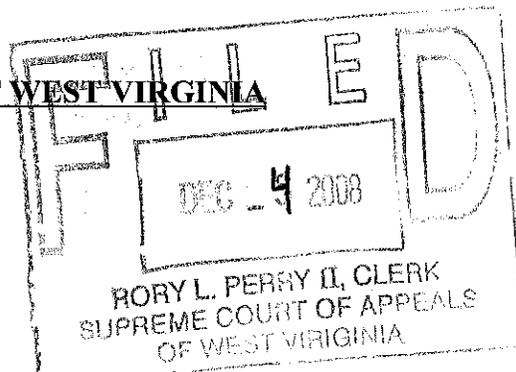


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No. \_\_\_\_\_

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

**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,  
MARTHA YEAGER WALKER, SECRETARY,  
RESPONDENTS.**

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**A MENDED PETITION FOR WRIT OF PROHIBITION  
FROM THE CIRCUIT COURT OF FAYETTE COUNTY**

---

**ANTHONY CILIBERTI, JR.  
Ciliberti Law Office, PLLC  
PO Box 621  
Fayetteville, WV 25840  
(304) 574-9111**

**West Virginia State Bar I.D. No. 7609  
*Counsel for Petitioners***

**Dated: December 4, 2008**

No. \_\_\_\_\_

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

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

**vs.**

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

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

To the Honorable Justices of the West Virginia Supreme Court of Appeals.

The Petitioners, Kathryn Kutil and Cheryl Hess, respectfully petition this Court to issue a Rule to Show Cause against Respondents, the Honorable Paul M. Blake, Jr., Chief Judge of the Twelfth Circuit, and the West Virginia Department of Health and Human Resources (DHHR), Martha Yeager Walker, Secretary, why a Writ of Prohibition should not be issued regarding the Court's Order entered on December 2, 2008 in Fayette County Juvenile Abuse and Neglect Case No. 07-JA-72 and in relation to the actions of the West Virginia Department of Health and Human Resources. Petitioners assert that the Honorable Paul M. Blake, Jr. acted outside of his discretionary authority in his Order entered on December 2, 2008 to remove the infant respondent from the home of the petitioners based upon DHHR's request to remove the child as the petitioners' home was over capacity. Petitioners also assert that this ruling is not in the best interest of the infant respondent because to transition a child of less than one year old to an unknown family within a two week period is impossible without inflicting severe emotional

trauma to the child, and is not in the best interest of the child. Petitioners further assert that the Honorable Paul M. Blake, Jr. violated the Petitioners' fundamental constitutional rights to family, privacy and equal protection under the law without due process by ordering the DHHR to remove said child from their home without hearing all of the evidence to be presented by the Petitioners, and based upon the Court's determination that the most appropriate placement for the child was in a traditional home consisting of a man and a woman. Finally, the Petitioners assert that the West Virginia Department of Health and Human Resources appears to now be more concerned with political fallout from its decision to allow children to be placed in a same sex couple's home rather than focusing on what is in the best interests of the child and as a result the DHHR has acted contrary to the best interests of the child at issue in recommending that the infant respondent be removed from the Petitioners' home.

In support of this Amended Petition for Writ of Prohibition, the Petitioners would state as follows:

1. That the Petitioners incorporate by reference the contents of their previously filed Petition for Writ of Prohibition in this matter as though set out fully herein
2. That pursuant to a hearing held on November 21, 2008, the Circuit Court entered an Order on December 2, 2008 which directed that DHHR remove the infant respondent from the home of the Petitioners as the Petitioners' home was over-capacity regarding the number of children in their home. A copy of the Court's Order entered on December 2, 2008 is attached as Exhibit A.
3. On November 21, 2008 the DHHR changed its position regarding the above referenced matter and requested that the infant respondent be removed from the home of the Petitioners to a different foster home by the end of the next week, around November 28, 2008. The reason

stated for this position was that the Petitioners were over-capacity in their home by one child and did not have the required waiver. DHHR change in position is referenced in Exhibit A, page 3. Previously, DHHR's position was that the Petitioners' home provided a loving, nurturing home with parents who loved and cared for the children residing in the home. A copy of the DHHR's prior pleading is attached as Exhibit C.

4. However, the seventh child placed in the Petitioners' home was placed by DHHR on October 31, 2008 with DHHR knowing the Petitioners home would be over capacity and with a DHHR employee assuring the Petitioners that the required waiver would be obtained to allow the Petitioners' home to exceed maximum capacity.

5. The Circuit Court appears to now include overcrowding as its basis for removal of B.T.C. from the home of the Petitioners by stating in its December 2, 2008 Order that as the Petitioners' home is over capacity and that B.T.C., out of all children in the home, should be removed.

6. However, conspicuously absent from the Court's findings are any references to what facts or issues were considered in determining that B.T.C., rather than one of the other children who had lived there for substantially less time, should be removed from the Petitioners' home because of the over-capacity issue.

7. The Circuit Court additionally reiterated its prior finding in the 12/8/2008 Order that placement of B.T.C. in a home with a married mother and father pending the adoption process was the most appropriate for the child's well-being. However, the Circuit Court failed to make any findings upon which to base such a determination. In point of fact, it appears that the Court's directive is based solely on the Court's opinion as to how children should be raised.

8. The Court made an additional finding that it would be unfair not to allow the child the option of being adopted by a traditional family. The Court failed to make any findings or

provide any logic upon which to base the preceding and again the Court appears to be rendering its decision based solely on the Court's opinion as to how children should be raised.

9. The petitioners' presented expert testimony during the November 21, 2008 hearing from a psychiatrist, Christine Cooper-Lehki, D.O.

10. Dr. Cooper-Lehki testified that the most appropriate manner to relieve the over-capacity issue in the Petitioners' home would be to remove the child who had least bonded with the Petitioners and that the most recently placed child would most likely have the least emotional bond with the Petitioners. Dr. Cooper-Lehki further testified that given that B.T.C. had resided with the Petitioners for virtually her entire life, that she would not recommend moving the infant unless there was evidence of abuse or neglect.

11. Dr. Cooper-Lehki testified that the American Psychiatric Association, the American Medical Association, and the American Association of Child Psychiatry had all adopted policy statements to the effect that sexual orientation should not be a consideration in determining whether an adult is an appropriate parent. Dr. Cooper-Lehki further stated that such policy statements were important, were generally accepted positions, and represented Dr. Cooper-Lehki further opined that it was generally well accepted in the medical community that the controversy regarding homosexual parenting was more philosophical than medical in nature.

12. Trayce Hansen, Ph.D., a licensed psychologist and the Guardian ad Litem's expert witness testified that the American Psychological Association was the largest professional organization in the United States for psychologists and that the American Psychological Association had adopted a policy statements to the effect that sexual orientation should not be a consideration in determining whether an adult is an appropriate parent. However, Dr. Hansen further testified that aforementioned policy statement was promulgated by a committee of six and did not represent all members of the A.P.A.

13. Although Dr. Hansen testified as to several studies which she believed demonstrated that being raised in a non-traditional household or homosexual household had a negative effect on child development, Dr. Hansen further acknowledged that not all same sex couples were unfit to raise children and she further acknowledged that same sex couples can raise healthy children.

14. Dr. Cooper-Lehki further testified that the overwhelming majority of research into gay or lesbian parenting indicated that sexual orientation had no bearing on the ability to parent and raise well adjusted children. Dr. Cooper-Lehki acknowledged that some studies reached contradictory conclusions, but that in her opinion such studies were typically flawed for one reason or another.

15. Dr. Cooper-Lehki further testified that the most important factors in child development was the quality of parenting provided and the parents' interaction with the children and not the number of parents, nor the gender of the parents, nor the sexual orientation of the parents.

