

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 34618

KATHRYN KUTIL and CHERYL HESS,

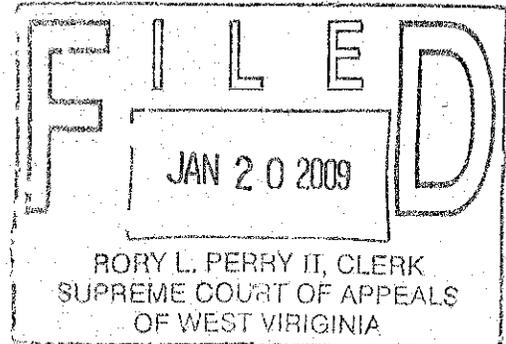
Petitioners,

vs.

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

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

Respondents.



**BRIEF *AMICUS CURIAE* OF THE AMERICAN COLLEGE OF PEDIATRICIANS
IN SUPPORT OF RESPONDENTS**

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INTRODUCTION

Petitioners challenge Respondents' actions in removing an infant foster child from their home. In carrying out these actions, Respondents recognized that the child should be given the "opportunity" to be adopted by a married father and mother because it is "unfair" to deprive the child of that opportunity when available. *See* Circuit Court Order at p. 23. Petitioners dispute Respondents' actions on appeal, seeking a form of extraordinary relief and arguing, among other things, that Respondents have not acted in the best interests of the child.

This brief refutes the underlying assumption of Petitioners' arguments by demonstrating, based on well-established social science, that Respondents acted in the best interests of the infant child. Respondents have given the child the opportunity to be raised by a married father and mother, and in doing so, they have sought to provide the child with the *optimal* childrearing environment. The married father-mother household is the best setting for raising children because children benefit from stability and close, daily interaction with both a male and a female. The studies overwhelmingly show that children raised by a married mother and father exhibit increased emotional and physical health, educational achievement, economic advantage, and behavioral compliance. Thus, in acting as they did, Respondents without question sought the best interests of the infant child.

This brief also refutes Petitioners' constitutional claims. Petitioners' constitutional claims are subject to rational-basis review, under which this Court affords exceeding deference to governmental conduct. Simply put, Respondents' actions were a reasonable means of furthering a legitimate governmental interest, and thus they did not violate Petitioners' constitutional rights.

INTEREST OF *AMICUS CURIAE*

Amicus Curiae American College of Pediatricians (“*Amicus*” or “College”) is a national medical association of pediatricians and other healthcare professionals who specialize in the care of infants, children, and adolescents. The College was formed in 2002 to promote the welfare of children and the preservation of the natural family, and is dedicated to ensuring all children reach their optimal physical and emotional well-being. Its members believe that children are the future of our nation and should be reared in the best possible family environment and supported by physicians committed to ensuring their optimal health and well-being.

The College is dedicated to educating parents, pediatricians, policy makers, and society about factors that are most likely to enhance a child’s well-being. To that end, the College publishes position papers and policy statements on issues affecting children, families, and society using evidenced-based medical research and expert opinion to assist parents and influence childrearing.

The College recognizes that the basic father-mother family unit within the context of marriage is the optimal setting for childhood development. Its members promote this basic family unit while pledging support for all children, regardless of their circumstances. Consistent with that goal, the College has filed briefs *amicus curiae* in cases dealing with parenting and the welfare of children.

This case involves issues of parenting and childrearing that are of particular interest to the College’s mission. The College believes this Court should uphold Respondents’ decisions, which aimed to place the infant child in the optimal family environment, with a married father and mother.

STANDARD OF REVIEW

Petitioners face an overwhelming burden in seeking a writ of prohibition. Writs of prohibition are “drastic and extraordinary remedies . . . reserved for really extraordinary causes.” *Ohl v. Egnor*, 201 W. Va. 777, 784 (1997). It is not enough to show that the lower court merely abused its discretion. 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.” *Packard v. Perry*, 221 W. Va. 526, 531 (2007).

