

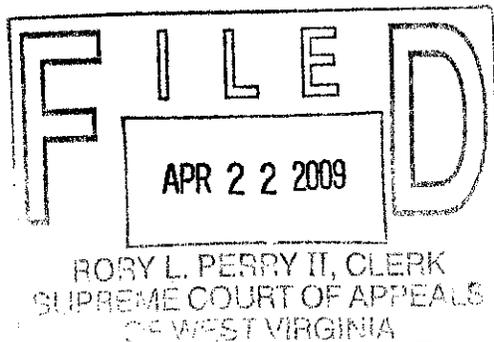
**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA**

No. 34752

**IN RE:
EMILY G**

**Wood County Abuse and Neglect
Case No. 08-JA-64
The Honorable Jeffrey B. Reed, Presiding**

**OPENING BRIEF
ON BEHALF OF
DONNA AND JOHN**



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN RE: WOOD COUNTY JUVENILE NEGLECT
EMILY G. & DELINQUENCY NO. 08-JA-64

OPENING BRIEF OF DONNA and JOHN M. [REDACTED]

Now come the Appellants, DONNA J. M. [REDACTED] and JOHN M. [REDACTED], and pursuant to Rule 3 of the West Virginia Rules of Appellate Procedure hereby file the within *Petition for Appeal*.¹

The Appellants appeal the September 23, 2008 *Order* of the Circuit Court of Wood County, West Virginia, the Honorable Jeffrey B. Reed presiding, summarily dismissing and denying the *Petition* filed by Appellants alleging abuse and neglect. (*Exhibit A hereto.*) This dismissal occurred before the *Petition* was served and before any hearings whatsoever on this issues raised in the *Petition* were conducted.

I. Nature of Proceeding and Ruling in Lower Tribunal

Following lengthy proceedings in Wood County Family Court, the Appellants filed a *Petition* pursuant to West Virginia Code §49-6-1 *et seq.* in the Circuit Court of Wood County. This *Petition* alleged that the Appellants' granddaughter, EMILY G. [REDACTED] was an abused and neglected child and seeking relief pursuant to this statutory framework. This *Petition* was assigned to Judge Jeffrey Reed, who summarily dismissed the *Petition* without hearing on September 23, 2008. (*Order of September 23, 2008, Exhibit A hereto.*) In its *Order*, the Court found that "the *Petition* does not allege sufficient facts to come within the statutory definition of abuse and neglect." The Court further noted that "there are no allegations that any of the acts of domestic violence occurred in the presence of the child." Appellants, who filed this abuse

¹ West Virginia Code §49-6-1 provides that "the department or a reputable person. . . may present a petition setting forth the facts" believed to comprise abuse or neglect. See also, *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997).

and neglect at the recommendation of the child's *Guardian Ad Litem*, seek an appeal of this dismissal.

II. Statement of the Facts

EMILY G (hereafter "EMILY") was born on August 14, 2006 to SYLVIA MARIE [REDACTED], the Appellants' daughter.² (*Petition at ¶2.*) EMILY's father was ultimately determined to be CARL LEE [REDACTED] (*Petition at ¶3.*) As the *Petition* alleges, MARIE [REDACTED] and CARL LEE [REDACTED] have been involved in a violent and stormy relationship since well before EMILY was conceived.

EMILY presently resides in the Appellant's care and custody by virtue of an *Order* from the Wood County Family Court entered in case 06-D-881 (*Carl Lee [REDACTED] and Sylvia Marie [REDACTED] v. Donna J. [REDACTED] and John E. [REDACTED]*). (*Petition at ¶6, Exhibit 1 thereto.*) EMILY began to live with the Appellants with SYLVIA MARIE [REDACTED] consent. MS. G [REDACTED] granted guardianship of EMILY to her mother and step-father shortly after EMILY was born on August 14, 2006 due to concerns about the Respondent-mother's ability to care for the child. These concerns were caused by the Respondent-mother's longstanding emotional and mental health problems. (*Petition at ¶9a.*)

Very soon thereafter, this custody arrangement was challenged by the then-putative father, CARL LEE [REDACTED]. The Appellants were served with a "*Petition for Support and/or Allocation of Custodial Responsibility*" filed in Wood County Family Court in case 06-D-881 on November 14, 2006 by the alleged father, Carl Lee [REDACTED]. (*Petition at ¶9b, Exhibit 2 thereto.*) Before a final *Order* was entered by the Wood County Family Court granting custody to the Appellants, no less than four separate *Petitions* were filed in Family Court regarding custody of EMILY.

