

This Court concludes that [petitioners] can not adopt this child as a couple because of statute. The [petitioners] argue that *they* are the only proper parties to be considered for the adoption of [BTC]; 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. (Order at 24.)

With respect to BTC's placement, then, petitioners' home was merely a foster placement, over and against which the court was bound, both by statute and by the clear decisions of this Court, to give legal preference to a home in which she would be adopted. The court's order is fully justified on the basis of this strong policy preference for adoptive placement. It did not, therefore, constitute a clear error as a matter of law, and thus the court did not exceed the scope of its legitimate power.

3. *The Circuit Court Properly Considered BTC's Interest in Being Adopted by a Legal Mother and a Legal Father.*

Petitioners have now claimed that, even though the law prevents them from adopting BTC as a couple, one of them should be allowed to adopt her as an individual. They claim that the Circuit Court's order was clearly erroneous as a matter of law because it denied either of the petitioners this "right."

It must be noted, first of all, that the court expressly approved the possibility of one of the petitioners adopting BTC. As the order states, "[t]he Court informed the parties that it was of the opinion that it was not proper to decide at this time *who* should adopt, but rather *whether to approve Permanency Plan* and where to place [BTC] while [the] case proceeds to adoption." (Order, at 16 (emphasis in

original).) The order also said that “[petitioners’] household may be the most appropriate adoptive placement home for the child.” (Order, at 23.) The very language of the order, then, reveals that petitioners have not been denied the opportunity to be individually considered as adoptive parents.

It appears, however, that petitioners are claiming a right to be given more than this; they claim that one of them should be given “priority” to adopt the infant. (Pet., at 9.) It must be stressed again that priority for adoptive placement is to be assigned, not in light of the relative strength of the claims of competing families, but in light of the overall best interests of the child. Accordingly, it would have been inappropriate for the Circuit Court automatically to assign priority to one of the petitioners without considering other possible interests.

One such possibility that the court did consider was the opportunity that BTC might have to be adopted by a married mother and father. Petitioners object to the Court’s considering such an interest and claim that, by doing so, the court violated petitioners’ rights and acted against the child’s best interests, and thus clearly erred as a matter of law. However, the court’s consideration of BTC’s opportunity to be adopted by a married mother and father is not contradicted by any legal standard (and is arguably consistent with West Virginia’s strong public policy preference for marriage), nor was such a consideration in conflict with the expert testimony presented at the hearing.

Indeed, at the November 21 hearing to approve BTC’s Permanency Plan, *both* expert witnesses (including the witness for petitioners) testified that, in general,

adoptive placement with a married mother and father is ideal. (Order, at 13.)

Petitioners' expert testified further that "children do thrive best in mother-father married environments," that "a father's involvement in a child's life was important," and that "a male influence is important and can provide things females cannot."

(Order, at 13, 15.)

Presumably, one of the main reasons for this preference for adoptive placement in married mother-father homes is that this is the only arrangement by which a child may obtain two legal parents. As has already been said, it is not legally possible in West Virginia for an unmarried couple to adopt a child. The best a child can hope for in such a situation is to have one legal parent (who resides with someone who is a legal stranger to both the child and the parent). Another reason for preferring adoption into a married mother-father home is the presence of a legal parent of each gender. In the present case, for example, BTC's adoption by one of the petitioners would prevent her not only from having two legal parents, but also from having a legal father.

The Circuit Court properly considered this Court's stated goal in promoting adoptive placement which is to help "a child who has been removed from his or her parents achieve a legal and economic status *'on a par with natural children.'*" *Michael M.*, 202 W. Va. at 358 (emphasis added). It properly considered that adoption into a household with a married mother and father is the closest possible approximation of such a status and is, accordingly, the option most "consistent with the child's best interests." W. Va. Code § 49-1-1(a). In light of the appropriateness of

these considerations, as derived from the statutes and cases of this State and the expert testimony presented at the hearing, it could certainly not have been clear error as a matter of law for the court to find that BTC should be given the opportunity to be adopted by a mother and father, “and not be locked into single parent adoption.” (Order, at 23.)

Although another court may have exercised its discretion differently in this case, that is of no concern in an extraordinary action for a writ of prohibition, which will only issue to correct “substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate.” *Hinkle*, 164 W. Va. at syllabus pt. 1. The order contains no such legal errors and was thus well within the bounds of the court’s legitimate powers.