Neither is it enough to show that the lower court committed an error on a disputable issue of law. The Court will only use prohibition to correct “substantial, clear-cut” legal errors. *Hinkle v. Black*, 164 W. Va. 112, 121 (1979); *see also Hoover v. Berger*, 199 W. Va. 12, 21 (1996) (noting that one of the factors when analyzing a writ-of-prohibition request is whether the lower court’s decision was “clearly erroneous as a matter of law”). Thus, a trifling or debatable legal error is not sufficient to warrant this Court’s issuance of the writ.

ARGUMENT

I. Respondents Acted In The Best Interests Of The Infant Child.

“[T]he best interests of the child is the polar star by which decisions must be made which affect children.” *Katherine B.T. v. Jackson*, 220 W. Va. 219, 229 (2006). Petitioners argue that Respondents clearly erred as a matter of law by disregarding the best interests of the infant child. Yet, as *Amicus* will demonstrate, nothing could be further from the truth.

At the outset, it is important to emphasize that this case is not about “sexual orientation” or, more specifically, the ability of someone to parent based on their professed “sexual orientation.” It is instead a case about parental composition, relational stability, and the positive effects of those factors on children. Respondents were not motivated by

Petitioners professed “sexual orientation” or their perceived abilities to parent the infant child; rather, Respondents acted as they did to place the child in the optimal setting for her upbringing.

A. Respondents Have Acted In The Best Interests Of The Child By Seeking To Place Her In The *Optimal* Childrearing Environment—A Household Headed By A Married Father And Mother.

Whenever possible, an adopted child should be placed into the optimal family structure of a stable, married father-mother unit. Recognizing this fact, Respondents properly acknowledged that a child should be given the “opportunity” to be adopted by a married father and mother, finding it “unfair” to deprive the child of that opportunity when available. *See* Circuit Court Order at p. 23. Thus, in acting as they did, Respondents have sought to provide the infant child with the *optimal* childrearing environment, which, by definition, is an action furthering her *best* interests.

The positive impact of a married mother and father on a child’s development has been scientifically verified across all measures of well-being. The ideal family in which to rear and nurture children consists of both a mother and a father in a harmonious marriage. A married mother-father unit significantly and positively impacts how a child will do in every important measure of well-being and maturity.

Both experts who testified before the lower court acknowledged this fact. Dr. Tracey Hansen, PhD, testified that the optimal family structure is the traditional mother-father stable home with married parents, noting that children raised in other family structures are negatively impacted in a wide variety of categories. *See* Circuit Court Order at p. 11. Similarly, Petitioners’ own expert, Dr. Christine Cooper-Lehki, testified that it would be

ideal for a child to be adopted by a married mother and father with a stable, low-conflict relationship. *See* Circuit Court Order at p. 13.

Confirming the testimony of both experts, childrearing studies have consistently shown that children are more likely to thrive emotionally, mentally, and physically in a home with married parents of differing sexes. *See* Byrd, *Gender Complementarity and Child-rearing: Where Tradition and Science Agree*, *Journal of Law & Family Studies* Vol. 6(2) p. 213-35 (2004); Sarantakos, *Children in Three Contexts: Family, Education, and Social Development*, *Children Australia* Vol. 21 p. 23-31 (1996); Popenoe, *Life Without Father* p. 144, 146 (Cambridge: Harvard University Press 1996); McLanahan *et al.*, *Growing Up with a Single Parent: What Hurts, What Helps* p. 45 (Cambridge: Harvard University Press 1994); Hilton *et al.*, *Comparison of Parenting and Children's Behavior in Single-Mother, Single-Father, and Intact Families*, *Journal of Divorce and Remarriage* Vol. 29 p. 23-54 (1998); Thomson *et al.*, *Family Structure and Child Well-Being: Economic Resources vs. Parental Behaviors*, *Social Forces* Vol. 73 p. 221-42 (1994). The veracity of this principle remains unrefuted throughout the scientific community.

1. Children Benefit From Close, Daily Interaction With Both A Male And A Female, Substantive Engagement With A Father, And A Stable Relationship Between Their Parents.

