

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.

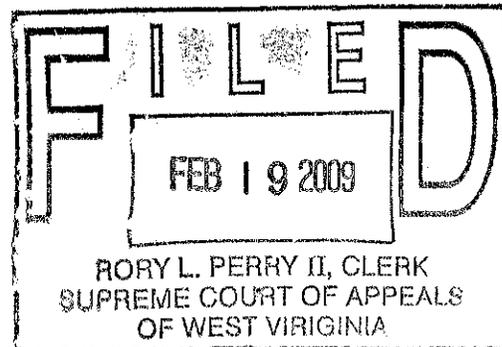
**BRIEF OF AMICI CURIAE**

**FOSTER CARE ALUMNI OF AMERICA; COLAGE; CASA (COURT APPOINTED  
SPECIAL ADVOCATES) OF THE EASTERN PANHANDLE, INC.; AND FAIRNESS  
WEST VIRGINIA IN SUPPORT OF PETITIONERS**

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## **INTERESTS OF *AMICI CURIAE***

Foster Care Alumni of America (FCAA) is the only national association representing the 12 million adults in the United States who were in foster care when they were children. The mission of Foster Care Alumni of America is to connect the members of the alumni community to each other and to transform policy and practice, ensuring opportunity for people in and from foster care. FCAA's 2200 members are alumni of foster care and allies of the foster care movement. They represent all fifty states. Since its founding, FCAA has been building a national network of foster care alumni and training alumni leaders to utilize their expertise as consumers of the foster care system to be effective advocates for improved federal and state policy and practice. FCAA partners with providers and public policy organizations to ensure that the best practices in child welfare are available to every child no matter where they live.

CASA (Court Appointed Special Advocates) of the Eastern Panhandle, Inc. is a non-profit organization that advocates for the best interests of abused and neglected children within the court system to secure a safe and permanent home for each child. Its goal is to provide an advocate for every abused and neglected child in the Eastern Panhandle. Among its long-established guiding principles are that every child deserves a safe, loving, permanent home in which to live, and that the child's best interests should be the ultimate criterion in determining the child's placement. CASA acknowledges the need to understand and respect diversity including race, gender, religion, national origin, ethnicity, sexual orientation, socioeconomic status and the presence of a sensory, mental or physical disability in order to enable it to respond to each child's unique needs.

COLAGE is a national movement of children, youth and adults with one or more lesbian, gay, bisexual, and/or transgender parents. COLAGE builds community and work toward social justice through youth empowerment, leadership development, education and advocacy. With over 15,000 supporters, 32 chapters in 28 states, and almost two decades of expertise in LGBT family matters, COLAGE builds pride and community, provides youth leadership training and opportunities, offers public education, and advocates for policies, regulations, and laws which uphold the human rights of the millions of people in the U.S. who have same-gender loving and/or transgender parents, including foster parents. Many COLAGE members have been fortunate enough to have lesbian and gay foster parents; COLAGE believes children need and deserve the love and care that dedicated responsible adults (regardless of their sexual orientation or gender orientation) may provide.

Fairness West Virginia ("Fairness") is West Virginia's first statewide LGBT (lesbian, gay, bisexual, and transgender) advocacy organization dedicated to bringing fair treatment to all West Virginians through advocacy and education. Fairness submits this brief to reflect the concern of LGBT parents in the state that the best interests of their children should be the focus of any judicial or administrative process affecting the children's care and upbringing. Fairness specifically challenges those who would subvert their children's best interest by replacing the careful focus on the individual child's well-being with discriminatory rules and practices, whether such actions are motivated by antigay animus or simply a failure to understand the principle that all children should be treated equally without regard to the sexual orientation of their parents.

## INTRODUCTION

*You know, you can probably bring in a truckload of people to testify about what wonderful people they are and what wonderful parents they are. I don't think that's the decision that this Court has to make. I've heard from your expert about the tremendous trauma that's going to be caused to this child if this child is removed from this home . . . I don't know that that is something that is really relevant and material here.*

— Respondent Honorable Paul M. Blake, Jr., Judge of the Circuit Court of Fayette County, shortly before ordering that Baby Girl C be removed within 18 hours from the only home she had known.<sup>1</sup>

This case is a sad story of a year-old girl caught in an abuse and neglect process where, but for this Court's intervention, the failure of the various players to do their jobs properly would have led to her being uprooted from her home in disregard for her best interests:

- The trial court judge invented an adoption placement preference found nowhere in the law and then applied it to wrest the girl from the only home she has ever known, expressing indifference both to the legal significance of the bonds the girl had developed with the family and how well she was doing in their care.
- The guardian ad litem (“Guardian”) made one seven-minute visit to the girl's home in January 2008 before agreeing at the November 21, 2008 hearing that she should be transferred to another couple he gave no indication of ever having met “because it's a man and a

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<sup>1</sup> In keeping with this Court's practice, all references to the child shall be by “Baby Girl C” to preserve anonymity. *E.g.*, *In re Carol B.*, 209 W.Va. 658, 661 n.1, 550 S.E.2d 636, 639 n.1 (2001).

woman and they are married. That is -- that's best. That's best, Your Honor." (11/21/08 Tr. at 210).

- The guardian, sworn to protect this child's interests, became so consumed with seeking a statewide injunction against placement of other children in gay homes that when the Department of Health and Human Resources ("DHHR") changed its position to endorse the guardian's effort to remove the girl, the guardian derided it as "a tactical decision to try to duck the true merits" of the injunction he sought that would cover not only Baby Girl C but also "many other children." (11/21/08 Tr. at 18).
- DHHR, whether due to neglect or the intentional scheme the guardian and petitioners suggest, placed another child in petitioners' home on October 31, 2008, making the home over-capacity (11/21/08 Tr. at 22), "discovered" this the day before the November 21, 2008 hearing, and then changed its position to urge removal of Baby Girl C, admitting that it gave no consideration about the impact on the children in the home from removing Baby Girl C after she had spent eleven months in the home, compared to the impact from removing the child who had been added three weeks before the hearing. (11/21/08 Tr. at 42).

What should not be lost in this proceeding are the legal principles that should have guided all parties and the court below. This Court and the West Virginia Legislature provide strong protections for beneficial foster parenting relationships,

which the court below eviscerated, based on the unyielding principle that the child's best interests are paramount and are served by respecting the contributions foster parents make and the relationships that they establish with their foster children. This Court already has interceded to right the course for Baby Girl C by issuing, on the day before Thanksgiving, an emergency stay of the lower court's order requiring that Baby Girl C be removed from the only home she has ever known and where, by all accounts, she has thrived. *Amici* respectfully request that this Court ensure that, going forward, all of the parties involved look only to Baby Girl C's best interests -- as defined not by their personal agendas, but by this Court.

### **FACTUAL BACKGROUND**

Baby Girl C was born on December 8, 2007. Three days later, DHHR filed an abuse and neglect petition under West Virginia Code § 49-6-1 *et seq.* due to the presence in Baby Girl C's blood of cocaine and oxycodone. After obtaining a court order of custody, DHHR placed the child in the home of Kathryn Kutil and Cheryl Hess ("the Kutil/Hess home") upon her discharge from the hospital on December 24, 2007.

Exactly one month later, the Guardian in the case, Thomas Fast, filed with the court a "Motion to Order DHHR to Remove Child from Physical Placement in Homosexual Home and for Other Injunctive Relief." The "other injunctive relief" sought was a statewide injunction forbidding any placement with gay foster parents. The motion mentioned the Guardian's visit to the Kutil/Hess home on January 16, where he observed Baby Girl C to be doing well and the home to be safe and comfortable. In her testimony at the November 21, 2008 hearing, Kathryn Kutil

reported that the meeting lasted seven minutes, and that none of the other children was present.<sup>2</sup> Kutil and Hess successfully sought to intervene and filed papers opposing the motion.

In February, the Circuit Court denied the Guardian's request for emergency relief, stating that "The Court will, after having sufficient time to review the documentation filed in regard to said Motion, notify the parties and those entitled to notice and opportunity to be heard by letter regarding the Court's decisions." Exhibit 3 at 2. The court further ordered DHHR to conduct home studies on "the natural aunt of the infant respondent, and any other family member interested in custody of the infant respondent." *Id.* at 3.

On October 8, 2008, after the child's biological mother failed to rectify substance abuse issues, the court stated it would terminate her parental rights, and the order doing so was entered November 5, 2008. Later that October, a multidisciplinary team (MDT) of DHHR met to prepare a permanent placement report to be submitted to the court. The report noted that the girl appeared to be "thriving" in her current placement, an assessment that neither the Guardian, who was part of the MDT, nor the Circuit Court has disputed. The report unanimously recommended adoption, with all parties except the Guardian endorsing the plan to keep the girl in the Kutil/Hess home. The report also endorsed Kutil and/or Hess for the adoptive placement, which all the parties have agreed was improper in a permanency report, because a different group within DHHR, the Adoption Unit, makes such a determination.

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<sup>2</sup> During the hearing, Judge Blake also mentioned the Guardian ad litem's one seven-minute uncomfortable visit. 11/21 Tr. at 196-97.