16. Dr. Cooper-Lehki further testified that negative parenting factors affecting a child's development would be a parents' mental illness, substance abuse, lack of resources, or abuse or neglect of the child or children.

17. Dr. Cooper-Lehki further testified that bonding between a child and parent begins at birth, that B.T.C. has most likely bonded with the Petitioners' and the other children in their home as she has resided with the Petitioners for approximately eleven months.

18. Dr. Cooper-Lehki testified that sudden removal of B.T.C. from the home of the petitioners could cause serious and long term negative effects on her emotional and psychological well-being. Although B.T.C. may not have specific memories of being removed from the Petitioners' home, Dr. Cooper-Lehki testified that the removal of the child and the resulting effects could manifest later in life in the form of emotional and psychological disorders.

19. Dr. Cooper-Lehki testified that the Petitioners home which consisted of two adults, one adopted child, and six foster children was not only a "family-like setting" but is a family. Subsequent to the November 21, 2008 hearing, two sibling foster children were removed from the Petitioners' home on December 1, 2008 at the request of the Petitioners, as Petitioner Kutil was scheduled to have major surgery on December 2, 2008.

20. Jody Conner, adoption supervisor for DHHR testified that DHHR had found a home willing to adopt B.T.C., the home of the Thompsons, and that DHHR had begun the transition into that home. Ms. Conner further testified that the Thompsons indicated they were willing to adopt and immediately assume physical custody. Ms. Conner further testified that it had not yet been determined if the Thompson home best suited the needs of B.T.C.

21. Although substantial evidence was presented, the Petitioners did not finish presenting all their evidence when the Court announced it was ready to issue a ruling on physical custody. The Petitioners intended to further introduce evidence as to their parenting and evidence that the Petitioners methods and practices in terms of parenting were no different than parenting provided by heterosexual couples.

22. Kathryn Kutil was permitted to testify and was the final witness to testify. Ms. Kutil testified about visiting and feeding the infant respondent in the hospital before she came to their home, that the Petitioners have been providing for the basic and extraordinary needs of the infant respondent continually from the time she came to their home, that the infant respondent has not been left alone with any person other than the Petitioners and one of the Petitioners' mother, that the other children in the home have an emotional bond with the infant respondent and that the Petitioners are willing to adopt the infant respondent and were told by the DHHR when the infant respondent was placed with them that they would be considered as an adoptive home if she came up for adoption.

23. Ms. Kutil further testified about the two visitations that occurred between the infant respondent and the Thompson family, and Ms. Kutil indicated that the infant respondent had never been left alone with the prospective foster parents and the visits were approximately one hour long.

24. Although the Petitioners were not able to present all of their evidence as to their parenting and fitness, the Court acknowledged on the record and in its 12/2/2008 Order that no allegations had been made that the Petitioners had mistreated the child nor disputed that the Petitioners were good to the children in their home.

25. The Circuit Court Ordered the DHHR to move the infant respondent to the home of the Thompsons, foster parents she previously visited, by noon the next day, November 22, 2008.

26. DHHR complied with the Court's order and the DHHR adoption worker, Terry Farley, directed the Petitioners to take the infant respondent and her belongings to the Thompson home the next day and Ms. Farley accompanied them.

27. The Petitioners were informed by the Thompons that the infant respondent cried heavily after realizing the Petitioners had left.

28. The Petitioners filed a Motion for Emergency Stay On November 24, 2008 seeking an Order from this Court staying the ruling of the Circuit Court pending the filing of this Petition.

29. On November 26, 2008, the Thompsons contacted DHHR and advised that they had reconsidered adopting B.T.C. and decided that they were no longer interested in following through with the adoption. In light of the preceding, DHHR moved B.T.C. to a new foster home in Greenbrier County later in the day.

30. On November 26, 2008, this Court granted the Petitioners' Motion for Emergency Stay and B.T.C. was returned to the home of the Petitioners later that same day.

31. As the parental rights of the infant respondent's biological parents have been terminated, and as adoption has been selected as the permanency plan, one of the Petitioners should be considered a prospective adoptive parent and should have priority since the child has resided virtually her entire life with both Petitioners and their family and an emotional bond has formed between the infant respondent, the Petitioners and the Petitioner's family. It is absolutely nonsensical for DHHR or the Circuit Court to remove the infant respondent from the only home she has ever known simply because the Court believes traditional families are the best environment for a child and as DHHR now appears to be attempting to avoid scrutiny by advocating for removal of the child.

32. By removing the infant respondent from the home of the Petitioners on the basis of their sexual orientation and without hearing all evidence, after an expectation has been created by the DHHR that Kathryn Kutil would be considered as an adoptive parent, and by the Court ignoring the psychological parent status of the Petitioners and referring to them merely as a "temporary foster care home" when the child has lived there almost a year and her entire life, the Court has violated the Petitioner's rights to due process and is not acting in the best interest of the child.

33. The Court has additionally violated the Petitioners' fundamental constitutional rights to family, privacy, and equal protection under the law without due process by its December 2, 2008 Order, as the Petitioners have been effectively terminated as an "appropriate placement" in the Court's view based solely on the fact that they are a same sex couple and not a "traditional couple" consisting of a man and a woman as defined by the Court. Furthermore, the decision by the Court to remove the infant respondent from the home of the Petitioners was based solely on their sexual orientation, was made arbitrarily and capriciously, and although a partial evidentiary hearing was held on November 21, 2008, it should be clear from the Court's Order of November 12, 2008 that the decision as to physical custody had been made. Furthermore, the manner in

which the Court Ordered removal, by noon the next day, is in direct conflict with the testimony of a medical doctor and expert witness and the representations of DHHR as to when the transfer could be finalized, and should be considered prima facie evidence that the Court is not acting in the best interest of the infant respondent.

34. This Court has repeatedly indicated that “the best interest of the children is the polar star in the resolution of abuse and neglect cases.” *In re Tiffany P.*, 600 S.E.2d 334, 215, W.Va. 622 (2004).

35. This Court has held that “(a) psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.” *Syl. Point 3, In re Clifford K.*, 619 S.E.2d 138, 217, W.Va. 625 (2005).

36. At first blush, the requirement from the preceding holding as to the relationship beginning with the consent and encouragement of the child's legal parent or guardian would appear to disqualify the Petitioners as psychological parents of B.T.C. However, B.T.C. was in the legal custody of DHHR at the time she was placed in the home of the Petitioners making DHHR the legal guardian of B.T.C. at the time she was placed in the petitioners home. Furthermore, the preceding requirement appears to exist to protect the rights and interests of the natural parents and to prevent one from claiming psychological parent status against a natural parent where the psychological parent relationship was initiated against the will of the natural parent or parents. In the present case, B.T.C. no longer has parents as the parental rights of both

her parents have been terminated. As there are no longer natural parents whose rights need protected, the Petitioners should be afforded the status of psychological parents.

37. In issuing its ruling, the Court has completely disregarded the Petitioners' status as psychological parents.

38. This Court has held that "(i)t is a traumatic experience for children to undergo sudden and dramatic changes in their permanent custodians. Lower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved. Further, such gradual transition periods should be developed in a manner intended to foster the emotional adjustment of the children to this change and to maintain as much stability as possible in their lives." Syl. Pt. 8 *In re Jonathan G.* 198 W.Va. 716, 482 S.E.2d 893 (1996). And yet, the lower Court in issuing its directive ignored the evidence presented and the input from the DHHR as to an appropriate transition time frame and/or manner of transition.

