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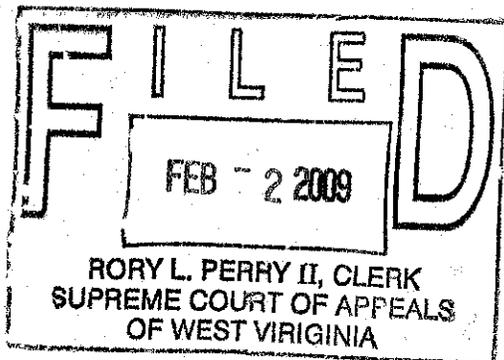
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

*IN RE: BRITTANY B., KENNETH B., TIFFANY B., BRANDON B.,  
JOSHUA B., PATRICIA B. and TESSA F.*

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BRIEF ON BEHALF OF APPELLEE, STATE OF WEST VIRGINIA,  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

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**I. KIND OF PROCEEDING AND NATURE  
OF RULING IN LOWER TRIBUNAL**

This matter constitutes an appeal from the Dispositional Hearing Order entered herein on July 3, 2008 by the Circuit Court of Mineral County, West Virginia pursuant to West Virginia Code § 49-6-5, wherein said Court Ordered that any parental rights of Rosemary C. and Hiram C. to Tiffany B., Patricia B., Joshua B., Brandon B., and Tessa F. be terminated. The Circuit Court also terminated visitation rights of Rosemary C. and Hiram C. to the children. The Circuit Court further directed significant visitation to occur among the children.

It should be noted that Rosemary C. is the appellant in this matter. Rosemary C. is not the biological mother of any of the children named herein. Rather, she and her son, Hiram C., took these children in over a period of time while they lived in Baltimore, Maryland. Rosemary C. was granted legal custody and guardianship of the children in the Circuit Court of Baltimore City Division for Juvenile Causes in April 1999. Later, Rosemary C. and Hiram C. moved to Mineral County, West Virginia, perhaps in 2001. The Maryland Court terminated its jurisdiction over the matter in 2006. The Maryland Court never resolved the parental rights of Kenneth B. and Kimberly B. to these children.

Rosemary C. is represented by her court-appointed counsel in this matter, Brian J. Vance, Esq. Though the above Dispositional Hearing Order is also adverse to Hiram C. it does not appear that the Circuit Court ever appointed him an attorney in the proceedings below. It is also apparent in the evidence adduced in this matter that Hiram C. acted in a custodial and/or caretaker role concerning these children. In fact,

they referred to Rosemary C. as "Mom" and to Hiram C. as "Dad". Moreover, some of the allegations set forth in the abuse and neglect petition were specifically against Hiram in his "parental" role.

## **II. PROCEDURAL HISTORY AND STATEMENT OF FACTS**

The West Virginia Department of Health and Human Resources ("Department") does not dispute the facts as stated in the Petition for A Writ of Error and Appeal filed herein on behalf of Rosemary C. on or about September 2, 2008, or the facts as represented in an October 9, 2008, letter filed by F. Cody Pancake, Esq., Guardian ad litem ("GAL") on behalf of the above children. It should be noted that the Department did not oppose the motion or request of Rosemary C. and Hiram C. at the dispositional hearing below held on June 19, 2008 that the children be reunified in the home. Neither did the GAL. In short, at the time of said hearing there were no parties adverse to the position advocated on behalf of Rosemary C. and Hiram C.

The Department had, as ordered, established a rigorous case plan to remedy the conditions of abuse and/or neglect described in the abuse and neglect petition and amended petition. The Department acknowledges that Rosemary C. and Hiram C. started out slowly in complying with the case plan, but as of the time of the dispositional hearing the Department, as well as the entire MDT, acknowledged that these individuals had substantially complied and accomplished the goals of the case plan to at least warrant an opportunity for reunification with much structure and continued oversight by the Department.