The parties continued to litigate custody matters concerning the child, EMILY G, until the final hearing which was held on May 5, 2008.

² Sylvia Marie [REDACTED], or "Marie" is the biological daughter of Donna M [REDACTED] and John M [REDACTED] step-daughter.

(*Petition at ¶9c.*) The final *Order* in case 06-D-881 was entered on July 10, 2008 which designated the DONNA J. M [REDACTED] and JOHN E. M [REDACTED] as primary residential custodians of EMILY G [REDACTED] “until further Order of the Court.” Further, both parents and the paternal grandparents were granted weekly monitored visits at the Kids First Visitation Center. (*Petition at ¶9c and Exhibit 1 thereto.*)

During the family court proceedings, on August 27, 2007, the Family Court appointed attorney MICHAEL FARNSWORTH to act as *Guardian Ad Litem* on behalf of EMILY. (*Petition at ¶10b, Exhibit 3 thereto.*) The *Guardian Ad Litem’s* investigation and report carefully documented the violent and stormy relationship of SYLVIA MARIE [REDACTED] and CARL LEE [REDACTED] and concluded that these parents have been and will continue to be abusive and/or neglectful parents due to their longstanding and continuous pattern of domestic violence directed towards each other and others. (*Id.*)

The history of the documented incidents of domestic violence and domestic violence proceedings between SYLVIA MARIE G [REDACTED] and CARL LEE B [REDACTED] which had occurred up to that point in time is set forth in the *Guardian Ad Litem’s Report, Exhibit 3 to the Petition*, which summarized the many domestic violence proceedings, incidents of violence and the general instability with respect to SYLVIA MARIE GOODRICH and CARL LEE BOYLES:

- (i) March 21, 2006 – Carl B [REDACTED] filed *Domestic Violence Petition 06-DV-120* alleging that Sylvia Marie G [REDACTED] threatened to kill him and his family.
- (ii) April 5, 2006 – *Petition 06-DV-120* was dismissed at the request of Carl Lee B [REDACTED]
- (iii) August 14, 2006 – Emily G [REDACTED] was born. Sylvia Marie G [REDACTED] was 17 years of age (DOB 2/22/89). Emily and her mother stayed with Donna and John M [REDACTED] following Emily’s birth.
- (iv) October 25, 2006 – Sylvia Marie G [REDACTED] signed temporary guardianship of Emily G [REDACTED] to Donna and John M [REDACTED].

- (v) November 14, 2006 – Sylvia Marie G [REDACTED] and Carl B [REDACTED] jointly filed a *Petition* in the Wood County Family Court seeking custody of Emily.
- (vi) November 29, 2006 – Donna M [REDACTED] filed a *Domestic Violence Petition* on behalf of her daughter, Sylvia Marie G [REDACTED] (still a minor at the time) and against Carl Lee B [REDACTED] (06-DV-586). A six month protective Order was issued prohibiting Carl Lee B [REDACTED] from having contact with Sylvia Marie G [REDACTED], Donna and John M [REDACTED], and Emily G [REDACTED].
- (vii) December 6, 2006 – Josephine B [REDACTED], Carl Lee [REDACTED] mother and paternal grandmother of Emily G [REDACTED] filed a *Domestic Violence Petition* against Sylvia Marie G [REDACTED] alleging phone threats in case 06-DV-204. This Petition was dismissed on December 21, 2006.
- (viii) January 29, 2007 - the Wood County Family Court entered an *Order* recognizing the guardianship agreement signed by Sylvia Marie G [REDACTED] and granting temporary custody of Emily Marie G [REDACTED] to Donna and John M [REDACTED].
- (ix) February 2, 2007 – Carl Lee B [REDACTED] filed a *Petition for Modification* in Wood County Family Court case 06-D-881 seeking custody of Emily G [REDACTED]. This Petition was denied on February 22, 2007.
- (x) March 5, 2007 – Carl Lee B [REDACTED] filed another *Petition for Modification of Custody* seeking custody of Emily G [REDACTED] in Wood County Family Court Case 06-D-881.
- (xi) July 10, 2007 – Carl Lee B [REDACTED] and Sylvia Marie G [REDACTED] were married.
- (xii) July 30, 2007 – Sylvia Marie B [REDACTED] filed a *Domestic Violence Petition* in case 07-DV-381 alleging that Carl Lee B [REDACTED] had abused her, kicked her and punched her. An *Order* was granted.
- (xiii) August 8, 2007 – *Order* in case 07-DV-381 was terminated at the request of Sylvia Marie B [REDACTED].