Many factors contribute to the married father-mother model constituting the premier setting for children. First, a child benefits from being raised by both a male and a female. "Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like." *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006). Cognitive and relational differences between men and women provide unique parenting attributes that contribute to the well-balanced development of a

child. See Thompson *et al.*, *Gender in Families: women and men in marriage, work, and parenthood*, Journal of Marriage and the Family Vol. 51(4) p. 845-71 (Nov 1989); Taylor *et al.*, *Biobehavior responses to stress in females; Tend-and-befriend, not fight-or-flight*, Psychological Review Vol. 107(3) p. 411-429 (July 2000).

Second, a father's influence in a child's life is a vital factor contributing to his or her successful development. Dr. Hansen testified that fathers contribute in a unique and important way to a child's development and that the absence of a father has significant negative effects. See Circuit Court Order at p. 11. Dr. Cooper-Lehki agreed that a father's involvement in a child's life is important because, among other things, he provides unique contributions that a female cannot. See Circuit Court Order at p. 13. Indeed, overwhelming scientific evidence demonstrates that a father's active and regular engagement with the child predicts a range of positive outcomes, such as reducing the frequency of psychological problems in young women, enhancing cognitive development in children, and decreasing delinquency over time. See Sarkadi *et al.*, *Fathers' involvement and children's developmental outcomes: a systematic review of longitudinal studies*, Acta Paediatr Vol. 97(2) p. 153-58 (Feb 2008). The father's role is particularly vital during the child's early developmental years. See Easterbrooks *et al.*, *Toddler Development in the Family: Impact of Father Involvement and Parenting Characteristics*, Child Development Vol. 55 p. 740-52 (1984).

These factors disclose one unassailable fact: a household comprising a married father and mother constitutes the optimal childrearing environment.

2. Children Raised By A Married Father And Mother Exhibit Increased Emotional And Physical Health, Educational Achievement, Economic Advantage, and Behavioral Compliance.

A growing and increasingly sophisticated body of research indicates that children raised by a married mother and father thrive in a broad range of areas. First, children raised by a married mother and father experience greater emotional and physical health. Studies have shown that children reared by a continually married mother and father have lower levels of emotional problems than children living with cohabitating (but not married) parents. *See Brown, Family Structure and Child Well-Being: The Significance of Parental Cohabitation, Journal of Marriage and the Family Vol. 66 p. 351-367 (2004).* These emotional and physical health benefits attributable to marriage are not confined to the child's developmental stages; these benefits extend deep into adulthood. *See Wilcox et al., Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences p. 23 (2nd Edition New York: Institute for American Values 2005).*

Second, children reared by a married mother and father demonstrate greater educational achievement. For instance, studies have shown that children reared by a married mother and father have higher levels of interest in school and completing homework than children living with cohabitating (but not married) parents. *See Brown, Family Structure and Child Well-Being: The Significance of Parental Cohabitation, Journal of Marriage and the Family Vol. 66 p. 351-367 (2004).*

Third, children who grow up in a household with a married father and mother are more likely to be economically advantaged. Family structure is more closely correlated with childhood poverty than parental unemployment alone. Recent data from the United States Census Bureau shows that—all things being equal—children raised by a married mother and

father are approximately three times less likely to be living in poverty than children raised by cohabiting (but not married) parents. Kreider, *Living Arrangements of Children*, Current Population Reports p. 6 (Washington, DC: U.S. Census Bureau 2008).

Finally, children reared by a married father and mother exhibit less antisocial behavior than children raised in suboptimal settings. Indeed, the studies overwhelmingly show that children living with a married father and mother are substantially less likely to cause problems at school, experiment with controlled substances, exhibit premature sexual promiscuity, or engage in violent or criminal behavior. See Painter *et al.*, *Family Structure and Youths' Outcomes: Which Correlations are Causal?*, Journal of Human Resources Vol. 35 p. 524-549 (2000).

All these important benefits of growing up with a married father and mother strongly demonstrate that Respondents acted in the best interests of the infant child.

3. Petitioners Cannot Show, Based On Available Social Science, That Respondents' Actions Were Not In The Best Interests Of The Infant Child.