39. Further, this Court has also held that "(a) child has a right to continued association with individuals with whom he has formed a close emotional bond, *including foster parents*, (emphasis added) provided that a determination is made that such continued contact is in the best interests of the child." Syl. Pt. 11 *In re Jonathan G.* 198 W.Va. 716, 482 S.E.2d 893 (1996). And again, the Court's ruling was in direct contradiction to the expert testimony and did not consider whether continued contact between the infant respondent and foster parents would be in the best interests of the infant respondent.

40. "The standard of review for seeking a Writ of Prohibition is *de novo*." Syllabus Point 1, *Staten v. Dean*, 195 W.Va. 57, 467 S.E.2d 576 (1995); Syllabus Point 1, *O'Daniels v. City of Charleston*, 200 W.Va. 711, 490 S.E.2d 800 (1997).

41. The W. Va. Code § 53-1-1 states: “The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy or, having such jurisdiction, exceeds its legitimate powers.”

42. “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: 1.) Whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; 2.) Whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; 3.) Whether the lower tribunal’s order is clearly erroneous as a matter of law; 4.) Whether the lower tribunal’s order is an often repeated error of law; 5.) Whether the lower tribunal’s order raises new and important problems or issues of first impression. Although all five factors need not be satisfied, it is clear that the third factor... should be given substantial weight.” Syllabus Point 4, *State ex. rel Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

43. In this case, at least four factors are present for a writ to be issued. The Petitioners and the infant respondent have no other adequate relief such as a direct appeal as the case has not reached its ultimate conclusion and therefore is not ripe for direct appeal. The Petitioners and the infant respondent will both be damaged and prejudiced in a way not correctable on appeal as the ordered separation would cause and has caused severe damage emotionally and psychologically. Further, the lower Court’s ruling is clearly erroneous as a matter of law because the Court effectively ruled on the Petitioner’s fitness to be foster parents, and potentially adoptive parents, without hearing any evidence initially, then after a second hearing on November 21, 2008 where the Petitioners’ evidence was cut short, thereby depriving the Petitioners of their fundamental rights to family, privacy and equal protection without affording them meaningful due process. The lower Court’s ruling is also clearly erroneous as a matter of

law because the Court has disregarded the best interests of the infant child, the status of the Petitioners as psychological parents, and the Petitioners' right to continue to associate with a child with whom they have established a strong emotional bond. The lower Court's ruling also raises new and important issues of first impression including, but not limited to, discrimination based solely on sexual orientation and whether it is in the best interest of the infant respondent to be removed from the only home she has known based solely on the "same sex" or "non-traditional" nature of the home without any balancing of the evidence.

WHEREFORE, the Petitioners respectfully pray that this Court issue a Rule to Show Cause against the Respondent, the Hon. Paul M. Blake, Jr., as to why a Writ of Prohibition should not be issued prohibiting the Judge Blake ordering the West Virginia Department of Health and Human Resources to remove the infant respondent from the home of the Petitioners based solely on their status as a non-traditional household. The Petitioners further request of that this Court issue a Rule to Show Cause against the Respondent, West Virginia of Health and Human Resources, Marth Yeager Walker, Secretary, as to why a Writ of Prohibition should not be issued prohibiting DHHR from removing B.T.C. from the Petitioners' home absent any concerns for the child's health, safety, or welfare and directing that the Petitioner, Kathryn Kutil, and her household be considered the primary candidate as an adoptive parent. The Petitioners further seek any and all other relief this Honorable Court deems appropriate.

**RESPECTFULLY SUBMITTED**  
**KATHRYN KUTIL and CHERYL HESS,**  
**By Counsel**

  
\_\_\_\_\_  
**Anthony Ciliberti, Jr. W.Va. State Bar No. 7609**  
**Ciliberti Law Office, P.L.L.C.**  
**P.O. Box 621**  
**Fayetteville, WV 25840**  
**304-574-9111**

No. \_\_\_\_\_

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

**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, and,  
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,  
MARTHA YEAGER WALKER, SECRETARY,  
RESPONDENTS.**

**CERTIFICATE OF SERVICE**

I, Anthony Ciliberti, Jr., certify that on December 4, 2008, I served a true and exact copy of the foregoing *Petition for Writ of Prohibition* by hand delivery, or by FAX and by U.S. Mail, first-class, to those listed below at the following addresses:

Hon. Paul M. Blake, Jr.  
Chief Judge  
2<sup>nd</sup> Floor Fay. County  
Courthouse Annex  
Fayetteville, WV 25840

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

Thomas K. Fast  
Guardian ad Litem  
201 North Court St.  
Fayetteville, WV 25840

Hand Delivery

FAX: 304-425-6766  
U.S. Mail

Hand Delivery



**Anthony Ciliberti, Jr. W.Va. State Bar No. 7609**

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

IN THE INTEREST OF:  
Baby Girl Cales a/k/a Brailey TiCasey Cales

Juvenile Abuse and Neglect Case No.: 07-JA-72  
Paul M. Blake, Jr., Judge

Adult Respondent:  
Meggan Albaugh a/k/a Meggan Cales,  
Unknown Father.

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ORDER

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On the 21<sup>st</sup> day of November 2008, came the West Virginia Department of Health and Human Resources, ("DHHR"), by counsel, Angela Ash, *Assistant Attorney General*, *WVDHHR Legal Division*; the infant respondent, not in person but by her *guardian ad litem*, Thomas K. Fast; and the intervenors, Kathryn Kutil and Cheryl Hess, appearing in person and by their counsel, Anthony Ciliberti, Jr., all for the purpose of conducting a hearing regarding the proposed *Permanency Plan* and the guardian ad litem's pending motion for removal of the child from the home of the intervenors. Thomas J. Steele, *Assistant Prosecuting Attorney*, who previously appeared on behalf of the WVDHHR, was also present.

Whereupon, Thomas J. Steele, *Assistant Prosecuting Attorney*, informed the Court that he received a letter from the Attorney General's office stating that his previously filed responsive motion to intervenors' motion for stay/writ of prohibition was inappropriate because he did not represent the WVDHHR in this matter, rather, the Attorney General's office represented the WVDHHR. Mr. Steele informed the Court that the West Virginia Supreme Court of Appeals requested that he file a response to the intervenors' motion, that he attempted to contact Skip Jennings, *WVDHHR*, and received no response. He then filed a response believing it to be the

FAYETTE COUNTY  
CIRCUIT CLERK  
2008 DEC -21 9:08 AM  
DANIEL E. WRIGHT

most proper course of action.<sup>1</sup> Mr. Steele informed the Court that after receipt of the letter from the Attorney General's Office, he attempted several times to speak with the Attorney General's office and the WVDHHR, still receiving no response. Therefore, Mr. Steele filed a Rule 49(6)(10)(a) request for the Prosecuting Attorney's Institute to meet regarding his position in this matter; such a meeting could not be scheduled prior to this hearing but will be scheduled before the next hearing. For these reasons, Mr. Steele explained that Angela Ash would appear on behalf of the WVDHHR.

Angela Ash then addressed the Court regarding Mr. Steele's statements. Ms. Ash stated that she spoke with Mr. Steele shortly before he filed his response and after he filed the response. Ms. Ash asserted that Mr. Steele could not file a response because the WVDHHR did not have a position upon such motion for stay/writ of prohibition. Ms. Ash asserted that the DHHR did not have a response until 4:55 p.m. on the date Mr. Steele's response was filed.

Whereupon, the Court then informed the parties that on this date, prior to the commencement of the hearing, it received and reviewed a facsimile from Angela Ash, counsel for the DHHR, stating the DHHR's position that infant Baby Girl Cales should be removed from the intervenors' home and placed in another foster care home. In such filing, the DHHR took the position that Baby Girl Cales needed to be removed from the Kutil-Hess household because the household is over capacity and the DHHR had found a potential adoptive home for Baby Girl Cales, (the home of Amy and Roger Thompson.) The Court stated that this position was

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<sup>1</sup>The Court notes that, while the Attorney General's Office has made appearances from time to time in this matter, no representative from the Attorney General's Office appeared in court for the hearing in this matter held on November 6, 2008.

significantly different than the factual circumstances presented to this Court by Heather Hunter, (now Heather Lucas), Fayette County DHHR child protective service worker, during and prior to the last hearing held in this matter on November 6, 2008.