On October 31, 2008, DHHR placed yet another foster child in the Kutil/Hess home, raising the total number of children in the house to seven. Pursuant to a DHHR regulation, the “total number of children in a foster home, including the family’s own children living in the home, may not exceed six (6).” W. Va. Code of State Reg. §78-2-13.3.a. Petitioners assert that the DHHR representative handling the placement assured them that DHHR would grant a waiver; DHHR has demurred, saying only that any DHHR employee who made such a representation did so without authorization. (Compare Amended Petition for Writ, ¶ 4; DHHR Answer, ¶ 4).

On November 6, 2008, the court conducted a hearing among the attorneys on approving the permanent placement report. No evidence was taken. At the conclusion of the hearing, the Circuit Court ordered Baby Girl C removed from the Kutil/Hess home by November 20, 2008, and placed with a “traditional” home with a married mother and father. On November 12, 2008, the Circuit Court issued an opinion with the following “findings of fact”:

The Court finds that in Fayette County, West Virginia a traditional family is considered to consist of both a mother and a father and that the most family-like home setting for a placement/adoption of a child is in a home consisting of both a mother and a father. (¶ 30, p. 9)

The Court finds that children need both mother and father and that avenue to such a result should at the least be explored by the DHHR. The Court finds that untraditional family settings should not be the first and only route taken by the DHHR when searching for a permanent/adoptive placement for a child. (¶ 31, p. 9).

The November 12 decision also included this conclusion:

The court concludes that, if at all possible, it is in the best interest of children to be raised by a traditionally defined family, that is,

a family consisting of both a mother and a father. The court concludes that nontraditional families, such as the intervenors, should only be considered as appropriate permanent/adoptive placements if the DHHR first makes a sufficient effort to place the child in a traditional home and those efforts fail. [If a failure occurs after DHHR's good faith" effort, "then a non-traditional family may be considered as an adoptive placement.] (§ 8, p. 11)

On November 17, 2008, Kutil and Hess filed with this Court their Petition for Writ of Prohibition challenging the November 12 decision. The next day, the Circuit Court stayed the November 12 decision until after the hearing on November 21, 2008.

The November 21, 2008 hearing began with DHHR's abrupt announcement that it was changing its position in the case to support removal of Baby Girl C due to discovering the day before that petitioners' home was over capacity. The only reason DHHR gave for why it favored the removal of Baby Girl C, and not the child placed three weeks earlier, was that there was an available placement for Baby Girl C, with Amy and Roger Thompson, and not for the most recent placement. The availability was the result of DHHR's efforts to seek a placement for Baby Girl C since being ordered to at the November 6 hearing; DHHR had not been seeking to move the most recent placement, having only discovered the capacity situation the day before, on November 20. DHHR has not disavowed its earlier endorsement of the high-quality home that Kutil and Hess provided Baby Girl C. *See* DHHR Answer ¶ 3 ("Nowhere has WVDHHR indicated that the home provided by Petitioners was anything other than loving and nurturing.").

The Guardian endorsed the transfer to the Thompsons, despite giving no indication of ever having met them. *See* Motion for Emergency Stay, ¶ 19. Dr. Cooper-Lehki, an assistant professor of psychiatry at West Virginia University,

recognized by the Circuit Court as an expert in the fields of general psychiatry and child and adolescent psychiatry, in each of which she is board-certified, testified that removing the child with the least attachment and bonding to the family “would make the most sense clinically and probably be the least detrimental to the kids” (11/21 Tr. at 167), and that that child was most likely to be the most recent addition. Kathryn Kutil testified that Baby Girl C not only had bonded with the other children in the home but indeed had become “the center of the house.” 11/21 Tr. at 195.

At the end of the hearing, after 6pm, the court ordered that Baby Girl C be removed from the Kutil/Hess home by noon the next day, Saturday, and placed with the Thompsons, which did occur. On Monday, November 24, 2008, petitioners filed an emergency stay motion in this Court. By the time this Court granted that motion two days later, on November 26, 2008, the Thompsons had contacted DHHR and advised that they had reconsidered adopting Baby Girl C and decided they were no longer interested in following through with the adoption. Pursuant to this Court’s Order, Baby Girl C was returned to the Kutil/Hess home, where she remains.

## **ARGUMENT**

### **I. THE CIRCUIT COURT LACKED THE AUTHORITY TO TERMINATE THE EXISTING FOSTER CARE PLACEMENT**

As a threshold matter, the Circuit Court lacked the jurisdictional authority to terminate the existing beneficial foster care placement as part of the permanent placement review process. While the Circuit Court largely glossed over the issue of its authority to remove Baby Girl C, it appears to offer two bases: (1) that it could

order Baby Girl C transferred to a married foster couple, because in its view married couples are the preferred adoptive placement; and (2) that the provision allowing consideration of whether the current placement is the “least restrictive one (most family-like one)” allowed the court to terminate the nearly year-long placement with a demonstrably fit family in favor of another placement that better conformed with its notion of a family. Neither claim has merit. First, as the Circuit Court itself observed, the purpose of the permanent placement review process is to establish adoption as the preferred long-term solution. That process must *not* include the selection of a particular adoptive placement, which is a matter left for another day. Second, the “least-restrictive (most family-like)” provision is not license to impose unsupported notions of what a “family” is without basis in child welfare law. Finally, there are many provisions in the West Virginia Code, ignored by the Circuit Court, that do speak to the authority to terminate foster placements; those statutory provisions not only do not authorize the action here, but indeed establish its error.

**A. Circuit Courts Are Not Authorized to Terminate Beneficial Foster Care Arrangements as Part of the Permanent Placement Review Process**

It is remarkable that the Circuit Court would seek to justify terminating Baby Girl C’s foster placement in the permanent placement review process on the basis of a preferred adoptive placement. The Circuit Court – correctly – criticized the DHHR officials responsible for Baby Girl C’s abuse and neglect case for appearing to prejudge the selection of Baby Girl C’s adoption placement. The permanent placement report submitted to the Court in October went beyond making

the appropriate recommendation that adoption was the preferred long-term solution for Baby Girl C. The report also set forth that Kutil and Hess had expressed the desire to adopt Baby Girl C, and stated that such adoption would be "appropriate" for various reasons. At both the November 6 and November 21, 2008 hearings, the Circuit Court repeatedly stressed that the adoption selection process was a different matter that had no place in the permanent placement review process, and DHHR, through its attorneys and a parade of witnesses, agreed. DHHR agreed that the written permanent placement report submitted to the Court should be deemed modified to excise all mention of an adoption placement recommendation. Response to Petition for Writ of Prohibition of the Honorable Paul M. Blake, Jr. ("Blake Brf.") at 25; 11/21 Tr. at 28-30. Towards the end of the November 21, 2008 hearing, the proper role of the Circuit Court was explained in simple terms -- by the court itself:

But I find myself thinking all through this, you know, this is not an adoption proceeding. This Court sitting here today is not to decide whether to choose between an adoptive couple who are the traditional family type, husband/wife, man/woman relationship versus a nontraditional family setting, Kutil and Hess over here. So I'm -- that's not the decision I'm to make today. That's not before me.

What's before me today is the approval of the permanency plan as now submitted and where this child is to be placed upon the approval of that plan or modification to it or whatever as it relates toward the ultimate goal of adoption, which is still down the road a ways. And all that -- I find myself listening to this testimony here thinking, "Well, you know, this really" -- I mean, once it gets down to a situation where the adoption is getting ready to be approved by a circuit judge, whether it be me or someone else, all this may become relevant and material at that point, or it may not. I don't know.

11/21 Tr. at 183.<sup>3</sup>

The Circuit Court's recognition of its limited role at the permanent placement review juncture comports with the well-established principle that "[i]t shall be the responsibility of the state department to provide care for neglected children who are committed to its care for custody or guardianship." *In re Clifford K.*, 217 W.Va. 625, 619 S.E.2d 138 (2005), quoting W. Va.Code § 49-2-1; *State ex rel. West Virginia Dept. of Public Assistance v. See*, 145 W.Va. 322, 335, 115 S.E.2d 144, 152 (1960) (Foster children remain "in legal custody of the State"). "[O]ur Legislature has attempted, through pertinent legislation, to provide a comprehensive system of child welfare, vesting in [DHHR] . . . broad powers, discretion and responsibilities." *Id.* 145 W.Va. at 334, 115 S.E.2d at 152. Among the functions assigned to it by the Legislature" are "extensive investigations for the purpose of discovering proper and suitable adopting parents." *See*, 145 W. Va. at 335, 115 S.E.2d at 152.