The married father-mother parenting model is the normative construct upon which most comprehensive longitudinal research on childrearing has been based. Studies on the long-term outcomes for children placed with two parents of the same sex are very limited. The studies suggesting neutral or favorable results by children raised by two parents of the same sex have critical flaws such as non-longitudinal design, inadequate sample size, biased sample selection, lack of proper controls, or failure to account for confounding variables. See Lerner and Nagai, *No Basis: What the Studies Don't Tell Us About Same Sex Parenting* (Washington, DC; Marriage Law Project, Ethics and Public Policy Center 2001). Given the current body of research, *Amicus* believes that, where possible, children should be placed

with a married father and mother to help ensure their most successful upbringing. Sound public policy does not support placing children in an unproven environment when the time-tested, verified model is available. This position is rooted in the best available science.

Importantly, no study has purported to show that a household comprising two parents of the same sex is *preferable* to the time-tested model of a married mother and father. Thus, based on the available social science, Petitioners simply cannot show that Respondents' actions were not in the child's best interests.

B. Respondents Have Sought The Best Interests Of The Child By Allowing Her The Opportunity To Have Two *Legal* Parents Of The Opposite Sex.

As a matter of law, Respondents have taken the infant child out of a situation where the best she could hope for was to be adopted by *one* of her foster parents, and "upgraded" her to a situation where she is likely to be adopted by *two* parents. West Virginia adoption law provides as follows:

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

W. Va. Code § 48-22-201. Per the terms of this statute, adoption is limited to (1) married couples, (2) married persons with the consent of their spouses, or (3) single persons. West Virginia law thus precludes Petitioners from adopting the infant child as a couple; indeed, only one of them can adopt the child.

Certainly, it is in the child's best interest to have two *legal* parents rather than one. For example, if a child's only legal parent dies, that child faces the possibility of reentering the foster-care system, with all its inherent instability. In contrast, however, if that child has two legal parents, the death of one parent will not propel her into state custody once again.

III. Respondents Did Not Violate Petitioners' Constitutional Rights.

As part of their attempt to shift the focus to themselves, Petitioners contend that Respondents violated their constitutional rights. Yet, a cursory review of the governing law demonstrates that those claims lack merit.

When an individual asserts that the government has violated his or her constitutional rights, the Court must begin by determining the proper standard of review. Unless the case involves a fundamental right or a suspect classification, this Court applies rational-basis review. *See Marcus v. Holley*, 217 W. Va. 508, 523 (2005) (“[W]hen a suspect classification, such as race, or a fundamental[] constitutional right, such as speech, is involved, the [government action] must survive strict scrutiny, [A]ll other [government actions], including those which involve economic rights, are subjected to the least level of scrutiny, the traditional . . . concept that the [government action] will be upheld if it is reasonably related to the achievement of a legitimate state purpose.”) (citations and quotations omitted).

Here, Petitioners have not shown that they have a fundamental right to adopt the infant child. Indeed, they cannot make such a showing because no such right exists. Neither have Petitioners demonstrated that they are a member of a suspect classification. Thus, it is clear that rational-basis review applies to Petitioners' constitutional claims.

“A reviewing court should not overturn a [government action] under the rational basis test unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that the court may only conclude that the [government action] is irrational.” *Id.* As previously demonstrated, Respondents have acted rationally: they have sought the best interests of the child by placing her in the optimal

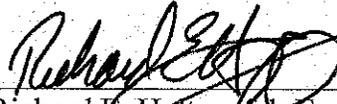
childrearing environment and giving her the opportunity to have two legal parents, both a father and a mother. Petitioners' attempts to portray Respondents' actions as anything but rational are wholly unpersuasive.

Amicus thus urges this Court to find Petitioners' constitutional arguments lacking in merit.

CONCLUSION

Based on the foregoing, Petitioners' request for a writ of prohibition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

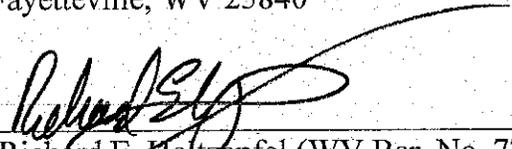
I, Rich Holtzapfel, certify that a true and exact copy of the foregoing Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* was served by regular United States mail this 20th day of January, 2009, upon the following:

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