Whereupon, and as is more fully set forth on the record, the Court then heard proffers and argument from counsel for the DHHR, the guardian ad litem, and counsel for the intervenors. The Court also heard from a number of witnesses, including: Ms. Jody Conner, Mercer County DHHR, Region Four, Adoption Supervisor; Amy Hunt, DHHR Adoption Unit, Region Four, Home Finding Supervisor; Heather Hunter/Lucas, Fayette County DHHR child protective service worker; Sharon Hess, intervenor; Dr. Tracey Hansen, PhD, the guardian ad litem's expert witness; Dr. Christine Cooper-Lehki, WVU/UHA Assistant Professor of Clinical Psychiatry, the intervenors' expert witness; and, Ms. Kathryn Kutil, intervenor. (Witness testimony and the arguments and proffers made by counsel are summarized in following pages.)

Angela Ash, counsel for the DHHR, first addressed the Court. Regarding the DHHR's present position that Baby Girl Cales should be removed from the intervenors' home, Ms. Ash informed the Court that since entry of the November 12, 2008 Order, the DHHR found that the Kutil-Hess home has seven children, (one over capacity), and that one of the children must be moved. Counsel for the DHHR informed the Court that no waiver was available except for siblings. Counsel for the DHHR informed the Court that the DHHR found a potential adoptive home for Baby Girl Cales, (that of Amy and Roger Thompson), that Baby Girl Cales had visited the home of the potential adoptive parents, and that the transfer to the potential adoptive family could be finalized by next week.

Counsel for the DHHR opposed the request contained in the guardian ad litem's motion that the Court issue a state wide injunction against DHHR prohibiting the placement of children in same sex households. Counsel for the DHHR then stated that it was premature for the Heather Hunter/Lucas to state that the DHHR recommendation was adoption by the intervenors and that it was up to the Court to accept a *Permanency Plan*. Counsel for the DHHR asserted that the only issue presently before the Court was the intervenors' argument that the child should not be removed.

Thomas Fast, guardian ad litem, next addressed the Court. Mr. Fast informed the Court that during the last MDT there was unequivocal evidence that the DHHR would recommend the intervenors' home as an appropriate adoptive placement. Mr. Fast stated that, despite the statements currently made by the DHHR, the *Permanency Plan* presented to the Court during the last hearing remains unchanged.

Regarding his pending motion, Mr. Fast asserted that the motion consisted of two parts, the first requesting removal from the intervenors' home, and the second requesting the aforementioned statewide injunction. Regarding his request for removal and the DHHR's current recommendation that Baby Girl Cales be removed from the intervenors' home, Mr. Fast stated that he did not receive information of the DHHR's change in position until shortly before the hearing. Mr. Fast pointed out that the DHHR's change in position was not due to the reasons set forth in his motion, but rather because of the intervenors' household was over capacity. Mr. Fast stated that he believed that the DHHR's change in position was a tactical one to avoid the issues raised by his motion.

Regarding his request for a statewide injunction, Mr. Fast argued that the Court had jurisdiction to consider a statewide injunction, and to hear evidence and issue rulings regarding whether or not placement in a homosexual home was in the best interests of children and whether DHHR policy of placing children in homosexual households such as the intervenors' violates children's constitutional rights. Mr. Fast argued that the Court could issue a ruling, that such a ruling may then be appealed, and that the West Virginia Supreme Court of Appeals could then issue a statewide injunction.

Mr. Fast then informed the Court that both he and counsel for the intervenors brought experts to testify regarding this matter. Mr. Fast requested that the Court hear testimony and make rulings regarding removal of the child and asserted that such rulings could be based upon overcrowding or could be because of the placement in a homosexual home.

Mr. Ciliberti, counsel for the intervenors, next addressed the Court. Mr. Ciliberti agreed with Mr. Fast that the DHHR's change in position regarding removal was an effort to avoid the issue raised by Mr. Fast's motion. Mr. Ciliberti further stated that the DHHR's actions during the past week and throughout the case were despicable, pointing out that the DHHR placed the child in the intervenors' home knowing the intervenors' were a same-sex couple and that their household was crowded, that an MDT was not held with regard to the DHHR's current position, and that when he inquired as to who made the decision to change positions, the DHHR and Ms. Ash refused to tell him.

Mr. Ciliberti requested that the Court allow him to present his expert Dr. Cooper-Lehki's testimony. Mr. Ciliberti informed the Court that he expected Dr. Cooper-Lehki to testify that a

child the age of Baby Girl Cales could bond to caretakers, that it would be emotionally hurtful to remove the child in a short period of time; that removal should take place over a six to eight month period at least; that there is no parenting difference between lesbian parenting and mother-father parenting; that it is the quality of the parenting not the sexual orientation of the parents that mattered; that, absent a showing of maltreatment, that the child should remain in the custody of the intervenors; and, that the child who lived in the intervenors' home the least amount of time should be removed, not Baby Girl Cales. Mr. Ciliberti also asserted that, prior to its change of position, the DHHR knew the intervenors were over capacity and had promised to obtain a waiver for them but did not.

The Court then addressed the parties. The Court informed the parties that it must review the *Permanency Plan* and may accept, reject, or modify the *Permanency Plan* based upon what the Court finds to be in the child's best interest. The Court stated that the issues raised concerning the fitness of the intervenors' home is corollary to that determination, but in many ways was a side issue only. The Court stated that, as it appeared that the DHHR had modified the earlier submitted *Permanency Plan*, the most logical way to proceed would be to hear the DHHR's testimony/evidence regarding the *Permanency Plan* and then proceed to the other issues raised by the parties. The Court then requested that the DHHR inform the Court, through testimony, of the substance of the current *Permanency Plan*.

***Testimony of Ms. Jody Conner, Mercer County DHHR, Region Four, Adoption Supervisor***

The DHHR the called Ms. Jody Conner, Mercer County DHHR, Region Four, Adoption Supervisor. Ms. Conner was questioned by Ms. Ash, Mr. Fast, and Mr. Ciliberti, and the Court.

Ms. Conner testified that this matter was first brought to her attention on October 28, 2008 when she was contacted by telephone to participate in a multi-disciplinary team meeting, (“MDT.”)<sup>2</sup> Ms. Conner testified that the *Permanency Plan* at that time was for Baby Girl Cales to be placed in an adoptive home, but not a specific home. Ms. Conner denied ever seeing the *Permanency Plan* and testified that she only asked that the *Permanency Plan* reflect a recommendation of transition to an adoptive home.

Ms. Conner could not recall if during the last MDT she was asked about the guardian ad litem’s role in the adoption process but testified that she told the guardian ad litem that an MDT would be held regarding the issue and that he could express his opinion at that time. Ms. Conner denied stating that the DHHR would not transfer the child out of the intervenors’ home, denied recommending that the Kutil-Hess home be the adoptive placement, and denied stating that the Kutil-Hess home would be the recommended placement for Baby Girl Cales. Ms. Conner also testified that she did not personally approve adoptive homes, but rather the Adoption Unit approves adoptive homes.