4. *The Circuit Court Properly Considered the Recommendations of Both the Guardian Ad Litem and the DHHR Regarding the Overcapacity of Petitioners’ Home.*

Finally, Petitioners argue that even if adoption into another family might eventually have been demonstrated to be in BTC’s best interests, she should have been left within their custody until the final decision could be made. But it was not clearly erroneous as a matter of law for the court to have moved the child when it did. Indeed, the court’s decision was in perfect accord with the recommendations of both the child’s guardian *ad litem* and DHHR, both of whom were appointed to act exclusively in the best interests of BTC. They agreed that overcapacity of the petitioners’ home was a sufficient basis for her removal.

Petitioners, while acknowledging that DHHR policy required a child to be removed from their home, claim that one of the more recently placed children should have been moved instead of BTC. But there are several factors indicating that the court's determination did not present any clear error as a matter of law. First, whereas there were no families ready to adopt the more recently placed children, BTC had such an opportunity and had already begun transition to a new adoptive home. (DHHR Answer, at P3.) Second, in deciding on the timing of BTC's removal, the Circuit Court gave appropriate consideration to the potential trauma she might experience as the result of a move. It was, in fact, on the basis of this interest that the court ordered the transfer at the time that it did. "The Court finds that trauma is always involved when removing children, that is why the Court sought to accomplish removal within a two week period while the child was still of tender years." (Order, at 24.)

In light of the opportunity for adoption into a home with a married mother and father, it was well within the bounds of the law for the court to expedite her transfer before she had further bonded with petitioners and before she had grown closer to an age at which removal might have been even more traumatic. If it were ultimately to be found that petitioners home was the best placement, BTC could always have been transferred back into their custody.

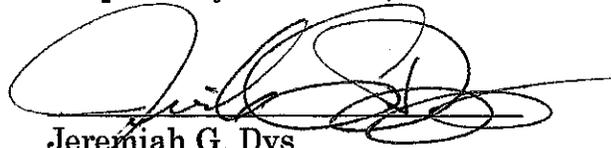
With respect to the overcapacity of petitioners' home, then, the Circuit Court ordered the removal of the child that appeared to have the least to lose by being moved (being of an age at which such moves are less traumatic) and the most to

gain (having a unique chance to be adopted by a legal mother and a legal father). Moreover, the order was consistent with the facts presented to the court and with the recommendations of the Infant's guardian *ad litem* and the DHHR, parties whose sole responsibility is to look out for the child's best interest. The court's decision in light of these facts and recommendations was not clearly erroneous as a matter of law.

### CONCLUSION

The Circuit Court's order to remove BTC from petitioners' temporary foster care was perfectly in keeping with West Virginia's statutory and common law directions for determining a child's best interests. It was, moreover, consistent with the testimony of expert witnesses at the hearing, as well as the particular recommendations of the child's guardian *ad litem* and the DHHR. Petitioners have failed to satisfy their burden to show any substantial, clear-cut, legal error that plainly contravenes a clear statutory, constitutional, or common-law mandate. Consequently, the court has not exceeded its legitimate powers, and petitioners' request for an extraordinary writ of prohibition should be denied.

Respectfully submitted,



Jeremiah G. Dys  
(WV Bar No. 9998)  
THE FAMILY POLICY COUNCIL  
OF WEST VIRGINIA  
P.O. Box 566  
Charleston, WV 25322  
Telephone: (304) 982-2803  
Facsimile: (304) 720-3257

James A. Campbell\*  
(OH Bar No. 0081501)  
ALLIANCE DEFENSE FUND  
15100 North 90th Street  
Scottsdale, Arizona 85260  
Telephone: (480) 444-0020  
Facsimile: (480) 444-0028

\* *Pro hac vice* motion pending

*Attorneys for Amicus Curiae*  
*The Family Policy Council of West Virginia*

CERTIFICATE OF SERVICE

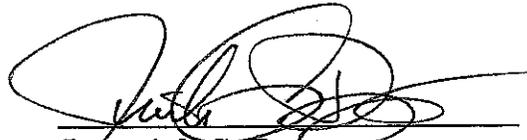
The undersigned hereby certifies that a true copy of the foregoing Brief *Amicus Curiae* was served upon the following counsel via regular U.S. mail this 20<sup>th</sup> day of January, 2009:

Hon. Paul M. Blake, Jr.  
Chief Judge, 12<sup>th</sup> Judicial Circuit  
Fayette County Courthouse Annex  
2<sup>nd</sup> Floor  
Fayetteville, WV 25840

Angela Alexander Ash  
Asst. Attorney General  
200 Davis Street  
Princeton, WV 25840

Thomas K. Fast, Esq.  
201 North Court Street  
Fayetteville, WV 25840

Anthony Ciliberti, Jr., Esq.  
Ciliberti Law Office, PLLC  
P.O. Box 621  
Fayetteville, WV 25840



Jeremiah G. Dys  
WV State Bar No. 9998