- (xiv) August 27, 2007 – Carl Lee B [REDACTED] signed an affidavit of paternity acknowledging that he was the father of Emily G.
- (xv) October 2, 2007 – A final divorce hearing for Carl Lee B [REDACTED] and Sylvia Marie G [REDACTED] was held in Wood County Family Court before Judge C. Darren Tallman. A hearing was also held in case 06-D-881 at which time the Wood County Family Court granted Carl Lee B [REDACTED] monitored visits with Emily at the Kids First Visitation Center for one hour, every other week. These visits were later increased to every week.
- (xvi) November 18, 2007 – Sylvia Marie G [REDACTED] married Andrew R [REDACTED].
- (xvii) April 9, 2008 – Carl B [REDACTED] filed a *Domestic Violence Petition* in case 08-DV-197 alleging that Sylvia R [REDACTED] cut him, and threatened him. An *Order* was entered on April 16, 2008 for six months.
- (xviii) April 9, 2008 – Sylvia R [REDACTED] filed a *Domestic Violence Petition* in case 08-DV-182 alleging that Carl Lee B [REDACTED] held her against her will. An *Order* was entered on April 16, 2008 for six months.
- (xix) May, 2008 – Sylvia R [REDACTED] was divorced from Andrew R [REDACTED].
- (xx) May 5, 2008 – Custody of Emily G [REDACTED] granted to Donna M [REDACTED] and John M [REDACTED] in Wood County Family Court case 06-D-881.

In the approximate year that has passed, additional events have transpired and proceedings have occurred.³ As is evident from this summary, these parents have engaged for years in a pattern of physically assaultive behavior, arguments and violence against one another, separating for a time after the filing of some

³ There is presently a *Domestic Violence Protective Order* in effect against Carl Lee B [REDACTED] prohibiting him from having contact with Sylvia Marie G [REDACTED] and Donna M [REDACTED] in case 09-D-21, issued on January 21, 2009. (Exhibit 4 hereto.)

type of legal proceeding and then reuniting to begin the pattern again. (*Petition ¶10d.*) They have married, divorced, separated and reconciled more times than can be counted. Moreover, this summary does not include the series of criminal charges filed against Carl Lee B [REDACTED] or anything that has occurred since May 5, 2008. (*Petition ¶10e.*) Additionally, testimony concerning these incidents as well as those which have occurred since the filing of this Petition will establish that the chaotic violence of the lives of SYLVIA G [REDACTED] and CARL B [REDACTED] continues and has escalated. (*See Exhibit 4.*)

As a result of the ongoing pattern of violence between the Respondent-mother and Respondent-father, the *Guardian Ad Litem* found each parent unfit to assume custody of Emily G [REDACTED], stating that “both parents, since Emily’s birth, have failed to demonstrate that they can establish a home environment that is stable, safe, nurturing, free of domestic violence and otherwise appropriate for a child of such tender years. (*Petition ¶10f, Exhibit 3.*) The *Guardian Ad Litem* further recommended a number of steps that each parent take in order to rectify the conditions of abuse and neglect caused by the ongoing domestic violence, including supervised visits at Kids First; a prohibition on the parents residing in the same home where Emily lives; completion of a Batterer’s Intervention Program; participation and completion of a program geared towards eliminating domestic violence; abiding by the protective orders in effect; completion of parenting classes; and most importantly, maintaining a home environment that is stable, safe, nurturing, free of domestic violence, and other appropriate for Emily. (*Petition ¶10g, Exhibit 3 thereto.*)

The *Guardian Ad Litem* further concluded that “Abuse and Neglect Proceedings should be commenced as soon as it becomes evident that either party is failing to comply fully with the conditions set forth herein so that parental rights can be terminated and visitation ended.” (*Id.*) The *Guardian Ad Litem* reasoned that “if the parents do not take the appropriate steps as outlined herein to become adults upon whom Emily is able to depend on to help nurture her to maturity as a healthy adult, then steps should be taken to have their parental rights terminated and to protect Emily from further exposure to these individuals and any knowledge of their self-destructive ways of life that will be a

constant emotional burden to Emily when she is of an age to care and worry about the safety of her parents.” (*Id.*)