Regarding the present *Permanency Plan*, Ms. Conner testified that the *Permanency Plan* is now *adoption in a home that will best address and meet the child’s needs and best interests*. Ms. Conner testified that the DHHR found a potential adoptive home for Baby Girl Cales and has begun the transition to that home, that Baby Girl Cales visited the home twice, that the prospective adoptive parents have expressed willingness to adopt Baby Girl Cales, and that the family is ready to take custody of Baby Girl Cales at any time. Ms. Conner testified that, as it

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<sup>2</sup>Although she failed to appear, Ms. Conner testified that she was aware that a hearing was held on November 6, 2008 regarding this matter.

was very early in the case, the DHHR had not yet determined if the potential adoptive home would be the home that best suited Baby Girl Cales' needs. Ms. Conner testified that the DHHR would place the child in the potential adoptive family with a six month trial period and that the child could be removed during that time.

Mr. Ciliberti asked Ms. Conner if the DHHR considered the psychological well being of the child when making the time frame for transition of the child. Ms. Conner testified that the DHHR did not consult a psychologist but that the Court's *Order* required a two week transitional period and **that DHHR policy provided for a two to three week transitional period.**

The Court then asked Ms. Conner if the DHHR's decision regarding which home should adopt was fixed or still open for discussion. Ms. Conner stated that while the DHHR had located a home willing to adopt Baby Girl Cales, the DHHR would still consider other families if the MDT would request them to do so, however, the DHHR did not want to delay permanency any longer than necessary, Ms. Conner also testified that she did not know what percentage of adoptions were single person adoptions.

Ms. Ash then addressed the Court. Ms. Ash informed that Court that she had now presented the extent of the DHHR's evidence with regard to the *Permanency Plan*. The Court asked Ms. Ash for information about DHHR Adoption Unit policies. Ms. Ash informed the court that Ms. Amy Hunt, who was present, could testify as to the policies of the Adoption Unit. The Court then stated that the DHHR should consider what placement is in the child's best interest and inquired how the DHHR did so; Ms. Ash responded that the DHHR consulted lists of who is and who is not willing to adopt, but that adoptions can and do fail and that the process is

unpredictable.

***Testimony of Amy Hunt, DHHR Adoption Unit, Region Four, Home Finding Supervisor***

Ms. Ash then called Amy Hunt, DHHR Adoption Unit, Region Four, Home Finding Supervisor. Ms. Hunt was questioned by Ms. Ash and Mr. Fast. Mr. Ciliberti declined to question this witness.

Ms. Hunt testified regarding the criteria used by the DHHR Adoption Unit to locate a prospective adoptive home. Ms. Hunt testified that said criteria includes completion of a 30 hour PRIDE training course by prospective adoptive parents and completion of a home study with background, financial, and social history checks. Ms. Hunt testified that anyone could apply to be a foster parent if of age, (21-65), and that the DHHR automatically denied those convicted of either a felony or two misdemeanors, as well as those with a history of substantiated CPS or APS allegations. Ms. Hunt testified that the only way the DHHR makes decisions regarding the best home is through interviews.

Ms. Hunt testified that DHHR policy changed in about 2004 and that DHHR policy now states that adoptive couples do not have to be married<sup>3</sup> and that a single person can adopt. Ms. Hunt testified that in screening prospective adoptive parents the DHHR does not consider the sexual orientation of the families, that the DHHR does not discriminate as long as the families are stable, and that this is true for both foster and adoptive parents. Ms. Hunt testified that the DHHR does not take into account the effect the structure of a family has on a child or the long

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<sup>3</sup>This is contrary to W.Va. Code §48-22-201 which states: "Any person not married or any person, with his or her spouse's consent, or any husband and wife jointly, may petition a circuit court of the county wherein such person or persons reside for a decree of adoption of any minor child or person who may be adopted by the petitioner or petitioners." Thus, while single persons may petition for adoption, an unmarried couple may not petition for adoption as a couple.

term effect of placement in a homosexual home; that the DHHR gives no consideration to what effect, over the years, placement in a single parent or a homosexual home, whether foster or adoptive, may have on a child. Ms. Hunt was not aware of any research or data used for formulating the DHHR's placement practices policy. Ms. Hunt testified that the DHHR just finds a home for a child in need, and that foster parents are thereafter responsible for caring for the child.

***Testimony of Heather Hunter/Lucas, DHHR Child Protective Service Worker***

Mr. Fast then called Heather Hunter, (now Heather Lucas), Fayette County DHHR child protective service worker. Ms. Hunter/Lucas was questioned by Mr. Fast and Mr. Ciliberti.

Ms. Hunter/Lucas testified that she picked up Baby Girl Cales from the hospital where she was born and took her to the intervenors' home. Ms. Hunter/Lucas testified that she suggested the Kutil-Hess home as a temporary placement for the child and that the child was placed there.

Ms. Hunter/Lucas testified that when placing children she does not give regard to sexual orientation and that she was not aware whether or not the DHHR has a policy regarding the orientation of the parents or of any data used by the DHHR with regard to the long term effect of placement in a homosexual home, or with regard to the long term effect the structure of a family, (i.e. married, homosexual couple, etc.), has on a child. Ms. Hunter/Lucas was unaware of any long term effects of such placement. Ms. Hunter/Lucas testified that foster parents are dealt with on an individual basis and not based upon their orientation or whether they are single or married. Ms. Hunter/Lucas testified that the provision of appropriate feeding, medical treatment,

discipline, bedtimes, education, extracurricular activities was considered by the DHHR. Ms. Hunter/Lucas viewed these issues as more important than the sexual orientation of the parents.

***Testimony of Ms. Sharon Hess, Intervenor***

Mr. Fast then called Sharon Hess, intervenor. Ms. Hess testified that she lives with Ms. Kutil, and that they are DHHR approved foster parents of seven children. The Kutil-Hess home has four bedrooms. Baby Girl Cales sleeps in crib in Ms. Kutil and Ms. Hess' room, as is allowed by DHHR policy until age two. Ms. Kutil and Ms. Hess share a bed. Ms. Hess testified that she and Ms. Kutil are not married under the laws of any U.S. state.

***Testimony of Dr. Tracey Hansen, PhD***

Mr. Fast then called his expert witness, Dr. Tracey Hansen, PhD. After initial questioning by both Mr. Fast and Mr. Ciliberti, the Court ruled that Dr. Hansen was qualified to testify as an expert witness in field of child psychology and development, over the objection of Mr. Ciliberti. Dr. Hansen was questioned at length by both Mr. Fast and Mr. Ciliberti.

Mr. Fast had asked Dr. Hansen to render an opinion on the best, ideal environment to raise a child. Dr. Hansen offered the following opinions to the Court: (1) the optimal family structure is the traditional mother-father stable home with married parents; (2) placement in a homosexual home effects/causes differences in the development of children; (3) the optimal environment is with married mother-father family; (4) children from other family structures are negatively impacted; (5) the absence of a father has a significant negative impact; (6) fathers contribute in a unique way to a child's development; (7) raising children in a homosexual home is not the optimum or best choice when other options are available; and, (8) while the quality of

parenting is important, the relationship between the adults in the household, regardless of orientation, is also important. Dr. Hansen also testified that she was not of the opinion that all same sex couples are unfit and stated that same sex couples can raise healthy children.

Dr. Hansen recognized that there are studies that reach conclusions opposite of her opinions and of her cited studies, but stated that such studies are sparse, have a limited sample size, and have a flawed methodology. Dr. Hansen testified that the best studies available state that there are differences and negative outcomes resulting from homosexual parenting and which state that homosexual parenting effects children in a long term manner. Dr. Hansen based her opinions upon review of a number of professional articles/studies and research from both the U.S. and other nations and discussed during her testimony specific studies that assisted her in forming her opinion.

During her testimony, Dr. Hansen also discussed the American Psychiatry Association's policy statement that same sex parenting should not be an issue. Dr. Hansen stated that the A.P.A. statement has nothing to do with the broad feelings of A.P.A. members but rather was a statement issued by six or seven members who were homosexual parenting activists; that the policy statement does not necessarily reflect the opinion of the A.P.A. members; and, that the policy statement is opposite of studies, scarce as they may be, that overwhelming support mother-father home as the best environment for children.