Circuit Court judges have no business imposing their personal preferences on the DHHR decision-making process: DHHR's "functions, duties and responsibilities constitute mandates from the Legislature, and so long as it acts within proper bounds it is answerable only to that coordinate branch of our government, not to some theory, belief or philosophy of any individual, or some

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<sup>3</sup> *See also* 11/21 Tr. at 9-10 where counsel for DHHR states, "I don't think this court in this case should try to take jurisdiction of those [adoption placement] issues, because I believe they belong elsewhere." The court responded by saying "All right. And I don't disagree with anything you've said." *See also* 11/21 Tr. at 14 where DHHR counsel states that any adoptive placement recommendation was improper and that such consideration should go through the proper process with the Adoption Unit.

segregated portion of the public. Courts are to enforce or apply the law as written, not according to what an individual, though a judge, believes the policy in a particular situation should be.” *Id.* at 334, 151-52. When the Circuit Court ordered the removal of Baby Girl C after the November 6, 2008 hearing, it clearly erred in superimposing what it “believes the policy in a particular situation should be” on the foster placement process of DHHR. *See Id.*

**B. Consideration of the “Least Restrictive” “Most Family-Like” Setting Under Rule 41(a)(6) Is Not a License for a Judge to Choose Which Family Best Comports With His View of What a Family Should Be**

Against this Court’s prior precedent and the Circuit Court’s acknowledged limited role in the permanent placement review process, the Circuit Court relied for authority to terminate a beneficial foster placement on only the Child Abuse and Neglect Proceedings Rule 41(a)(6). That provision allows among the topics to be considered at the conference, “[t]he appropriateness of the current placement, including its distance from the child’s home and whether or not it is the least restrictive one (most family-like one) available.” The court extrapolated from this rule the authority to critique which type of private homes are most family-like, and that a married two-parent home is “obviously” preferable as “generally provides a more family-like environment.” Blake Brf. at 23. This interpretation reflects a profound misunderstanding of what “least restrictive most family like” means in the child welfare context.

While the words “least restrictive most family like” are not necessarily precise, they have a commonly-understood meaning, suggesting a hierarchy among

residential options, with the preferred option being a private home, followed by whichever institutional option most closely approximates a private home. *See, e.g., California State Foster Parent Ass'n v. Wagner*, 2008 WL 4679857 (N.D. Cal. 2008) (“The [Adoptive Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679] evinces a clear preference for foster parents rather than institutional care, where practicable.”); *Del A. v. Edwards*, 855 F.2d 1148, 1153 (5<sup>th</sup> Cir. 1988) (upholding denial of qualified immunity because allegation that children were placed in institutions which “are more restrictive and less family-like than necessary,” demonstrated violation of clearly-established law); *Matter of Daniel M.*, 166 Misc.2d 135, 138, 631 N.Y.S.2d 470, 472-73 (N.Y.Fam.Ct. 1995) (“To prolong this child’s stay in institutional care when a foster home is available to him would constitute a clear violation of Federal mandates . . . to achieve placement in the least restrictive (most family like) setting available . . .”).

*Amici* are aware of no cases suggesting that “most family-like” provides a license for the decision-maker to rank different families based on which comports best with his or her personal view of what a family should be.<sup>4</sup> Indeed, the very word “family-like” suggests that, as in the case with many child welfare placements, an actual family is not available and the goal should be the closest

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<sup>4</sup> Similarly, the Circuit Court erred in judging which prospective child placements were more “traditional.” This Court should reject any notion that a judge can decide child welfare issues based on what he or she deems is “traditional,” as the standard is what is in the child’s best interests. *See Cleo A.E. v. Rickie Gene E.*, 190 W.Va. 543, 546, 438 S.E.2d 886, 889 (1993) (invalidity of couple’s stipulation that husband was not the father of child born during their marriage “is not founded on the traditional arguments against bastardization . . . Rather, we are once again guided by the cardinal principle that ‘the best interests of the child is the polar star by which decisions must be made which affect children.’”).

approximation. As Dr. Cooper-Lehki testified at trial, the phrase “family-like” is not appropriate for assessing the Kutil/Hess home, which is “not family-like. That’s a family, by definition.” *See*, 11/21 Tr. at 168.

Moreover, the purported reliance on the “least restrictive one (most family-like one)” language becomes all the more troublesome when the orders under challenge are compared with the defense of them now offered in Judge Blake’s brief.<sup>5</sup> While the orders repeatedly use the terms “traditional” “untraditional” “mother” and “father,” those words scarcely if ever appear in the brief, which instead emphasizes the legal protections that a “two parent” family can offer.<sup>6</sup>

At the November 6, 2008 hearing, the Circuit Court’s focus clearly was on having a mother and a father; their marital status was not important, as the transcript from the hearing and resulting order reveals. *See* November 6, 2008 transcript at p. 22 (“And it’s nothing against these ladies . . . I think I’ve indicated time and time again, this Court’s opinion is that the best interest of a child is to be raised by a *traditional family, mother and father.*”); *Id.* at 23 (“Now, occasionally there may be situations where there is no *traditional family*, there’s not a *mother and father* . . . if

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<sup>5</sup> This action concerns the legitimacy of the actions taken by the Circuit Court, and thus amici properly will refer to the court in that way in discussing those actions. Complicating matters is the atypical situation of a brief filed by Respondent Honorable Paul M. Blake, Jr., setting forth various justifications for his rulings; in reference to the arguments in the brief, amici will refer to Judge Blake by name.

<sup>6</sup> Respondent Blake’s Brief asserts that Petitioners “mischaracterized” his use of “traditional” as limited to “heterosexual” couples when it was “clear” that the reference was “to a two-parent, rather than a single-parent household.” Blake Brf. at 5-6 n.16. Amici respectfully submit that the citations set forth herein from the November 6 hearing and the Circuit Court’s November 12 Order requiring the removal of Baby Girl C, demonstrates that petitioners’ characterization is accurate.

there's no other alternative for a traditional family, then you look at a *nontraditional family*, whether it be *two men, two women* or such.”); *Id.* at 25 (“I believe that and that most courts would hold that a child benefits from a *mother and a father*. There's *no father* in this relationship . . . I believe that this Court has seen the value of having a *father/daughter* relationship . . .”); *Id.* at 27 (“That child is to be placed in a *traditional home with a mother and a father* . . . that transition . . . is to occur over the next two weeks, to be moved into a *traditional foster family, mother and father.*”); Exhibit 11, Finding of Fact 27 (“ . . . DHHR failed to pursue placement of this child in the *traditional* most family-like home setting *with a mother and father.*”); *Id.*, Finding of Fact 30 (“The Court FINDS that in Fayette County, West Virginia a *traditional* family is considered *to consist of both a mother and a father* and that the *most family-like* home setting for a placement/adoption of a child is in a home consisting of *both a mother and a father.*”); *Id.*, Finding of Fact 31 (“The Court FINDS that children need *both mother and father* and that avenue to such a result should at the least be explored by the DHHR.”); *id.*, Conclusion of Law 10 (“The Court CONCLUDES it is necessary and in the best interest of the child to ORDER that the DHHR place the child in a *traditional* home setting with a *mother and a father.*”); *Id.*, at p. 12 (“Baby Girl C shall be removed from the intervenors' temporary foster care home. The DHHR shall place the child in a *traditionally defined home with both a mother and a father* within two weeks from November 6, 2008.”) (italics added in each citation).

The November 21 hearing, and the resulting December 2 Order reveal a shifting emphasis, sometimes on the importance of a father and mother (Exhibit 15,

Finding of Fact 8 [“The Court also ordered that Baby Girl C be removed . . . {and placed} in a traditional home setting with a mother and a father . . .]; *Id.* at 11 [citing two of Dr. Hansen’s opinions concerning the importance of a father]), sometimes on the importance of having a married couple as parents (*Id.* at 11 [citing two of Dr. Hansen’s opinions concerning the importance of a married couple as parents]; *Id.*, Finding of Fact 16 [“The Court FINDS that placement of Baby Girl C in a home with a married mother and father pending such adoption process is most appropriate for the child’s well being.”]) and ambiguous statements in which the underlying rationale is not clear. (11/21Tr. at 221 [“And the Department has asked that the child be removed to a more appropriate setting in the home of Amy and Roger Thompson . . . And this Court finds that the child should be placed in this family-type home . . .”]; Exhibit 15, Finding of Fact 13 [“The child should be given the opportunity to be adopted by mother-father adoption and not be locked into a single parent adoption.”]; *Id.* at 25 [“The Court ORDERS that Baby Girl C be removed from the intervenors’ home by 12:00 noon November 22, 2008 and placed with a traditional family.”]).

In his brief to this Court, Judge Blake shifts emphasis yet again, now placing importance on the child having two legal parents. See Blake Brf. at 5-6 n.16; 23, 28-30. This shift of focus provides yet another reason not to allow a provision intended to require the least institutional-type setting to morph into a license for individual courts to impose their views as to which family best fits its definition of what a family should be at that particular moment. A judge’s personal – and

evolving – notion of which family is most “family-like” has no place in a permanent placement review hearing.<sup>7</sup>

**C. West Virginia Statutory Law Sets Forth the Criteria for Terminating Foster Arrangements, and the Termination Here Did Not Comply With any Applicable Statute**

Chapter 49, Article 2 sets forth the relationship between DHHR and foster parents and provides limitations on DHHR’s ability to terminate foster placements. Of course, DHHR has broad authority to remove a child from a harmful placement, but all agree that those criteria and sections do not apply. W. Va. Code §§ 49-2-12 (“child is subject to undesirable influences or lacks proper or wise care and management”); 49-2-14(a) (abuse or neglect, including sexual abuse).