Since the entry of Family Court Order on July 10, 2008, EMILY’s parents have done nothing whatever and have taken no steps at all to rectify the conditions outlined herein. (*Petition ¶10i.*) They continue to live together off and on, and to have contact with one another which inevitably and always manifests itself in violence and fighting. (*Petition ¶10i.*) In fact, since the filing of this Petition, additional incidents of violence have occurred involving these parents. While supervised visits are occurring between EMILY her parents and paternal grandparents, the parents have done nothing else recommended by the *Guardian Ad Litem*. (*Petition ¶10j.*) Accordingly, the Appellants filed this action reasoning that EMILY is entitled to have permanency and stability in her placement.

The longstanding and repeated incidents of domestic violence between EMILY’s parents constitutes abuse as defined by West Virginia Code §49-1-3(4). Appellants further assert that if EMILY cannot ever live with either or both of her parents due to their violent conduct, and if EMILY’s parents are unable or unwilling to correct these conditions which gave rise to Emily’s continued removal from their care, then the parental rights of Sylvia Marie G. [REDACTED] and Carl Lee B. [REDACTED] should be terminated so that the best interests, health, safety and welfare of this child can be protected and served.⁴

On September 23, 2008, this *Petition* was summarily dismissed based upon the finding that the *Petition* did “not allege sufficient facts to come within the statutory definition of abuse and neglect.” In support of this finding, it was noted that “there are no allegations that any of the acts of domestic violence occurred in the presence of the child.” The Appellants assert that the Court clearly erred in its findings and conclusions, and they appeal the dismissal of this abuse and neglect *Petition*.

² Upon information and belief, the Petitioners further alleged that representatives of the West Virginia Department of Health and Human Resources have not been involved with or provided services to either of these parents. However, the B. [REDACTED] family and/or some person or persons presumed to be directed by the family has/have made referrals against the Petitioners during the past two years, none of which has been substantiated. (*Petition ¶10m.*)

III. Assignments of Error

The Circuit Court erroneously dismissed this Petition as the acts of domestic violence set forth in the Petition do constitute abuse and neglect.

IV. Points and Authorities, Statement of Law, and Argument

1. **EMILY G** is an abused child since her health or welfare is harmed or threatened by:

(4) **Domestic Violence as defined in section two hundred two [§48-27-202], article twenty-seven, chapter forty-eight of this code. (West Virginia Code §49-1-3)**

2. **EMILY G** is entitled to permanency and stability.

Standard of Review

A Circuit Court's final order and ultimate disposition is reviewed under an "abuse of discretion standard." Challenges to findings of fact are reviewed under a clearly erroneous standard. Conclusions of law are reviewed de novo. Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996); In re Frances J.A.S., 213 W.Va. 636, 584 S.E.2d 492 (2003)

Argument

In the instant case, the court-below summarily dismissed the abuse and neglect *Petition* filed by the Appellants, ruling in essence that this *Petition* failed to state a claim upon which relief could be granted, similar to the granting of a motion made pursuant to Rule 12 or akin to a summary judgment ruling under the West Virginia Rules of Civil Procedure. Under these circumstances, the Appellants assert that the facts set forth in the verified *Petition* should accordingly be "construed in the light most favorable" to the Appellants, and that

the allegations should further be accepted as true. Shaffer v. Charleston Area Medical Center, 199 W.Va. 428, 485 S.E.2d 12 (1997).

The issue presented in this case is not complicated: is it child abuse when two parents are rendered unfit, (and most likely permanently unfit), by virtue of the ongoing pattern of domestic violence in their lives, regardless of whether that domestic violence occurs while the child is present? The Appellants assert that domestic violence as alleged in the *Petition* does constitute child abuse and that the court-below erroneously concluded that it does not. Moreover, the Appellants assert that EMILY should not be required to remain in limbo for her entire childhood while she waits for her parents to remediate the abhorrent conditions in which they live.

Notwithstanding the fact that EMILY's safety has been ensured thus far by the Family Court, the Family Court can do nothing further to provide permanent safety and stability for EMILY. Accordingly, it is now up to the Circuit Court to do so.

- A) The *Petition* filed herein alleges child abuse contrary to the findings of the Circuit Court.