On June 12, 2007 a general abuse and neglect petition was filed by the

Department against the appellant, Rosemary C., based upon a history of CPS referrals dating back to 2001. Allegations included medical neglect, physical neglect, physical abuse, emotional abuse, poor living conditions and drug abuse in the home. In addition to the appellant, other party respondents were Kimberly B. and Kenneth B., Sr., biological parents of Brittany B., Kenneth B., Tiffany B., Patricia B., Joshua B. and Brandon B., and Melissa M., biological mother of Tessa F. David F. was originally alleged to be the biological father of Tessa F. but was quickly dismissed out of the case upon producing results of a paternity test indicating unequivocally that he was not the child's father. Hiram C, adult son of the appellant, was not named as a party respondent herein. However, as stated previously it is undisputed that he was a caretaker of the aforesaid children during the time in which they lived in the home of the appellant.

The parental rights of Kimberly B. and Kenneth B., Sr. were terminated below. Neither of said respondents appealed said Dispositional Hearing Order. Melissa M. never appeared in this matter and was never able to be served with the abuse and neglect petition. As of the filing of this response brief the Mineral County Circuit Court continues to resolve her status in this abuse and neglect proceeding. Only the parental and visitation rights of Rosemary C. are the subject of this appeal.

Prior to moving to Mineral County, West Virginia around 2001, Rosemary C. and Hiram C. resided together in Baltimore, Maryland. Rosemary C. is presently in her mid seventies. Hiram C. is presently forty-seven. On or about April 29, 1999 the Circuit Court for Baltimore (Maryland) City, Division for Juvenile Causes, granted guardianship

of Kenneth B., Tiffany B., Brittany B., Patricia B., Joshua B., and Brandon B. to Rosemary C. Said court apparently deemed the parents of these children, Kimberly B. and Kenneth B., Sr. to be unfit though stopped short of actually terminating their parental rights. The Maryland court later denied the parents visitation with their children and terminated jurisdiction of the matter once Rosemary C. and Hiram C. moved to West Virginia. Tessa F. came into the appellant's custody in much the same manner.

In 2001 the Department began to receive CPS referrals regarding this family. Approximately eleven (11) referrals were received on this family from 2001 through May 2007. It appears that the Department substantiated three (3) of these eleven (11) referrals which included allegations of physical abuse (excessive corporal punishment – e.g. hitting with cake turners), emotional abuse ( e.g. threatening to send them away to Baltimore when they are bad), and neglect (e.g. withholding food) by Rosemary C. and/or Hiram C. Services were put in place to address the issues of abuse and neglect on numerous occasions by the Department as early as September 2004.

An abuse and neglect petition was filed on or about June 12, 2007. In addition to the above allegations, the petition further represented that Rosemary C. had failed to follow through with the myriad of services offered and installed in the home by the Department over an extended period of time. Allegations also included that Rosemary C. was permitting individuals with drug problems and extensive criminal backgrounds to reside in the house with the children. The Department also discovered that Hiram C. was a felon with convictions for drug possession and transportation of firearms.

Kenneth B. and Brittany B. were both removed from the home of Rosemary C. on

different occasions due to juvenile and/or status offense petitions. Brittany was removed in January 2003 and returned approximately a month later. Subsequently, she was removed again from the home in September 2004 due to another juvenile and/or status offense petition. Brittany elected not to return to the home of Rosemary C. after turning eighteen (18) years of age. She presently resides with her (biological) maternal grandmother in Berkeley County, West Virginia. Shortly after the filing of the abuse and neglect petition in June 2007 Kenneth B. turned eighteen (18) years of age and returned to reside in the home of Rosemary C. He continues to reside in said home.

Brandon B. was removed from the home of Rosemary C. in January 2007 as a result of a juvenile and/or status offense petition. He was ultimately ordered to a residential treatment facility and remains in said placement currently. The juvenile and/or status offense petitions filed with regard to Kenneth B., Brittany B. and Brandon B. all involved incorrigibility, disciplinary, and general issues arising from the home. None of the petitions concerning these children involved delinquency allegations aimed victims outside the home.