Section 49-2-14(c) applies to Baby Girl C’s placement as of the time of the hearing. This provision indicates that termination of the placement was improper because its conditions had not been met, as petitioners had applied to DHHR to establish an intent to adopt Baby Girl C, and the thirty-day deadline to make such application had not yet passed:

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<sup>7</sup> In addition to the substantive problems with the married couple preference imposed by the Circuit Court at the November 6 hearing, the transcript and order from that hearing reveal that the Circuit Court was displeased with DHHR for not having attempted placement with a married couple – despite no indication in the record that DHHR was requested to do so. *See* Exh. 11, Finding of Fact p. 27 (“DHHR *failed* to pursue placement of this child in the traditional most family-like home setting with a mother and father”) (emphasis added); *Id.*, Finding of Fact p. 28 (“DHHR *unilaterally determined* that placement with the intervenors is sufficient.”) The February 25 Order required only that DHHR look into placement with relatives. Exh. 3 at 3. This Court’s admonition that actions taken regarding children in the abuse and neglect process must be based on their best interests, and not based on frustration with DHHR, *see State v. Michael M.*, 202 W. Va. 350, 359, 504 S.E.2d 177, 186 (1998), applies with greater force when the frustration with DHHR is unwarranted.

“When a child has been residing in a foster home for a period in excess of six consecutive months in total and for a period in excess of thirty days after the parental rights of the child’s biological parents have been terminated and the foster parents have not made an application to the department to establish an intent to adopt the child within thirty days of parental rights being terminated, the state department may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed. . . .”

W.Va. Code § 49-2-14(c).

Here, Baby Girl C had been residing in the Kutil/Hess home for more than six consecutive months. The Circuit Court’s order terminating the parental rights of Baby Girl C’s mother was entered November 5, 2008. Thus, pursuant to Section 49-2-14(c), DHHR could terminate the placement if (1) neither Kutil nor Hess made an application to establish an intent to adopt Baby Girl C by December 5, 2008, *and* (2) DHHR developed another, more beneficial long-term placement for Baby Girl C. Of course, pursuant to the plain language of the statute, DHHR’s right to terminate a beneficial foster care arrangement does not accrue unless and until six (6) months have passed and the foster parents decide not to apply for adoption. *See City of Wheeling v. Public Service Com’n of W. Va.*, 199 W.Va. 252, 257, 483 S.E.2d 835 (1997) (provision that Public Service Commission “shall review” rates in certain specified situations meant that no jurisdiction existed if those conditions were not met).<sup>8</sup> Given that the permanent placement report DHHR submitted to the court specifically relayed the intention of Kutil and Hess to adopt Baby Girl C (Permanency Plan of 10/31/08 or Exhibit 8), terminating the foster placement is improper under Section 49-2-14(c). Even if there remained a procedural

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<sup>8</sup> Indeed, W. Va. Code § 49-2-14 is entitled “Criteria and procedure for removal of child from foster home; notice of child’s availability for placement; *limitations*”. (emphasis added).

requirement necessary for Kutil and/or Hess to “ma[ke] an application to the department to establish an intent to adopt” Baby Girl C, they had until December 5, 2008 to do so, rendering the circuit court’s orders of removal prior to that date invalid. Such an interpretation is also consistent with the Legislature’s preference for encouraging foster parents to adopt. *See* Section II.A.2, *infra*.

In short, the Circuit Court lacked the authority to terminate a beneficial foster arrangement as part of the permanent placement review process.

**II. EVEN ASSUMING JURISDICTION TO ACT, THE TERMINATION WAS BASED NOT ON THE GOVERNING BEST INTERESTS STANDARD AND AN INDIVIDUALIZED ASSESSMENT OF BABY GIRL C’S WELFARE, BUT ON THE CIRCUIT COURT JUDGE’S PREFERENCE FOR MARRIED COUPLES**

Even if there existed any legal authority for the circuit court to *consider* terminating a beneficial foster placement, the Circuit Court’s ruling actually doing so is contrary to this Court’s core mandate to “steadfastly adher[e] to the polar star test of looking to the best interests of our children and their right to healthy, happy productive lives.” *In re Edward B.*, 210 W.Va. 621, 632, 558 S.E.2d 620, 631 (2001). In child welfare cases, this Court requires a thorough examination and weighing of all the factors relevant to a particular child’s upbringing. Moreover, this Court repeatedly has reversed decisions that truncated the best interest analysis by relying on only one factor that a judge deemed determinative. Instead of following this Court’s precedent, Judge Blake was quite frank that he was replacing the typical best interest analysis with his personal preference for married couples; this preference affirmatively harms the best interests of children by delaying permanency in their placements, a goal this Court has stressed often.

## **A. The Circuit Court Order Reflects a Profound Misunderstanding of the Best Interests Standard**

Even assuming the Circuit Court did have authority to re-evaluate the Kutil/Hess placement, it profoundly misunderstood the best interests standard in requiring DHHR to attempt placements with married couples before considering other placements. Moreover, in criticizing the notion that Baby Girl C's relationship with petitioners may weigh in favor of an adoptive placement in their home, the Court failed to appreciate the state's public policy supporting exactly that result.

### **1. Under the Best Interests Standard, No Single Factor Should Be Determinative of the Custody Decision**

While this Court frequently has had to grapple with thorny issues of whether a trial court properly weighed a child's best interests, there is no such dilemma here. Both in his statements on the record and his brief before this Court, Judge Blake reiterates his belief that the quality of Baby Girl C's care in the Kutil/Hess household was utterly irrelevant to his decision to remove her. *See* 11/21 Tr. at 183 ("what wonderful parents" they are "is not a decision I have to make"); Blake Brf. at 34 (the Kutil/Hess "parenting skills and fitness were not issues" in the proceeding). This approach is antithetical to this Court's repeated direction that *all* factors relevant to a child's wellbeing must be examined. *See State ex rel. Jeanne U. v. Canady*, 210 W.Va. 88, 96, 554 S.E.2d 121, 129 (2001) ("the testimony of the parties and all other pertinent witnesses should be taken regarding Jordan's best interests. The analysis of Jordan's best interests *must necessarily include* . . .

consideration of Jordan's concerns and preferences, . his age and maturity level . . . his desires concerning visitation with his biological father, . . . ) (emphasis added); *Efaw v. Efaw*, 184 W.Va. 355, 359-60, 400 S.E.2d 599, 603-04 (1990) (reversing trial court award of custody after a "thorough review" of the "totality of the evidence," including duration of any pre-existing relationship; how the child is faring physically, emotionally, and academically; the parent's involvement in day-to-day activities; and potential harm if existing bonds are severed); *In Interest of Brandon L.E*, 183 W.Va. 113, 120-21, 394 S.E.2d 515, 522-23 (1990) (remanding for a custody determination based on child's best interests; "[a]ppropriate factors for the court to consider on this issue include the father's record with respect to payment of child support and visitation, together with any other indicia of normal parental interest (e.g. letters, gifts, telephone calls, and other communications), [and] psychological evidence.").

Indeed child custody determinations are premised on the importance of individualized fact-finding by trial judges to assess the best interests of the particular child, based on careful evaluation of evidence and witnesses, with deference paid by appellate courts to the fact-finder's conclusions. "The best interests of potential adoptees will vary from case to case, and the trial court retains broad discretion because of its opportunity to observe the parties and hear the witnesses." *Napoleon S. v. Walker*, 217 W.Va. 254, 260-61, 617 S.E.2d 801, 807-08 (2005).

Replacing the thorough weighing and balancing required by the best interests standard with an absolute preference for a married couple violates this

Court's frequent admonition that courts cannot truncate the best interest analysis by relying on any single fact. *In re Brian James D.*, 209 W.Va. 537, 540, 550 S.E.2d 73,76 (2001) (error to terminate parental rights based only on parent's conviction for selling drugs); *Rowsey v. Rowsey*, 174 W.Va. 692, 696, 329 S.E.2d 57, 61 (1985) (change of custody not warranted by parent's violation of order to allow visitation; "we emphatically return to the fundamental principle that a change of custody shall not be ordered unless it be shown that such change would materially promote the welfare of the children."); accord *Weece v. Cottle*, 177 W.Va. 380, 352 S.E.2d 131 (1986); *Lesavich v. Anderson*, 192 W.Va. 553, 453 S.E.2d 387 (1994); *State v. Julie G.*, 201 W.Va. 764, 774, 500 S.E.2d 877, 887 (1997) (reversing neglect and abuse finding where a "court's findings of fact in this case were improperly limited" by what the court deemed relevant).

Application of the best interest standard demonstrates that a judicially-created preference is improper. In his brief, Judge Blake sets forth examples of benefits that a child with two legal parents has compared to a child with one. Even under the misplaced assumption that Kutil and Hess necessarily cannot both be legal parents,<sup>9</sup> any list of legal benefits might be less important for certain children than having a parent who, for example, has a flexible work schedule, has experience with special-needs children, speaks the child's native language, is a consistent disciplinarian, has medical training, knows sign language, already has a bonded relationship with the child, etc. Under the best interests test, all of these factors must be considered.

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<sup>9</sup> See Sec. II.B.2, *infra*.

Here, the Circuit Court committed the most basic of errors in substituting a single factor for the best interests standard.

**2. West Virginia Law, in Its Efforts to Promote the Best Interests of Abused and Neglected Children, Protects Beneficial Foster Care Placements and Encourages Foster Parents to Adopt**

The Circuit Court also improperly disregarded the respect properly accorded to beneficial foster care arrangements as being in children's best interests. The filings to date in this proceeding reveal considerable confusion over the State's recognition that preserving good foster parents serves the best interests of the children in the abuse and neglect process. The Circuit Court, the Guardian, and certain *Amici* ignore the fact that West Virginia law provides special protections for foster parents because of a determination that children benefit as a result.<sup>10</sup> While it was inconsistent with governing standards for DHHR to prejudge the adoption placement selection and automatically offer the placement to Kutil or Hess, that issue was resolved. The lower court's contention that this beneficial foster care relationship, which resulted in parent-child bonding, is irrelevant to the adoption placement process was absolutely wrong.