To evaluate the allegations set forth in the *Petition* filed herein, the statute defining child abuse is the starting point. West Virginia Code §49-1-3 states: "An abused child means a child whose health or welfare is harmed or threatened by-

(4) Domestic Violence as defined in section two hundred two [§48-27-202], article twenty-seven, chapter forty-eight of this code." "Domestic violence" includes physical harm or attempting to cause physical harm, placing someone in fear of physical harm, creating fear of physical harm by harassment,

psychological abuse or threatening acts, sexual assault or sexual abuse, and holding, confining, detaining or abducting someone when those acts are committed against a family or household member. West Virginia Code §48-27-202. Clearly, the *Petition* herein set forth and enumerates many instances of documented domestic violence as defined by West Virginia Code §49-1-3(4).⁵

While acts of domestic violence were only recently added to the statutory definition of child abuse in 2006, this Court has recognized the negative impact of domestic violence upon children for quite some time. Thus, in Mary Ann P. v. William R. P., 197 W. Va. 1, 475 S.E.2d 1 (1996), evidence of domestic violence was held to be relevant in deciding visitations. As the Court observed:

We have consistently acknowledged that domestic violence is potentially harmful to a child's welfare. In syllabus point two of Mary Ann P., we recognized:

"Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account[.]" *Syl. pt. 1, in part, Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994)." *Syl. Pt. 2, Mary Ann P. v. William R. P.*, 197 W. Va. 1, 475 S.E.2d 1 (1996).

The language from this syllabus point "was originally generated by the West Virginia Legislature in the domestic violence statute, West Virginia Code § 48-2A-1(a)(2) (1992)," and the "findings of the Legislature" which "included the recognition that '[f]amily violence is a major health and law-enforcement problem in this state and one that affects people of all racial and ethnic

⁵ Domestic violence was not added to W.Va. Code §49-1-3 by the legislature until 2006. This provision became effective on June 9, 2006, a few months before EMILY's birth.

backgrounds and all socioeconomic classes . . ." and that [f]amily violence can be deterred, prevented or reduced by legal intervention." Dale Patrick D. v. Victoria Diane D., 203 W. Va. 438, 442-443, 508 S.E.2d 375 (1998).

It has been the law of the State for over twenty years that "...spousal abuse is a factor to be considered in determining parental fitness for child custody" and that "a family law master should take domestic violence into account when making an award of temporary custody." Nancy Viola R. v. Randolph W., 177 W. Va. 710, 714, 356 S.E.2d 464, 468 (1987); Henry v. Johnson, 192 W. Va. 82, 86, 450 S.E.2d 779, 783 (1994). So, is the Circuit Court correct in finding that acts of domestic violence between parents or caretakers must be committed in the presence of a child before such violence constitutes child abuse as stated in the Court's *Order*?

Nowhere in the definition of abuse premised upon acts of domestic violence is it stated that domestic violence must be committed in the presence of the children in order for such conduct to constitute abuse. In fact, it is clear that the child's "health or welfare" need only be *threatened* by an act of abuse or neglect, not actually harmed. West Virginia Code §49-1-3(4). Must the child be physically present to be threatened by such acts, that is, actually put in harm's way? Appellants assert that physical presence is not required.

While no case precisely on point could be found, several cases are instructive on this issue. In the case of In Re Frances J.A.S., 213 W. Va. 636, 639, 584 S.E.2d 492 (2003), an abuse and neglect petition was filed based upon "allegations of domestic violence and alcohol abuse which affected . . . parenting

abilities.” The evidence showed that there had been several police calls to the residence and an incident of domestic violence in May of 2000. (*Id. at footnote 4.*) However, there was no indication that these incidents of domestic violence occurred in the presence of the children, or that their presence was necessary to a determination of abuse.

Similarly, this Court reversed a Circuit Court’s dismissal of an abuse and neglect proceeding where the mother had never parented her baby and was subjected to domestic violence while pregnant with the child. In Re Brandon Lee B., 211 W. Va. 587, 567 S.E.2d 597 (2001). In reversing the Circuit Court’s ruling, this Court found that an abuse and neglect a petition could be premised on unfitness and inability to parent due to a variety of issues, including domestic violence.

Like the Frances case, SYLVIA MARIE G [REDACTED] and CARL LEE B [REDACTED] have engaged in domestic violence which permeates their lives, affects their parenting abilities and renders them unfit. Like Brandon’s mother, EMILY’s parents have engaged in acts of domestic violence since before EMILY was born, and because of the ongoing violence, these two parents have been deemed unfit and have never been permitted to parent their child.