As a result of the original abuse and neglect petition filed in June 2007 the Department was granted legal custody of the children. At this time physical custody of the children remained with Rosemary C. and Hiram C. However, sometime in September 2007 the Department filed an amended petition alleging that Rosemary C. and Hiram C. had allowed the children's medical cards to lapse. At this time the Department requested and was granted physical custody of the children due to the lack

of follow through by Rosemary C. and Hiram C. which adversely affected the children's ability to receive necessary services from Family Preservation Services and Mountain State Psychological, local, contracted service providers.

An adjudicatory hearing was held on October 3, 2007. Rosemary C. entered into a voluntary stipulation to certain allegations contained in the petition and amended petition. She conceded that while in her home the children had been exposed to inappropriate discipline which resulted in physical and emotional abuse, that she had failed to follow through with in-home services and social services recommended by the Department, and that living conditions in her home had been less than adequate for the health, benefit and welfare of the children.

At the conclusion of the adjudicatory hearing the Court directed Rosemary C. to participate in counseling recommended by her psychological evaluation, to attend all counseling, medical, psychological, psychiatric and/or parenting appointments or sessions determined by the MDT, to address necessary parenting issues to protect the children, to improve the living conditions in the home as recommended by the Department for the benefit of the children, and to maintain current medical cards on the children. The Court further granted Rosemary C. a six (6) month post adjudicatory improvement period with the above goals to be spelled out by the Department and the MDT in a family case plan. A written stipulation signed by all parties and their respective counsel confirming the above stipulated facts and outlining the problems and deficiencies (also stated above) to be resolved by the time of the dispositional hearing was also lodged at this time.

On November 1, 2007 the Circuit Court convened an adjudicatory hearing concerning Kenneth B., Sr. and Kimberly B. The Court found that said biological parents had abandoned their children and had, among other things, also failed to provide emotionally and financially for the children. On December 12, 2007 a dispositional hearing was held to consider the parental rights of Kenneth B., Sr. and Kimberly B., an issue left unfinished by the Maryland Court years earlier. Based on the evidence adduced, the Circuit Court terminated said parental rights. Neither Kenneth B., Sr. nor Kimberly B. appealed said dispositional order terminating their respective parental rights.

A hearing was held on April 16, 2008 to review the status of the improvement period and family case plan. At this time Counsel for Rosemary C. requested that independent counsel be appointed to represent the interests of Hiram C. in this proceeding. It was acknowledged before the Court at this time that though Hiram C. had never been named as custodian and/or guardian of the children in the State of Maryland (as Rosemary C. had been appointed) Hiram C. had in fact served as the primary father figure in the lives of the children. Hiram C. advised the Court at this time that he was willing to proceed in this matter without representation of counsel. This discussion occurred some ten (10) months after the original abuse and neglect petition had been filed.

By Order dated June 6, 2008 (and entered on June 13, 2008) the Circuit Court acknowledged receipt of the Department's Children's Case Plan filed in accordance with Rule 28 of the West Virginia Rules of Procedure for Child Abuse and Neglect

Proceedings. The Department recommended a reunification plan whereby Tiffany B., Patricia B., Joshua B. and Brandon B. (upon completion of his residential treatment program) would transition back to the home with Rosemary C. and Hiram C. The case plan acknowledged that Tessa F., then age fourteen (14), adamantly opposed returning to the home of Rosemary C. and Hiram C. Accordingly, the case plan directed that she would remain in the Department's legal custody in foster care and further work toward appropriate permanency. It was acknowledged at this time that both Kenneth B. and Brittany B. had turned eighteen (18) during the pendency of this proceeding and were no longer under the Court's jurisdiction.

The Circuit Court further advised that it did not agree with the Department's assessment of the case and had reservations about the recommended permanency plan for the children. Accordingly, the Court directed that a hearing be held pursuant to West Virginia Code § 49-5D-3a wherein the Court would consider evidence from the Department and MDT regarding its rationale for the proposed Children's Case Plan.