"The Legislature wants foster parents to know that if they become attached to a child in their care, the bureaucrats will not come and take the child away." *In re Adoption of Jamison Nicholas C.*, 219 W.Va. 729, 733 n.4, 639 S.E.2d 821, 825

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<sup>10</sup> The argument that foster parents do not have any "right" to adopt is an academic one that sheds no light on the outcome of this case. See ACP Brf. at 10-12; GAL Oppos. to Petition at 12-15; Blake Brf. at 35-39. What is relevant to this case is that the Legislature has expressed both preference for continuing beneficial foster care placements and encouragement of adoption by good foster parents.

n.4 (2006), quoting *State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 213, 429 S.E.2d 492, 495 (1993). The West Virginia Legislature seeks to protect quality foster parents – out of a common-sense realization that vulnerable children of this state will benefit: West Virginia has a specific public policy “to encourage foster parents not to treat the children placed in their care as an income producing commodity, but rather to love their foster children as their own.” *In re Adoption of Jamison Nicholas C.*, 219 W.Va. at 733 n.4.

As a corollary, the state has a strong policy against creating undue harm by needlessly disrupting the bonds between good foster parents and children. “[W]here the child has spent a substantial period of time in the home of foster parents, . . . extraordinary circumstances exist which demand that the best interests of the child not only be considered but be given primary importance.” *State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 429 S.E.2d 492 (1993) (reversing an order that had transferred custody of a child from her long-time foster parents to the child’s half-sister, based on the deep emotional bonding during the foster care placement), quoting *West Virginia Dept. of Human Services v. La Rea Ann C.L.*, 175 W.Va. 330, 335, 332 S.E.2d 632, 636 (1985); see also *Honaker v. Burnside*, 182 W.Va. 448, 452, 388 S.E.2d 322, 326 (1989) (“Elizabeth has been through a most traumatic ordeal by losing her mother at such a tender age. Taking away continued contact with the two other most important figures in her life would be detrimental to her stability and well-being.”).

What the lower court excoriated as an unseemly attempt by petitioners to point out the bonds that have been established in the hopes of becoming the

eventual adoptive placement is indeed exactly what the West Virginia Legislature intends to happen. “Presumptively, if a child is in a loving and caring foster home, the child will be harmed by being removed from that home and placed in a strange, unknown home. The state, therefore, has implemented a policy encouraging foster parents to adopt their foster children.” *Jamison Nicholas C.*, 219 W.Va. at 733 n.4, 639 S.E.2d at 825 n.4;<sup>11</sup> accord *State v. Tammy R.*, 204 W.Va. 575, 581 n.20, 514 S.E.2d 631 (1999) (“The West Virginia Legislature has similarly taken steps to “expressly encourage foster parents who develop emotional ties to the children for whom they care to adopt those children.”), quoting *Treadway*, 189 W.Va. at 213, 429 S.E.2d at 495; compare *Blake Brf.* at 25 (petitioners are “using their status as foster parents who have had the child since her birth in December 2007 to force an adoption because the infant has bonded with them and they are an otherwise fit household.”). This Court has spoken eloquently about the need to preserve the

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<sup>11</sup> This Court’s appreciation for the harm associated with an unnecessary uprooting of a child from a familiar home is echoed in the scientific literature. Nat’l Scientific Council on the Developing Child, *Young Children Develop in an Environment of Relationships* 4 (3d. ed. 2006) (“[P]rolonged separations from familiar caregivers and repeated ‘detaching’ and ‘re-attaching’ to people who matter are emotionally distressing and can lead to enduring problems. Although the importance of sustained, reliable relationships within the family is well understood, the need for stable and predictable relationships in child care settings is acknowledged less frequently, and the disruptive impacts of the abrupt changes related to high caregiver turnover are too often disregarded.”), available at [http://www.developingchild.net/pubs/wp/Young\\_Children\\_Environment\\_Relationships.pdf](http://www.developingchild.net/pubs/wp/Young_Children_Environment_Relationships.pdf); Rae R. Newton et al., *Children and Youth in Foster Care: Disentangling the Relationship Between Behavior and the Number of Placements*, 24 *Child Abuse & Neglect* 1363, 1364 (2000) (“Once removed from one dangerous or neglectful environment, a child confronting further disruption through numerous placement failures is likely to experience difficulties trusting adults or forming attachments with adults and children.”).

placement in a case where foster parents took in a special-needs child whom they sought to adopt:

He is presently in a good home with foster parents who are providing him with love, care, support, and a nurturing environment in addition to attending to his medical needs. The foster parents' desire to adopt Micah clearly shows that they have established a strong emotional bond with him. Foster parents who are willing to assume such an awesome responsibility are extraordinary. It is not easy to find foster care placement for a child like Micah who is suffering from a severe disease, and it is even more difficult to find an adoptive home. Obviously, these foster parents need assurances that the adoption will be allowed to proceed in the future because they have made a substantial investment of emotional support and time.

*In Interest of Micah Alyn R.*, 202 W.Va. 400, 407, 504 S.E.2d 635, 642 (1998).

The trial court's clear error is compellingly demonstrated by the solicitude shown a foster parent in *State v. Tammy R.*, 204 W.Va. 575, 514 S.E.2d 631 (1999). In that case, despite a statutory preference for adoption, this Court affirmed the award of permanent foster care to her grandmother, who did not want to adopt.<sup>12</sup> (The grandparent preference was passed later and only applies to adoptive placements. Acts 2001, c. 91, eff. March 22, 2001). The grandmother had given the girl quality care for the first six months of her life; the following year was spent elsewhere due to no fault of the grandmother. The mother challenged the permanent foster placement decision arguing both that the grandmother was a criminal (drug-dealing and shielding her fugitive son), and that DHHR could not make the requisite showing that adoption by a willing couple would not serve the child's best interest, which was required before DHHR could consider a permanent

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<sup>12</sup> This Court expressed some frustration with the grandmother's unwillingness to adopt, mentioning it in three separate footnotes. *Id.*, 204 W. Va. at 579 n.12, 581 n.19, 581 n.20 ("we note that the preferred disposition . . . would be for Kia's grandmother to take the affirmative step of adopting Kia.").

foster placement with the grandmother. *Id.* at 578, citing *State v. Michael M.*, 202 W.Va. 350, 359, 504 S.E.2d 177, 186 (1998). This Court affirmed the placement with the grandmother, citing the fact that she had “provided custody, care, commitment, nurturing and discipline to Kia.” *Tammy R.*, 204 W. Va. at 581.

The contrast between this Court’s ruling in *Tammy R.* and the Circuit Court’s ruling here is stark. The *Tammy R.* court held that quality care given to the child and the bonds established over the first year of her life were compelling enough to overcome a statutory preference in favor of a different placement, despite allegations of criminal activity and despite the fact that the grandmother could have overcome the statutory presumption simply by agreeing to adopt the child. By contrast, the Circuit Court here overlooked the quality care that, by all accounts, allowed Baby Girl C to thrive. While the bonds in *Tammy R.* were significant despite the child’s being in a different setting for the year prior to the hearing, here, Baby Girl C’s bonds with the only family she has known were dismissed. Finally, the grandmother in *Tammy R.* was allowed to overcome an actual statutory preference for adoption, even though she simply did not want to adopt, while Baby Girl C was ordered out of the Kutil/Hess home based on a judicially-fabricated adoption preference, when they both want to adopt Baby Girl C.

The state has recognized that treating good foster parents well serves the interests of the children in this State. By losing sight of that proposition, respondents can cause untold harm to the state’s efforts to care for abused and neglected children, unless directed otherwise by this Court. *See In re Jonathan G.*, 198 W.Va. 716, 729, 482 S.E.2d 893, 906 (1996) (“scenarios such as the one before

us would discourage most people from ever embarking on the noble work of foster care.”); 11/21 Tr. at 200 (testimony of Kathryn Kutil) (“You know, we didn’t ask to be anybody’s poster children here. We just wanted a child or children and a family. We didn’t ask for this circus. We didn’t ask for this pain.”).

**B. The Circuit Court Made Up an Adoption Preference for Married Couples that Has Never Been Enacted by the West Virginia Legislature**

The West Virginia Legislature has enacted, in very specific terms, two statutory preferences to override DHHR’s general authority to select the foster or adoptive placement DHHR feels is best in the child’s interest. It was not the province of the Circuit Court to enact another preference. Moreover, such a preference makes no sense.