*Testimony of Dr. Christine Cooper-Lehki*

Mr. Ciliberti then called his expert witness, Dr. Christine Cooper-Lehki, WVU/UHA Assistant Professor of Clinical Psychiatry. After initial questioning by both Mr. Ciliberti and Mr.

Fast, the Court ruled that Dr. Cooper Lehki was qualified to testify as an expert witness in field of general and child psychiatry, with no objection from Mr. Fast. Mr. Ciliberti and Mr. Fast questioned Dr. Cooper-Lehki at length.

Mr. Ciliberti questioned Dr. Cooper-Lehki regarding Dr. Hansen's testimony and opinion that homosexual parenting negatively impacted children. Dr. Cooper-Lehki testified that, based on her review of literature, she did not agree with Dr. Hansen's opinion that being raised by homosexual parents leads to sexual acting out or increased instances of homosexual activity, etc. Dr. Cooper-Lehki agreed that it would be ideal to have a married mother and father with no conflict to adopt a child. Dr. Cooper-Lehki went on to state that studies which reference traditional homes do not really refer to Baby Girl Cales' situation because Baby Girl Cales can not be considered "traditional" because she was born to a drug addicted, unmarried mother who will not be permitted contact with her.

When questioned by Mr. Fast as to whether placement in a good mother-father traditional adoptive home would be at least the second best circumstance, (second to being in a home with two biological parents who wanted and loved her), Dr. Cooper-Lehki opined that this might have been true if Baby Girl Cales had been placed in such a home immediately, but that it could not happen now. Dr. Cooper-Lehki did agree that a father's involvement in a child's life was important and that a male influence is important and can provide things females cannot, however, she also stated that while it is good to have a positive adult male role model, that role model does not have to be a father.

Dr. Cooper Lehki offered the following additional opinions to the Court: (1) sexual

orientation was not one of the most influential or negative factors in a child's development; (2) the most important positive factor is the quality of parenting and the parents' interaction with the children; (3) the most negative factor would be a parents' mental illness, substance abuse, lack of finances, prior CPS involvement; (4) sexual orientation was not one of the negative factors, (5) the factors cited are reliable and do not have anything to do with sexual orientation; (6) it is widely accepted that, psychologically and medically speaking, that there is no difference between homosexual and heterosexual parents; (7) generally, it is well accepted in the medical community that the controversy concerning homosexual parenting is more philosophical than medical in nature; (8) most people who are gay did not have gay parents; (9) literature does not support the claim that homosexual parenting leads to homosexual activity; (10) bonding starts at birth; (11) at Baby Girl Cales eleven months, significant developmental milestones have already passed, (e.g. establishment of trust, security, etc.); (12) the fact that Baby Girl Cales is only eleven months old does not mean she has not bonded with the care givers, despite the fact that she cannot express herself in words; (13) with regard to the other children in the intervenors' home, there is a probable bond with Baby Girl Cales; (14) sudden removal from the home could cause a number of negative impacts physically and cognitively, and would be very disruptive; (15) Baby Girl Cales will not have any clear memories but could have emotional problems due to being overwhelmed by the removal; (16) with regard to the appropriate transfer of the child, Dr. Cooper-Lehki would not recommend moving the child quickly and would not recommend removal without evidence of abuse and neglect, (Dr. Cooper-Lehki stated specifically that she had considered the intervenors' sexual orientation in making this statement); and, (17) if there is

a need to remove a child from the home due to overcrowding, the child with the least bonding should be removed and that this is usually the most recently placed child.

Dr. Cooper-Lehki testified that she based her opinions upon review a number of professional articles and research, many of which were published in professional journals/peer review journals. Dr. Cooper-Lehki acknowledged that there are studies that find in an opposite way as she does, but stated that such studies were in the minority, and further stated that the studies cited by Dr. Hansen were small, methodologically flawed, and tended to be biased. While Dr. Cooper-Lehki did testify that children do thrive best in mother-father married environments, she disagreed with studies whose findings are negative with regard to homosexual parenting. Dr. Cooper-Lehki testified that the studies finding a negative impact of homosexual parenting did not typically properly use control groups; that the studies she reviewed that accept homosexual parenting appear to be more scientifically sound; that one of the studies cited by Dr. Hansen actually stated that homosexual parenting is not negative; and, that a different study cited by Dr. Hansen had an insufficient sample group and that she believed the study was biased.

Dr. Cooper-Lehki also discussed the American Psychiatry Association's policy/position statement that same sex parenting should not be an issue. Dr. Copper-Lehki stated that the A.P.A. policy/position statement is the same as the policy/position statement of the American Association of Child Psychiatry and the American Medical Association. Dr. Cooper-Lehki testified policy/position statements of these organizations are important, and must be a generally accepted position, a representative view of the organization, (contrary to Dr. Hansen's testimony.)

The Court then addressed the parties, stating that, while it was trying to be fair and give everyone time to be heard, this was not an adoption proceeding. The Court informed the parties that it was of the opinion that it was not proper to decide at this time *who* should adopt, but rather *whether to approve Permanency Plan* and where to place Baby Girl Cales while case proceeds to adoption. The Court informed the parties that the expert testimony heard thus far was probably most relevant to the actual adoption selection procedures rather than to the appropriateness of the *Permanency Plan* in this matter.

The Court then stated that it understood that Mr. Fast and Mr. Ciliberti believed the other issues should be addressed now and asked the parties what other evidence they would like to present. Ms. Ash replied that she had no further evidence. Mr. Fast replied that he would like to recall Dr. Hansen for the purpose of admitting her *curriculum vitae* into evidence. The Court asked Mr. Ciliberti if he had any objection to admission of Dr. Hansen's *curriculum vitae*, he replied that he did not and the *curriculum vitae* was admitted without further testimony from Dr. Hansen.

Mr. Ciliberti stated that he would like to put on the testimony of four additional witnesses and his clients. Mr. Ciliberti informed the court that the four witnesses were individuals who observed the Kutil-Hess home and would be considered character witnesses. The Court stated that no one alleged that the intervenors mistreated the child or disputed the fact that they were good to the children, and in light of those facts character testimony may not be relevant. The Court stated that if it believed the intervenors to be poor parents, it would not have allowed the child to be placed in the home at all. Mr. Ciliberti claimed such testimony was relevant to rebut

Mr. Fast's assertions.

***Testimony of Ms. Kathryn Kutil, Intervenor***

Mr. Ciliberti then called Mr. Kathryn Kutil, intervenor. Ms. Kutil was questioned by Mr. Ciliberti and by Mr. Fast.

During her testimony, Ms. Kutil testified that she is in an intimate relationship with Ms Hess. Ms. Kutil testified that the children have never asked her about their relationship, but that if they asked she would tell them that they cared about each other. Ms. Kutil testified that the children only see that they care about each other and that they are not overly affectionate in front of the children.

Ms. Kutil testified that she and Ms. Hess were a DHHR approved foster and adoptive home, and that they went through an extensive process to qualify as such. Ms. Kutil testified that she and Ms. Hess have served as a foster family in Fayette County for two years. Ms. Kutil testified that the DHHR told her it was rare to be permitted to adopt a child without being a foster family. Ms. Kutil testified that the DHHR had placed children in their home that were later returned to their parents. Ms. Kutil testified that the longest a foster child had stayed in their home was approximately 18 months. At present, Ms. Kutil's adopted twelve-year old girl and six foster children reside in the Kutil-Hess home. Mr. Kutil also testified that they would make sure the children had proper male role models, if such were needed.