A dispositional hearing was subsequently held on June 19, 2008. The Department called several witnesses to testify regarding the performance of Rosemary C. and Hiram C. with respect to the family case plan and terms of the improvement period. Those testifying were Roann Welch, the on-going child protective services ("CPS") worker; Adele Lavigne, a clinical therapist for Family Preservation Services, who provided individual therapy with Rosemary C. and Hiram C. as well as family therapy including the children; Stephenia Carr, a case manager and counselor for Family Preservation Services, who provided parenting training; April House, licensed

psychologist for Mountain State Psychological Services, who provided therapy primarily to Tiffany B.; and Brian Henchey, supervised psychologist for Mountain State Psychological Services, who worked primarily with Joshua B., Patricia B. and Tessa F.

All of these witnesses were active in the MDT in this case. Their consensus at the dispositional hearing was that though Rosemary C. and Hiram C. had started somewhat slowly they had made substantial progress toward meeting the goals of the case plan and improvement period. The Department, the GAL and the rest of the MDT members ultimately supported a recommendation to allow Rosemary C. and Hiram C. an opportunity to attempt reunification with four (4) of the children. The plan recommended that reunification occur in the course of a dispositional improvement period with continued and strict oversight by the Department and service providers.

The Dispositional Hearing Order was entered by the Circuit Court on July 3, 2008. The Court found, directly contrary to the MDT, that Rosemary C. and Hiram C. had failed to substantially comply with the case plan and the terms of the post-adjudicatory improvement period and that there existed no likelihood that the conditions of abuse and neglect could be substantially corrected. The Court rejected the Children's Case plan and determined that there was no basis upon which to grant a dispositional improvement period. The Court further found that any future visitation of the children with Rosemary C. and Hiram C. would not be in the children's best interests.

The Circuit Court terminated "any parental rights" of Rosemary C. and Hiram C. The Court also denied any visitation rights between the respondents and the children.

The Court directed that visitation occur among the children, though found it necessary to separate the siblings except for Patricia B. and Joshua B. Rosemary C. brings this appeal of the Dispositional Hearing Order.

### III. STANDARD OF REVIEW

“For appeals resulting from abuse and neglect proceedings . . . we employ a compound standard of review: conclusions of law are subject to *de novo* review, while findings of fact are weighed against a clearly erroneous standard.” In re Emily, 208 W. Va. 325, 332, 540 S.E.2d 542, 549 (2000).

“Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if a circuit court's account of the evidence is plausible in light of the record viewed in its entirety.” Syl. Pt. 1, In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

“In the context of abuse and neglect proceedings, the circuit court is the entity charged with weighing the credibility of witnesses and rendering findings of fact. Syl. Pt.

1, in part, In re Travis W., 206 W. Va. 478, 525 S.E.2d 669 (1999). . . This Court, therefore, cannot set aside a circuit court's factual determinations unless such findings are clearly erroneous." In re Emily, *supra*.

"Consistent with our cases in other areas, we give appropriate deference to the findings of the circuit court. In this regard, the circuit court has a superior sense of what actually transpired during an incident, by virtue of its ability to see and hear the witnesses who have firsthand knowledge of the events. Appellate oversight is therefore deferential, and we should review the circuit court's findings of fact following an evidentiary hearing under the clearly erroneous standard. If the circuit court makes no findings or applies the wrong legal standard, however, no deference attaches to such an application. Of course, if the circuit court's findings of fact are not clearly erroneous and the correct legal standard is applied, the circuit court's ultimate ruling will be affirmed as a matter of law." In re Elizabeth Jo Beth H., 192 W. Va. 656, 453 S.E.2d 639 (1994).

#### **IV. ARGUMENT AND REPORT ON PRESENT PLACEMENTS OF CHILDREN**

As stated previously, neither the Department nor any member of the MDT opposed Rosemary C. at the dispositional hearing. The parties were all willing to support a recommendation that Rosemary C. and Hiram C. be granted a dispositional improvement period with a goal of attempting to reunify the family (or, at least four (4) out of the five (5) minor children) under strict supervision by the Department.