**1. The Circuit Court Is Not Authorized to Add an Adoption Preference that the West Virginia Legislature Has Not Included**

W. Va. Code § 49-2-14(e) requires that DHHR’s foster or adoptive placement of a child must be with the foster or adoptive parent of that child’s sibling if that parent is fit and uniting the siblings is in their best interest. W. Va. Code § 49-3-1(a)(3), applying only to adoptive placements, requires that DHHR offer the placement to a willing grandparent who it determines to be suitable after a home study. The Circuit Court’s order enacts by individual judicial preference a third adoption preference in the case of Baby Girl C, in that DHHR is ordered to

consider married couples for adoption placement first and offer the placement to an unmarried person only if a suitable married couple is not found.<sup>13</sup>

An adoption preference is a very specific provision requiring that certain placements be considered first and given priority unless a particularized showing is made. For adoptive placements, the Legislature has decreed that DHHR must offer the placement to suitable grandparents first, absent specific findings:

For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

W. Va. Code § 49-3-1(a)(3). Similarly, the Legislature has mandated that DHHR's foster and adoptive placements keep siblings together, absent particular circumstances:

When a child is in a foster care arrangement and is residing separately from a sibling or siblings who are in another foster home or who have been adopted by another family and the parents with whom the placed or adopted sibling or siblings reside have made application to the department to establish an intent to adopt or to enter into a foster care arrangement regarding a child so that said child may be united or reunited with a sibling or siblings, the state department shall upon a determination of the fitness of the persons and household seeking to enter into a foster care arrangement or seek an adoption which would unite or reunite siblings, and if termination and new placement are in the best interests of the children, terminate the foster care arrangement and place the child in the household with the sibling or siblings: Provided, That if the department is of the opinion based upon

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<sup>13</sup> Only one state has enacted an adoption preference for married couples. See Utah Code Ann. § 62A-4a-602(5)(c).

available evidence that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children or if the child has a physical or mental disability which the existing foster home can better accommodate, or if the department can document that the reunification of the siblings would not be in the best interest of one or all of the children, the state department may petition the circuit court for an order allowing the separation of the siblings to continue.

W. Va. Code § 49-1-24(e). There is no comparable provision whatsoever regarding married couples.<sup>14</sup> And, of course, the shifting definition of the preference created by the Circuit Court (see section I.B., supra), provides yet another basis for invalidating it.

Unlike the preference for married couples fabricated by the Circuit Court, the two existing preferences were both passed by the Legislature and approved by this Court as satisfying the best interest standard. *Napoleon S. v. Walker*, 217 W.Va. 254, 261, 617 S.E.2d 801, 808 (2005) (“West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis . . . [T]he Legislature has implicitly included the requirement for an analysis by the DHHR and circuit courts of the best interests of the child, given all circumstances of the case.”); *In re Carol B.*, 209 W.Va. 658, 665, 550 S.E.2d 636,

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<sup>14</sup> In his brief, Judge Blake makes the puzzling argument that West Virginia, by statute, has indicated a preference for adoption by married couples. Blake Brf. at 23. This appears to be based on the *definitions* section of the Adoption Code, which simply reads, “‘Adoptive parents’ or ‘adoptive mother’ or ‘adoptive father’ means those persons who, after adoption, are the mother and father of the child.” *See id.* at 21, citing W. Va. Code §§ 48-22-103. This definition is to distinguish the person or persons who are the parents after the adoption from those who were the parents before the adoption. *E.g.*, W. Va. Code §§ 48-22-105, 48-22-106, 48-22-107, 48-22-110 (defining “birth father,” “birth mother,” “birth parents,” and “legal father”).

643 (2001) (rejecting argument “that W.Va.Code § 49-2-14(e) subordinates the best interests of the child consideration to the sibling preference. . . . We believe that both sibling preference and best interests of the child considerations are incorporated in W.Va.Code § 49-2-14(e).”).

West Virginia law is clear that, when the Legislature specifically has chosen to enact provisions covering certain subjects, the courts should not extend those provisions to other subjects the Legislature did not include. *See State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 260, 496 S.E.2d 198, 210 (1997) (“[H]ad the Legislature intended such a result, it could have, and would have, effectuated such a change in conjunction with the other adoption amendments. However, it did not.”); *Shaffer v. Fort Henry Surgical Associates, Inc.*, 215 W.Va. 453, 459, 599 S.E.2d 876, 882 (2004) (“Indeed, this Court is convinced that if the Legislature had intended to restrict recovery under the Wage Payment and Collection Act to certain categories of employees, it would have so indicated in the language of the Act, just as it did in other labor and employment statutes.”); *see also T. Weston, Inc. v. Mineral County*, 219 W.Va. 564, 568, 638 S.E.2d 167, 171 (2006) (“[w]here a statute provides for a thing to be done in a particular manner or by a prescribed person or tribunal it is implied that it shall not be done otherwise or by a different person or tribunal.”).

## **2. An Adoption Preference for Married Couples Makes No Sense**

The profound differences between the existing adoption preferences – for siblings and grandparents – and the one for married couples created by the Circuit

Court demonstrate the folly of the latter, in terms of feasibility, harm to children, and misplaced legal assumptions.

The existing adoption preferences impose, relatively speaking, minimal delay in reaching the goal of permanency for the affected children. Every child has a finite number of siblings and grandparents; thus, ascertaining which grandparents or sibling parents/caretakers want the placement in question is relatively easy, as is determining their suitability. Consequently, any delays in placement occasioned by exhausting that process are relatively minimal in scale. By contrast, requiring DHHR to canvas a certain area for any fit married couple that may want a particular adoptive placement would be very burdensome and could strand vulnerable children in undesirable institutional settings. There is a severe shortage of adoptive parents for waiting children in the foster care pool. It is antithetical to the Legislature's permanency goal to build in a requirement that a child like Baby Girl C, who is fortunate to have a loving family already eager to adopt her, wait for another adoptive family to materialize. This Court has emphasized repeatedly the goal of achieving permanency in a prompt fashion. *In re Cesar L*, 221 W.Va. 249, 258, 654 S.E.2d 373, 382 (2007) ("Ensuring finality for these children is vital to safeguarding their best interests so that they may have permanency and not be continually shuttled from placement to placement. See Syl.pt. 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).").

The Circuit Court believed it had the jurisdiction to terminate a beneficial foster arrangement during a permanent placement review and that substantively it was permissible to replace the best interests standard with a preference not found in

the adoption statutes. Only in light of these two incorrect assumptions did it become relevant in the court's mind to construe West Virginia Code § 48-22-201 to decide whether unmarried couples can adopt.<sup>15</sup>

However, the court erred in its predicate assumptions that led to the "relevance" of its statutory construction. For all of the reasons explained herein demonstrating that the removal of Baby Girl C was wrong even if Kutil and Hess cannot adopt jointly, *Amici* respectfully submit that this Court should follow its principle of not issuing advisory opinions and decline to address the trial court's interpretation of West Virginia Code § 48-22-201. *See State v. Whittaker*, 221 W.Va. 117, 133, 650 S.E.2d 216, 232 (2007) ("This Court will not decide abstract issues where there is no controversy. 'Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes.'"); *West Virginia Human Rights Com'n v. Esquire Group, Inc.*, 217 W.Va. 454, 463, 618 S.E.2d 463, 472

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<sup>15</sup> One should not assume that any unmarried couple cannot both become legal parents. Many states, including neighboring Pennsylvania, permit second parent adoptions, the term commonly given to the equivalent of a stepparent adoption by a same-sex couple. *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); 23 Pa. C.S.A. 2901 ("If all legal requirements have been met, the court may enter a decree of adoption at any time."). Most appellate courts faced with the issue have held that the interests of justice require construing their statutes to permit either joint adoptions or second-parent adoptions, while a few states have held that even compelling policy concerns favoring such adoptions cannot overcome a clear statutory preclusion. *In re Adoption of Baby Z.*, 724 A.2d 1035, 1060 (Conn. 1999) (denying adoption "We recognize that all of the child care experts involved in this case have concluded that the proposed adoption would be in Baby Z.'s best interest."), *superseded by statute*, Conn. Gen. Stat. § 45a-724(3). Thus, even if West Virginia did not permit joint or second-parent adoptions, Kutil could still adopt Baby Girl C in West Virginia, and Hess could become an adoptive parent in another state. Baby Girl C could have two legal parents whether or not the couple lived in West Virginia. *See, e.g., Finstuen v. Crutcher*, 496 F.3d 1139 (10<sup>th</sup> Cir. 2007).

(2005) (“At best this portion of the lower court’s order takes on the character of an advisory opinion, and such obiter dicta is not becoming a court.”). A pronouncement by this Court regarding joint adoption by unmarried couples should await a “claim of legal right asserted by one party and denied by the other before jurisdiction of a suit may be taken.” *Town of South Charleston v. Board of Ed. of Kanawha County*, 132 W.Va. 77, 83, 50 S.E.2d 880, 883 (1948). In addition to being judicially improper, it is unwise to make judicial pronouncements without adequate briefing and analysis. *See State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W.Va. 99, 117, 602 S.E.2d 542, 560 (2004) (Starcher, J., concurring) (“It is almost always the case that the competing voices and arguments of well-prepared, zealous advocates on all sides of an issue that has been raised in a concrete case permit this Court to craft decisions (and especially syllabus points) that will be enduringly useful. (That is one reason that we eschew advisory opinions.)”).