Ms. Kutil testified that she had a close relationship with all of the children. Ms. Kutil testified that Baby Girl Cales was the center of their household. Ms. Kutil testified that Baby Girl Cales needed a lot of attention when she first came home due to being born addicted to

drugs. Ms. Kutil testified that she and/or Ms. Hess took Baby Girl Cales to all of her medical appointments and, prior to the biological mother's termination of parental rights, attempted to facilitate visitation between Baby Girl Cales and the biological mother.

Ms. Kutil testified that an emotional bond with Baby Girl Cales does exist. Ms. Kutil recalled feeding Baby Girl Cales in the hospital and testified that Heather Hunter/Lucas told her to bond with the child then as she would be placed in their home. Ms. Kutil testified that the other children have also bonded with Baby Girl Cales. Ms. Kutil testified that Baby Girl Cales considers their family as her family and knows no one else.

Ms. Kutil testified that Mr. Fast, guardian ad litem, only visited their home on one occasion for a total of about seven minutes, that throughout his visit he seemed very uncomfortable, that he declined to sit and talk when asked, that he declined to hold Baby Girl Cales, that he left after she showed him the house, and that he seemed to have already made up his mind at the time of the visit.

Counsel then presented argument to the Court with regard to the testimony produced during the hearing and the appropriateness of the *Permanency Plan*.

Ms. Ash argued that the DHHR *Permanency Plan* submitted to the Court during the prior hearing stated prematurely who should adopt the child. Ms. Ash asserted that the *Permanency Plan* is transition to the DHHR Adoption Unit for an adoption recommendation, and, hopefully, a finalized adoption within six months. Ms. Ash stated that the DHHR has attempted to comply with the Court's prior *Order* and that the child could be placed in the Thompson home within a week.

Guardian ad litem Mr. Fast stated that his position remains the same. Mr. Fast stated that although both experts were competent, his expert Dr. Hansen based her opinion on specific studies/articles while Mr. Ciliberti's expert Dr. Cooper-Lehki based her opinion mostly on generalities. Mr. Fast reviewed his expert's opinion and testimony regarding the negative impact of homosexual parenting. Mr. Fast pointed out that Dr. Cooper-Lehki did not mention that studies show that a father in the home is critical to a child. Mr. Fast also pointed out that Dr. Cooper-Lehki is a psychiatrist while his expert is a psychologist, and that the approach of those distinct fields differed.

Mr. Fast reiterated that his position is that it is not in the best interest of a child, short or long term, to be placed in a home without a co-habiting father, and that it is in the best interest of Baby Girl Cales and any other child in similar circumstances to be placed in an adoptive home with a married mother and a father. Mr. Fast asserts that the State of West Virginia must follow the law and do what is in the best interest of the child and place the child in a traditional home, if possible. Mr. Fast argued that there should be a directive to the DHHR to place children with a married mother and father as the first option if at all possible, and if not, only then look at other options. Mr. Fast pointed out that, while Dr. Hansen testified that sexual orientation of the parents is a critical factor, representatives from the DHHR testified that they do not even consider sexual orientation. In summary, Mr. Fast asked that the Court: (1) to approve the *Permanency Plan* for adoption and to place child in a home with a married mother and father pending adoption; (2) find that the DHHR Policy not to consider sexual orientation in the placement of children is an unconstitutional practice that violates of children's constitutional rights; and, (3)

order removal of the child from the intervenors' home.

Mr. Ciliberti then addressed the Court. Mr. Ciliberti first requested permission to put on additional evidence. The Court responded that the Court would issue a ruling on the *Permanency Plan*, but would allow Mr. Ciliberti to present additional evidence following the Thanksgiving holiday. Mr. Ciliberti then presented his arguments to the Court.

Mr. Ciliberti agreed with the DHHR that the only logical *Permanency Plan* for the child was adoption. Mr. Ciliberti asserted that Dr. Cooper-Lehki's testimony is valid, and noted that she testified that the overwhelming majority of research indicates that homosexual parents are just as likely to raise well adjusted children as are others, and that there are many factors that should be considered other than the orientation of the parents. Mr. Ciliberti asserted that Dr. Cooper-Lehki's testimony was more reliable than that of Dr. Hansen. Mr. Ciliberti asserted that, considering Dr. Cooper-Lehki's testimony regarding bonding, removal of Baby Girl Cales will cause the child emotional trauma and that the DHHR's plan to transfer the child by the end of next week is inadequate. Mr. Ciliberti also questioned Mr. Fast's recommendations, stating that he questioned how Mr. Fast could condemn the Kutil-Hess home considering the fact that Mr. Fast spent only seven minutes in the home.

Mr. Ciliberti asserted that there is no basis for the DHHR's new position in support of removal. Mr. Ciliberti asked the Court to leave Baby Girl Cales in the intervenors' home until the Adoption Unit makes its recommendation; and that if the recommendation is not adoption by the intervenors, the parties could then examine transition. Mr. Ciliberti asked the Court to hold its ruling on Mr. Fast's motion regarding removal until he could present the remainder of his

evidence. Mr. Ciliberti informed the Court that he would need approximately two additional hours.

After consideration of all of the above described proffers, arguments and testimony, and incorporating as though set forth herein all prior findings and conclusions previously made by this Court, the Court hereby makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

1. The adult respondent mother, Meggan Albaugh a/k/a Meggan Cales, is the biological mother of the infant child, Baby Girl Cales a/k/a Brailey TiCasey Cales, ("Baby Girl Cales.") The identity of the biological father of Baby Girl Cales remains unknown to the Court and to the parties.
2. By *Order* entered November 5, 2008, this Court terminated both biological parents' parental rights to Baby Girl Cales.
3. The DHHR investigated the option of a relative adoption and/or placement for Baby Girl Cales and found no family members able or willing to take custody of Baby Girl Cales.
4. The intervenors are a same-sex couple who provide DHHR approved foster care in their home to a number of children. By *Order* entered February 25, 2008, and over the objections of the guardian ad litem, the Court permitted Baby Girl Cales to be placed in and remain in the intervenors' care as a temporary foster care placement.
5. The child has been in the Kutil-Hess home since December 2007.

6. The Court permitted placement of the child with the intervenors due to the age of the child, due to the DHHR's recommendation, and because the intervenors were an approved foster care family.
7. At no point was the Court informed that the intervenors would argue that because of their service as foster parents they were entitled to adopt Baby Girl Cales.
8. On November 6, 2008, the parties convened before this Court for a hearing regarding the DHHR's *Permanency Plan*. At the conclusion of said hearing, the Court tentatively approved the *Permanency Plan* pending argument/hearing to address the issues raised during the hearing regarding said *Permanency Plan* and argument/evidence in support of and in opposition to the guardian ad litem's pending motions. The Court scheduled said hearing for November 21, 2008 at 1:15 p.m. The Court also ordered that Baby Girl Cales be removed from the intervenors' temporary foster care home, that the DHHR place Baby Girl Cales in a traditional home setting with a mother and a father, and that the removal from the intervenors' home and placement in a traditional home be completed over a two week transitional period.
9. Thereafter, on November 10, 2008, the intervenors, by counsel, filed a *Motion to Disqualify Presiding Circuit Judge*. By letter to Chief Justice Elliot E. Maynard dated November 12, 2008, and incorporated into the Court file of this matter, the Court responded to the intervener's *Motion to Disqualify Presiding Circuit Judge*. By *Administrative Order* dated November 14, 2008, and thereafter incorporated into the Court file of this matter, the West Virginia Supreme Court of Appeals, Chief Justice

Elliot E. Maynard, found that the evidence set out in support of the disqualification motion was insufficient to warrant such disqualification and directed Judge Blake to continue to preside in the above referenced case.