The Circuit Court alone rejected said recommendation and drafted a twenty-four (24) page Dispositional Hearing Order outlining the Court's reasoning for terminating parental rights and denying any further visitation between the children and Rosemary C.

and Hiram C. The Order references very little of the testimony of the MDT members and providers that testified at the dispositional hearing. Rather, the Court seemed to draw largely on its own observations and history with the family (including prior juvenile proceedings involving some of the children) in ultimately determining the disposition that Rosemary C. now appeals. Perhaps most telling of the Court's thought process is a finding made by the Court for not granting a dispositional improvement period found on page 22 of the Order: "Given what has happened in this case, the Court simply cannot trust the members of this MDT to recognize and report to the Court if something were to go wrong."

Certainly, the Department does not share the Circuit Court's concern that the MDT could not have been trusted to implement and oversee a reunification plan set forth in a dispositional improvement period. Neither the Department nor the MDT in this matter ever suggested that a successful reunification in this case was guaranteed even with strict oversight. The parties merely represented at the time of the dispositional hearing that Rosemary C. and Hiram C. had progressed to a point where the parties could support an attempt at reunification in the form of a continued or additional period of improvement.

This Court has previously held that,

In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multidisciplinary effort among the court system, the parents, attorneys, social

service agencies, and any other helping personnel involved in assisting the family.

Syl. Pt. 4, In the Interest of Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991). The Department asserts that these principles were followed by the MDT in this case to implement a "workable" approach to resolve the family's problems. Nevertheless, the Department also acknowledges without question the Circuit Court's ultimate role as arbiter upon disposition. Carlita B. also instructs that,

At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement as been made in the context of all the circumstances of the case to justify the return of the child.

Syl. Pt. 6, Carlita B., *supra*.

The Department provides this response brief primarily for the purpose of advising this Court as to the status of the current placements of the children herein. Though the Department did not oppose the position of Rosemary C. below, the Department believes that this Court should be fully apprised of the nature of the children's placements and how they have progressed since the dispositional hearing was held in June 2007. The following information is therefore provided with a purpose to assist this Honorable Court in crafting a resolution of this case which promotes the best interests of the children, the polar star principle adopted long ago concerning minor children.

Tiffany B., Joshua B. and Patricia B. are all currently residing in the same foster care placement. Tiffany B. has been in this home since May 2008. Joshua B. and

Patricia B. joined their sister in the home on August 12, 2008 and August 14, 2008, respectively. Tiffany B. is presently seventeen (17) years old. Joshua B. just turned ten (10) years old on January 8, 2009. Patricia B. is currently thirteen (13) years old.

By all reports and continued contact with the Department, Tiffany B. has thrived since entering foster care placement. Her anger issues are under control, She is doing well in school, and is participating in extra-curricular activities such as playing soccer and joining the Key Club. Tiffany gets along well with her foster parents and siblings in the home. She appears happy and well-adjusted at this time. Tiffany has an IEP and sometimes struggles with reading, however she has benefitted from personal attention and assistance in this area from her foster parents who also work well with the school in finding ways to help her in her studies.

Since being placed in the same foster home as Tiffany B. since August 2008, Joshua's grades have improved dramatically. Joshua also has an IEP in place but does not appear to need much assistance from these services this school year. Joshua's social skills are also vastly improving. At the time of his removal from the family home he was very withdrawn and would make little or no conversation or make eye contact. Now, Joshua does not hesitate to start conversation and will look people in the eyes when conversing. He appears to have developed friendships at school and is particularly close to one child in the foster home, a teenage son of the foster parents. Joshua also has had no further anger outbursts out of the ordinary for a child his age since moving into the foster home.