While the Circuit Court appeared to consider it obvious that joint adoptions by unmarried couples are forbidden in West Virginia, a closer examination reveals that that such an assumption should not be made. In his discussion of joint adoptions, Judge Blake cites the Supreme Judicial Court of Maine’s decision in *In re Adoption of M.A.*, 930 A.2d 1088, 1090 (Me. 2007). Blake Brf. at 28. But that court *approved* a joint adoption by a same sex couple, interpreting a statute similar to West Virginia’s.<sup>16</sup> The Maine court recognized, as this Court has, that adoption is a

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<sup>16</sup> Compare W. Va. Code 48-22-201 (“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” to adopt) with 18-A M.R.S. 9-301 (“A husband and wife jointly or an unmarried person, resident or nonresident of the State, may petition the Probate Court to adopt . . .”).

statutory matter, but it also noted that its construction of adoption statutes took into consideration the best interests of children and thus held that the applicable statute did not preclude a joint adoption.<sup>17</sup> Any pronouncement from the Court on this issue should await a controversy over an actual joint adoption petition.<sup>18</sup>

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<sup>17</sup> *In re Adoption of M.A.*, 930 A.2d at 1096 (“Although statutes adopted in derogation of the common law are to be strictly construed, we have previously recognized that “[w]e construe our adoption statutes to protect the rights and privileges of the child being adopted.”); compare *State ex rel. Smith v. Abbot*, 187 W.Va. 261, 418 S.E.2d 575 (1992) (“As in any situation involving the welfare of minor children, the paramount concern in this adoption case is what is in the best interests of the child.”); *Petition of Nearhoof*, 178 W.Va. 359, 364, 359 S.E.2d 587 592 (1987) (“As we have stressed above, this Court’s ultimate concern is always for the welfare of the child.”; holding that biological grandparents could still seek visitation after adoption) and *King v. Riffie*, 172 W.Va. 586, 590 309 S.E.2d 85, 89 (1983) (“In the last forty years, each amendment to our adoption laws has favored the position of adoptive children and broadened the rights of those children to share in the property of their adoptive families.”).

<sup>18</sup> Because Judge Blake refers to second-parent adoptions in his brief, *Amici* also submit that it is improper to assume that second parent adoptions are unavailable in West Virginia. While the adoption code provides for the “severance of pre-existing relationships,” it is clear that this provision is for the benefit of the adoptive parent who typically wants “finality in the creation of new adoptive relationships, which breeds certainty for adopted children and their adoptive parents, alike, in their new adoptive relationship.” *In re the Adoption of Jon L.*, 218 W.Va. 489, 496-97, 625 S.E.2d 251, 259 (2005). The California Supreme Court held that second-parent adoptions were permissible on the theory that a party can waive statutory provisions intended for his or her benefit, absent public policy to the contrary. *Sharon S v. Superior Court*, 31 Cal.4th 417 (2003). West Virginia similarly recognizes this principle. *Dennison v. Jack*, 172 W.Va. 147, 156, 304 S.E.2d 300, 309 (W.Va. 1983) (party may waive constitutional, statutory, or contractual benefits intended for his benefit absent public policy to the contrary), citing *Smith v. Bell*, 129 W.Va. 749, 760, 41 S.E.2d 695, 700 (1947); *Grijalva v. Grijalva*, 310 S.E.2d 193, 197, 172 W.Va. 676, 680 (1983) (parties could waive right to modify divorce agreement). Moreover, many states have construed their stepparent adoption statutes to cover second parent adoptions to effectuate the legislature’s intent that a child should not have parental bonds severed when the child will continue to live with the parent in a parent-child setting and preserving the relationship is the clear intent. “The legislature recognized that it would be against common sense to terminate the biological parent’s rights when that parent will continue to raise and be responsible

The Circuit Court not only lacked the authority to consider terminating the beneficial foster placement, but its actual decision to do so substantively violated fundamental legal principles by elevating a preference for married adoptive couples to a determinative status, in disregard of legislative policy and the best interests standard.

### **III. THE CHALLENGED RULINGS ARE INVALID AS THEY ARE COMPLETELY UNSUPPORTED BY RECORD EVIDENCE**

Among the many other legal shortcomings of the challenged rulings is a complete lack of record evidence to support them. The November 6, 2008 hearing, with only the judge and attorneys present, included no evidence, yet led to an order including numerous “findings of fact” that are challenged in this proceeding. The court subsequently held an evidentiary hearing on November 21, 2008, but still did not make findings to support the removal of Baby Girl C from the Kutil/Hess home. This is unacceptable under this Court’s well-settled jurisprudence.

In making findings that children need a father and mother and concerning what constitutes a traditional family in Fayette County, after a hearing where no evidence was taken, the judge violated one of the most basic principles of law. “It

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for the child, albeit in a family unit with a partner who is biologically unrelated to the child.” *In re Adoption of B.L.V.B.*, 628 A.2d 1271, 1274 (Vt. 1993); *accord In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1258, 1259 (Ind. Ct. App. 2004); *In re M.M.D.*, 662 A.2d 837, 860-61 (D.C.,1995); *Matter of Adoption of Two Children by H.N.R.*, 666 A.2d 535, 539 (N.J. Ct. App.1995). West Virginia similarly recognizes the principle that “It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.” *Conseco Finance Servicing Corp. v. Myers*, 211 W.Va. 631, 638, 567 S.E.2d 641, 648 (2002).

is fundamental that the decision in a custody proceeding must be based on fact, and not on speculation.” *Lesavich v. Anderson*, 192 W.Va. 553, 453 S.E.2d 387 (1994); *see also John D.K. v. Polly A.S.*, 190 W.Va. 254, 259, 260, 438 S.E.2d 46, 51, 52 (1993) (reversing custody order where “the circuit court relied on its personal, out-of-court knowledge” and “incorporated information into the findings of fact that was not offered into evidence at any hearing” and the “record contains no professional psychological or medical evidence to support” the findings); *Judith R. v. Hey*, 185 W.Va. 117, 120 n.2, 405 S.E.2d 447, 450 n.2 (1990) (“Indeed, there appears to have been no evidence taken on this issue. A review of the record of the proceedings before the family law master does not reflect that any evidence was heard there on the issues of fitness or best interest of the child, and the circuit court apparently made its determination without any evidentiary basis.”); *Province v. Province*, 196 W.Va. 473, 483 n.19, 473 S.E.2d 894, 904 (1996) (family law master cannot “provide[ ] only legal conclusions unsupported by specific facts”); *Hawk v. Hawk*, 203 W.Va. 48, 51, 506 S.E.2d 85, 88 (1998) (reversing order terminating visitation where court made “only general, conclusory or inexact findings”). Such action is unacceptable and cannot form the basis of the ruling to remove Baby Girl C from her home.

Given that the Circuit Court already had made its determinations without the benefit of evidence after the November 6 hearing, it could not remedy that by relying *post hoc* on evidence presented at the later November 21, 2008 hearing to support its preconceived determinations. *See Smith v. Board of Educ. of Logan County*, 176 W.Va. 65, 71, 341 S.E.2d 685, 690 (1985) (“Subsequent notice and

hearing does not cure a premature decision not in compliance with the statute. 'If a decision has already been made, and the employees have already been prejudged, the process is meaningless.'") (citation omitted); *see also Brum v. Board of Educ. of Wood County*, 215 W.Va. 372, 375, 599 S.E.2d 795, 798 (2004). But more fundamentally, the Court did not even purport to base the findings in the December 2 order on the evidence at the November 21, 2008 hearing. For example, while its order includes many pages reciting what the experts said, its findings do not adopt either of their positions. Thus, this Court is left with no basis in the record supporting the judge's actions:

As a final matter, we note that the record and the custody decree in this case are utterly devoid of findings of fact and conclusions of law with regard to the critical issues involved in any child custody case. As we noted earlier, the trial court made no determination on the record with respect to the primary caretaker issue and expressly refused to make the requisite finding that the custody award issue was in the child's best interest. In addition, the record reveals no statement of the factual basis for the court's conclusion that the appellant was unfit to have custody. We have repeatedly held that the failure of a trial court to state on the record its findings of fact and conclusions of law violates Rule 52(a) of the West Virginia Rules of Civil Procedure.

*Allen v. Allen*, 173 W.Va. 740, 746, 320 S.E.2d 112, 118 (1984). In addition to their jurisdictional and substantive deficiencies, the Circuit Court's ruling removing Baby Girl C is invalid as being completely devoid of support in genuine factual findings.

#### **IV. RESPONDENTS IGNORED THE BEST INTERESTS STANDARD IN ADDRESSING THE CAPACITY ISSUE**

Respondents disregarded the polar star of child custody issues -- the best interests of children -- in their handling of the capacity issue presented by DHHR's introduction of a seventh child into petitioners' home on October 31, 2008. The

West Virginia legislature has acted to ensure that foster homes are of a size where children will receive the comfort and attention they deserve, while also providing for flexibility in instances where “the health, safety or well-being of a child would not be endangered thereby.” W.Va.Code § 49-2B-7; *see generally State ex rel. Lewis v. Stephens*, 199 W.Va. 180, 186, 483 S.E.2d 526, 532 (1996). Thus, the issue is not, as Respondent Blake suggests, whether his “finding” that the home exceeded capacity was error, but whether he erred in ordering Baby Girl C to be removed with no consideration whatsoever as to the effects on the children in the house of removing Baby Girl C instead of one of the other children.