10. On November 18, 2008, this Court entered an *Order of Stay* following a *Joint Motion to Stay Order Pending Full Hearing*, filed by counsel for the intervenors and the guardian ad litem, staying execution of the portion of the Court's Order entered November 12, 2008 which required Baby Girl Cales to be removed from the intervenors' home pending the hearing scheduled for November 21, 2008.
11. During the more than five and ½ hour hearing held on November 21, 2008, the Court heard testimony from Ms. Jody Conner, Mercer County DHHR, Region Four, Adoption Supervisor; Amy Hunt, DHHR Adoption Unit, Region Four, Home Finding Supervisor; Heather Hunter, (now Heather Lucas), Fayette County DHHR child protective service worker worker; Sharon Hess, intervenor; Dr. Tracey Hansen, PhD, guardian ad litem's expert witness; Dr. Christine Cooper-Lehki, WVU/UHA Assistant Professor of Clinical Psychiatry, intervenors' expert; and, Ms. Kathryn Kutil, intervenor.
12. The Court FINDS that the DHHR has not made its recommendation yet as to whom should adopt the child.
13. The Court FINDS that the Kutil-Hess household may be the most appropriate adoptive placement home for the child, but it is unfair not to allow the child the option to be adopted by a traditional family. The child should be given the opportunity to be adopted by mother-father adoption and not be locked into a single parent adoption.

14. The Court FINDS that trauma is always involved when removing children, that is why the Court sought to accomplish removal with a two week transition period while the child was still of tender years. While transferring custody may initially cause trauma, this does not mean that a child who has lived in a certain household for a period of time may never be moved.
15. The Court FINDS that the *Permanency Plan* of transition to the DHHR Adoption Unit is appropriate and should be accepted by this Court.
16. The Court FINDS that Baby Girl Cales is presently in the intervenors' home, however, the DHHR has found the intervenors' home is over capacity and has asked the Court to remove the child with a transitional period, based upon that reason. Thus, the Court FINDS that Baby Girl Cales should be moved immediately. The Court FINDS that placement of Baby Girl Cales in a home with a married mother and father pending such adoption process is most appropriate for the child's well being.

#### CONCLUSIONS OF LAW

1. The Court CONCLUDES that the intervenors can not adopt this child as a couple because of statute. The intervenors argue that *they* are the only proper parties to be considered for the adoption of Baby Girl Cales; however, under West Virginia law §48-22-201, only married couples, married persons with the consent of their spouse, or single persons may petition to adopt a child. For this reason, the Court CONCLUDES that the intervenors cannot lawfully petition *together* to adopt Baby Girl Cales, *only one* of the two intervenors may petition for adoption.

2. The Court CONCLUDES that the DHHR's request for removal based upon the fact that the intervenors' home is overcapacity should be GRANTED as it is in the child's best interest. Further considering the well-being of the child, the Court CONCLUDES and ORDERS that the child be removed from the intervenors' home by 12:00 noon November 22, 2008.
3. The Court CONCLUDES that, contrary to the argument of the guardian ad litem, the constitutionality or unconstitutionality of the DHHR adoption process and policies is not before the Court in this proceeding.

WHEREFORE, and for the above stated reasons, the Court hereby ORDERS the following:

1. The Court ORDERS that Baby Girl Cales be removed from the intervenors' home by 12:00 noon November 22, 2008 and placed with a traditional family.
2. The Court ORDERS that hearing for review of the *Permanency Plan* shall be held at the end of ninety days, following entry of this Order.
3. The Court ORDERS that a MDT meeting shall be held at least fifteen days prior to such review hearing.
4. The Court ORDERS that the intervenors shall be permitted to present additional evidence as requested by their counsel Mr. Ciliberti. Said hearing on additional evidence should be scheduled by Mr. Ciliberti and notice provided as soon as possible.

All objections and exceptions of the parties to all adverse rulings are preserved for the record.

The Clerk of this Court is directed to mail attested copies of this *Order* to Angela Ash, *WVDHHR Legal Division*, Counsel for WVDHHR, 200 Davis Street, Princeton, West Virginia 2470-7430; to Thomas J. Steele, Jr., Assistant Prosecuting Attorney; to Thomas K. Fast, Guardian Ad Litem; and to Anthony Ciliberti, Jr., counsel for the intervenors.

ENTERED this the 2<sup>nd</sup> day of December, 2008.

**PAUL M. BLAKE, JR.  
JUDGE**

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Paul M. Blake, Jr., Judge.

A TRUE COPY of an order entered  
Dec 2, 2008  
Teste: Daniel E Wright  
Circuit Clerk Fayette County, WV

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

IN THE INTEREST OF  
Baby Girl Cales

Juvenile Abuse Neglect No. 07-JA-72

Adult Respondents:  
Unknown Father  
Meggan Cales

**RENEWAL OF DHHR OBJECTION TO GAL MOTION TO ORDER DHHR  
TO REMOVE CHILD AND FOR OTHER INJUNCTIVE RELIEF**

COMES NOW, the West Virginia Department of Health and Human Resources ("DHHR"), by counsel, Angela Alexander Ash, and renews DHHR's objection to the pending GAL motion and moves this Court to deny the GAL's Motion to Order DHHR to Remove Child from Physical Custody in Homosexual Home and for Other Injunctive Relief. In support of said objection, DHHR avers the following:

1. This Court is without jurisdiction to grant a statewide injunction against DHHR.
2. West Virginia Code § 53-5-4 awards every judge of a circuit court "general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be in or out of the circuit, or the party against whose proceeding the injunction be asked reside in or out of the same. But, there is no authority for the judge of one circuit to issue a **statewide** injunction affecting 'acts' occurring in other circuits when there is no underlying judgment or proceeding". W.Va. Code 53-5-3, 53-5-4, 56-1-1. *Meadows on Behalf of Professional Employees of WV Educ. Ass'n v. Hey*, 399 S.E2d 657, 184 W.Va. 75 (1990) (emphasis added).

EXHIBIT B

3. Under the balance of hardship test, the court must consider the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

4. The Movant fails to state any actionable likelihood of harm to the child, as none is alleged. Irreparable harm to DHHR will occur in overturning duly promulgated policy, an invasion of separation of powers doctrine will occur, and the displacement of the child will occur, harming the child; the likelihood of success is minimal, as there has been no irreparable harm, and for every expert opinion Movant asserts, DHHR can offer another expert opinion giving an opposite view; and the public has an interest in children being in a loving, nurturing home with parents who love and will care for them, as do the subject foster parents.

5. This Court is without jurisdiction to determine DHHR policy. In West Virginia Code § 9-3-6, the legislature gives the WVDHHR Secretary the power to "promulgate, amend, revise and rescind department rules and regulations respecting the organization's government of the department and the execution and administration of those powers, duties, and responsibilities granted and assigned by this chapter and elsewhere by law to the department and the secretary".

6. West Virginia Code § 49-2-10 states: "It shall be the duty of the state department in cooperation with the state department of health to establish

reasonable minimum standards for foster-home care to which all certified foster homes must conform”.

7. The Movant has failed to state a claim upon which relief may be granted in that the motion filed states only generic political opinions and fails to state specific allegations regarding this foster home.

WHEREFORE, DHHR respectfully requests this HONORABLE COURT to deny the GAL'S Motion to Order DHHR to Remove Child from Physical Custody in Homosexual Home and for Other Injunctive Relief and for any other relief this Court deems appropriate.

WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,

By Counsel:



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CERTIFICATE OF SERVICE

I, Angela Alexander Ash, do hereby certify that on this 3<sup>rd</sup> day of April, 2008, a true and exact copy of the foregoing was filed on behalf of the West Virginia Department of Health and Human Resources and served on counsel of record, by first class mail, postage prepaid and addressed as follows:

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