Patricia B. was also placed in the same foster home in August 2008. She has an

IEP in place and receives special tutoring. Patricia is also doing well in school. She has developed friendships and social group of peers, despite being more quiet by nature. Patricia has Hepatitis C which she sustained from being pricked with a dirty needle by her biological mother. Recently, Patricia's foster parents have taken her to a physician in Pittsburgh due to an abnormal blood count and other potential concerns resulting from the Hepatitis C. Patricia and her siblings enjoy living in their current foster home where they have greatly thrived.

Tessa F. is currently in a residential treatment program. She will soon be fifteen (15) years old on March 11, 2009. She has expressed that she has no desire to see Rosemary C. or Hiram C. Her mother's parental rights are still in issue in the continuing abuse and neglect proceeding below.

Brandon B. is currently placed on the children's home campus of Burlington United Methodist Family Services. He has resided there since July 2008. Brandon is also fifteen (15) years old. Unfortunately, since he was placed at Burlington he has made little to no progress. He has had some visits with his siblings. He has also received numerous restraints for aggressive behaviors, been noncompliant and has overall disregard for the program. He has attempted to contact Rosemary C. and Hiram C. without permission. It is believed that his foreseeable future will include continued residential placement/treatment at his present or potentially at a more restrictive level. Brandon and Tessa both continue to struggle. Tiffany B., Joshua B. and Patricia B. have, however, flourished in their foster care placement.

## V. CONCLUSION

The position of the Department and the MDT was not adopted by the Circuit Court below at the dispositional hearing. The Department and the MDT recommended that Rosemary C. and Hiram C. be granted an improvement period upon disposition to allow them an opportunity for reunification of the family under close oversight and supervision by the Department. The Department further asserts that ample evidence exists in the record whereby the Circuit Court could have adopted said recommendation contained in the Children's Case Plan. However, the Department does not generally oppose or take a position regarding the assignments of error now raised by Rosemary C. on appeal. Should this Court overturn the Circuit Court's Dispositional Hearing Order the Department will continue to provide strict oversight and services aimed at achieving the goal of reunification of the family. Should this Court affirm the Circuit Court's Order, the Department will continue to promote the MDT's permanency goals for each of the children now in the Department's legal custody.

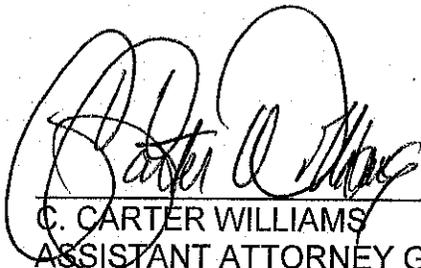
The Department, however, is cognizant of the sobering fact that to uproot Tiffany B., Joshua B. and Patricia B. from their newly found stability in foster care now may well represent a more egregious result. Unfortunately, children are often the most impacted and manipulated parties in these cases, and wind up paying most for the mistakes of their parents. Accordingly, the Department does not believe that the best interests of these three (3) children would be served by moving them again. The Department will also continue to ensure that all of the children, to the fullest extent possible, have the opportunity to visit with each other regularly as ordered by the Circuit Court. The

placements and permanency goals of Tessa F. and Brandon B. will continue to be a challenge for the MDT, which is also committed to achieving the best permanency goals feasible and in the best interests of said children.

Respectfully submitted,

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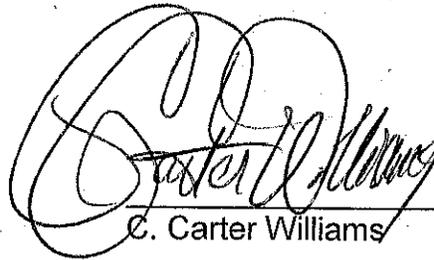
**CERTIFICATE OF SERVICE**

I, C. Carter Williams, do hereby certify that I have served a true copy of the foregoing Brief on Behalf of Appellee, State of West Virginia, Department of Health and Human Resources, upon the following Counsel, by mailing a true copy of same to their respective addresses as shown below, by United States Mail, postage prepaid, on this the 29<sup>th</sup> day of January, 2009:

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