Fortunately for EMILY, she has never been subjected to the violence in which her parents engage on a fairly constant basis. That is because shortly after her birth, her mother placed EMILY in the care of the Appellants. That single protective act has enabled the Appellants to protect EMILY. Although the

Appellants have battled to keep EMILY safe, and they have been successful to date.⁶

However lucky she is to have been removed from the care of her parents, EMILY's case is not finished as the current circumstances do not provide any permanency for EMILY. Those circumstances include having parents who are apparently not going to be able to rectify the conditions which led to the baby's removal from their care: ongoing domestic violence. Even though EMILY's removal from her parents' care was accomplished in Family Court without intervention by WVDHHR, it cannot be denied that EMILY has remained and hopefully will remain out of her parents' care by virtue of their unfitness due to domestic violence. This lack of permanency in EMILY's placement is not in her best interests as was initially recognized by the *Guardian Ad Litem*.

"A fundamental mandate, recognized consistently by this Court, is that the ultimate determination of child placement must be premised upon an analysis of the best interests of the child. As this Court has repeatedly stated, 'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.'" *Syl. Pt. 3, In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). "[T]he best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted).

⁶ Most recently, on March 26, 2009 the Appellants appeared in Wood County Family Court to defend themselves upon a *Petition for Contempt* filed by Carl Lee B. This *Petition for Contempt* was dismissed.

West Virginia Code § 49-1-1(b) addresses this best interests requirement, providing in pertinent part as follows:

In pursuit of these goals it is the intention of the Legislature to provide for removing the child from the custody of his or her parents only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal; and, when the child has to be removed from his or her family, to secure for the child custody, care and discipline consistent with the child's best interests and other goals herein set out. It is further the intention of the Legislature to require that any reunification, permanency or preplacement preventative services address the safety of the child.

“In order to effectuate the legislative intent expressed in *W.Va.Code* § 49-1-1(a) [1997], a circuit court must endeavor to secure for a child who has been removed from his or her family a permanent placement with the level of custody, care, commitment, nurturing and discipline that is consistent with the child's best interests. *State v. Michael M.*, 202 W.Va. 350, 358, 504 S.E.2d 177, 185; *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589. *Accord State ex rel Roy Allen S. v. Stone* 196 W. Va. 624, 638, 474 S.E.2d 554, 568 (1996) (“Although a parent has a protectable interest in a child, a parent's rights are not absolute: the welfare of the child is the paramount consideration to which all of the factors, including common law preferential rights of the parents, must be deferred or subordinated.” “Ensuring finality for ... children is vital to safeguarding their best interests so that they may have permanency and not be continually shuttled from placement to placement. *See Syl.pt. 1*, in part, *In re, Carlita B.*, 185 W. Va. 613, 626, 408 S.E.2d 365, 378 (1991).

By the same token, it is possible, although unlikely that EMILY's parents will be able to correct the conditions which led to EMILY's continued removal

from their care. This would allow unification of this family. EMILY is entitled to have that opportunity as well.⁷

Conclusion and Relief Sought

While EMILY is safe at present, she remains out of her parents' care and custody due to the longstanding domestic violence that is ongoing between them. That domestic violence poses a continuing threat to EMILY as it prevents her parents from carrying out their parental duties and responsibilities. Under these circumstances, the *Petition* filed with the court-below has alleged child abuse as set forth in West Virginia Code §49-1-3(4). Accordingly, the Wood County Circuit Court erroneously found to the contrary and abused its discretion by improperly dismissing this *Petition*.

WHEREFORE, for the reasons set forth herein, the Appellants respectfully request that this Court reverse the decision of the Wood County Circuit Court and remand this *Petition* for hearing.

Respectfully submitted,
JOHN E. and DONNA J. M. [REDACTED]

By their counsel,



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⁷ While the *Guardian Ad Litem* has in the *Response* filed with this Court retreated to some extent from his initial recommendations, the *Guardian Ad Litem* has expressed "hopes for Emily that her parents will avail themselves of any form of assistance available to them from the West Virginia Department of Health and Human Resources or other agencies to comply with the recommendations made by the Guardian in the prior report to Family Court..." *Response of Guardian Ad Litem to November 20, 2008 Petition for Appeal filed by Donna and John M. [REDACTED]* at page 4.