As this Court previously held, even when “DHHR’s bureaucratic bungling has created this regrettable situation,” a court’s focus in finding a solution remains the same — the one that best serves the affected children’s interests. *Treadway*, at 212-13; *see also State v. Michael M.*, 202 W.Va. 350, 359, 504 S.E.2d 177, 186 (1998) (“WHILE WE SYMPATHIZE with the circuit court’s frustration over any unwarranted delays caused by the Department, we cannot allow innocent children to be arbitrarily deprived of the chance to be adopted, . . .”) (emphasis in original). Here, there is not even pretense on the part of DHHR or the Circuit Court that any analysis was done to ascertain which child’s removal would cause the least harm.<sup>19</sup>

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<sup>19</sup> DHHR has stated unequivocally that the sole basis for choosing Baby Girl C was that a willing placement was ready. Of course, while the ease of an alternative placement may be a legitimate consideration in determining which child should be moved, DHHR’s attorney was clear at the hearing that they had been trying to find a placement for Baby Girl C and had not for any other child. (“In trying to comply with the Court order from the November 6th hearing, we did try to transition that child. We called several foster homes trying to find a home that would be willing to adopt or take this child.”) 11/21 Tr. at 31-32. Baby Girl C’s placement in the Thompson home failed within days. DHHR did not assert that finding an

DHHR's recommendation to remove Baby Girl C the day after discovering the capacity issue contravened DHHR's own policy manual, and the Circuit Court's acceptance of the recommendation ensured that the best interests of the affected children would not be addressed.<sup>20</sup>

The limited evidence adduced at the hearing supported the removal of the child placed three weeks earlier instead of Baby Girl C.<sup>21</sup> Dr. Cooper-Lehki testified that removing the child with the least attachment and bonding to the family "would make the most sense clinically and probably be the least detrimental to the kids," and that that child was most likely to be the most recent addition. Kathryn

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alternative placement for the most recently placed child would pose any special difficulty.

<sup>20</sup> See WVDHHR Foster Care Policy, Section 13, General Foster Care Policy: Multidisciplinary Treatment Team Meetings – Disrupted Placements ("When a disruption occurs the child is often moved around due to a lack of planning for an appropriate placement. The MDT must play a vital role when a child experiences a disruption from a placement. It is important for workers to understand that convening an MDT as soon as possible to determine the best possible placement for the child is in the child's best interest and will result in fewer disruptions in the future for the child."). Respondent Blake's brief mentions that petitioners could invoke a DHHR grievance procedure, Blake Brf. at 18 n.46. DHHR surprised everyone with its new position based on the home's capacity, on November 21, 2008, and at the close of the hearing that day, after 6pm on a Friday, Judge Blake ordered Baby Girl C removed from the Kutil/Hess household by noon the next day. Thus, petitioners never had time to utilize any DHHR grievance procedure.

<sup>21</sup> Respondent Blake's claim that DHHR testified it had "considered the emotional and psychological well-being of Baby Girl C in its initial steps to transition her from the petitioners to her prospective adoptive family" is misleading. Blake Brf. at 27 and n.64, citing 11/21 Tr. at 41-42. The DHHR representative testified only concerning the *timing* of the transfer, not the selection of Baby Girl C as the child to be removed, and even then merely pointed out that the judge's transition timeframe was similar to DHHR's standard timeframe. She specifically testified that "it was pretty much just ordered, to my understanding, that it had to be done within two weeks," and that DHHR never consulted any healthcare professional regarding the psychological and emotional effects on Baby Girl C.

Kutil testified that Baby Girl C not only had bonded with the other longer-term children in the home but indeed had become “the center of the house.”<sup>22</sup>

The Amended Petition asserts that two sibling children were removed from the Kutil/Hess home on December 1, at the request of petitioners, due to Kutil’s surgery the next day; DHHR did not respond to that allegation. Amended Petition, ¶ 19; DHHR Answer, ¶ 19. Thus the capacity issue may have been resolved already. If not, the proper course is for this Court to order an evidentiary hearing to resolve the placement issue based on the best interests of the various children in the Kutil/Hess household. *See State ex rel. Jeanne U. v. Canady*, 210 W.Va. 88, 96, 554 S.E.2d 121, 129 (2001) (Granting writ relief; “[a]n evidentiary hearing should be conducted, and the testimony of the parties and all other pertinent witnesses should be taken regarding [the child]’s best interests.”); *Horkulic v. Galloway*, 222 W.Va. 450, 665 S.E.2d 284, 299 (2008) (writ relief appropriate to require hearing on relevant issues with affected parties present).

**V. AMICI REQUEST THAT THIS COURT ONCE AGAIN CLARIFY THE PROPER ROLE OF A GUARDIAN AD LITEM**

Foster children have an acute need to have their interests represented in the judicial system, a fact that this Court has stressed often. Here, there can be no question that the Guardian’s central focus was to crusade against placement of any children in homes with gay foster parents, rather than to evaluate whether Baby Girl C was thriving in the Kutil/Hess home. Exactly one month after Baby Girl C was

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<sup>22</sup> “On a daily basis, everyone in the house is just in awe of her. She’s everything to everybody. . . . She’s the center of our family. She always will be, today, tomorrow and forever. She was the day we got her.” 11/21 transcript, 195-96.

placed in the Kutil/Hess home, the Guardian filed "Motion to Order DHHR to Remove Child from Physical Placement in Homosexual Home and for Other Injunctive Relief," in which he sought Baby Girl C's removal and a statewide injunction against future placements of children with gay foster parents. Any pretense that the Guardian was focused on Baby Girl C's needs was lost at the November 21, 2008 hearing. After DHHR switched its position and urged the removal of the child *sought by the Guardian*, he excoriated DHHR's position as a tactical ploy to block his injunction, and he urged the court to use this matter as a test case to stop gay foster parenting:

Because we have a case in controversy, you do have jurisdiction to look at the pros and cons . . . If Your Honor finds that that is an impermissible setting for children in foster care and/or adoptive settings, then that could be appealed to the Supreme Court. If the Supreme Court agrees with Your Honor at that point, then the Supreme Court does have jurisdiction over the state. (11/21 Tr. at 15, 16).

So all of us feel, Your Honor, that this is a tactical decision to try to duck the true merits of the motion that I filed in this case. And, Your Honor, on behalf of this child *and on behalf of many other children*, I would respectfully request that we go forward and have a hearing on this today." 11/21 Tr. at 18 (emphasis added).

"But I'm asking the Court also to take a bold step, Your Honor, very bold . . . that the Court find that [DHR placements with gay foster parents] is an unconstitutional practice. That can be appealed, the Supreme Court can yea or nay it, but that's critical, Your Honor. It's critical." 11/21, 2008 Tr. at 211.

Guardians should be reminded that they should disqualify themselves from cases where they have an obvious bias:

We believe, further, that the duties set forth above require guardians ad litem to avoid conduct which reflects adversely on

the undivided devotion owed by guardians ad litem to the children they represent. Guardians ad litem, therefore, have an affirmative duty to disqualify themselves following cognizance of good cause and to disclose facts that possibly could disqualify them from representing children in certain instances.

*In re Carol B.*, 209 W.Va. 658, 667 n.6, 550 S.E.2d 636, 645 n.6 (2001).

Additionally, this Court should clarify the role of the trial judge in assessing bias and conflicts in appointing and removing guardians. *See* W. Va. Code § 56-4-10 (providing for removal of guardians “whenever of opinion that the interest of an infant or insane person requires it”); *In re Carol B.*, 209 W.Va. at 667 n.6, 550 S.E.2d at 645 n.6 (“[C]ourts should be careful to appoint guardians ad litem who are free from any hint of conflict of interest.”).

Here, the Guardian exhibited that he was openly hostile to petitioners’ continued custody of Baby Girl C, irrespective of how well Baby Girl C was progressing under petitioner’s care. 11/21 Tr. at 16 (statement of Guardian) (“That child has probably bonded [with Kutil and Hess], and I think this is a tragedy, Your Honor.”). A guardian ad litem who fails to address the key issues of how the child is faring in a placement is of little use to the court. *See State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 261 n.25, 496 S.E.2d 198, 211 (1997); *In re Christina W.*, 219 W.Va. 678, 684, 639 S.E.2d 770, 776 (2006) (guardian ad litem must serve as an “advocate for the child” and “must also fulfill their duty to fully inform themselves of the child[ren]’s circumstances and determine and recommend the outcome that best satisfies the child[ren]’s best interests.”).

Moreover, the Guardian gave no indication of ever having met the Thompsons but still improperly endorsed the transfer of Baby Girl C to their home despite spending only a seven minutes in petitioners home, when none of the other

children was present. *See Napoleon S. v. Walker*, 217 W.Va. 254, 261 n. 5, 617 S.E.2d 801, 808 n. 5 (2005) (the guardian “had apparently not personally interviewed [the competing applicants]. This Court [has] emphasized the need for guardians ad litem to conduct a ‘full and independent investigation’.”).

Baby Girl C deserves an advocate who brings to her case not bias but careful attention to her best interests.

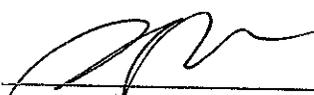
### CONCLUSION

*Amici* respectfully request that the writ of prohibition issue, and that this Court, as it has done so frequently in the past, command adherence to the principle that all parties, administrators, judges, and attorneys involved in the abuse and neglect process place the best interests of vulnerable children above all other concerns.

Dated: February 19, 2009

Respectfully submitted,

*Amici Curiae* Foster Care Alumni  
Association, CASA of the Eastern Panhandle,  
Inc., COLAGE, and Fairness West Virginia



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