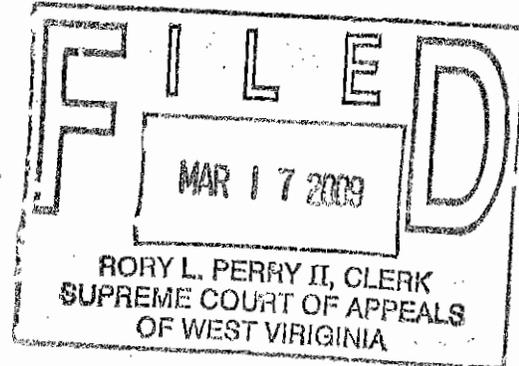


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34704



IN RE: CAITLYN M., CARSON M., and STEVEN M.

**BRIEF OF THE INFANT-CHILDREN-APPELLEES:
CAITLYN M., CARSON M. AND STEVEN M.**

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II. When the circuit court terminates a parent’s parental rights as part of its disposition of a child abuse or neglect case, whether the termination of parental rights is contested or uncontested, the circuit court must also enter an order pursuant to Rule 16-a, R.P.C.A.N.P. imposing a monthly child support obligation on one or both of the terminated parents, and such order continues through the child’s infancy until modified by order of the circuit court or until the infant child might be adopted, unless the court finds that such an order is contrary to the best interests of the child; and, in this case, the Harrison County Circuit Court did not err in entering disposition orders which terminated the Appellant’s parental rights but did not relieve the Appellant of any and all obligation to pay child support, because it was in the best interests of the children to terminate the Appellant’s parental rights while requiring him to continue to pay child support. 14 – 30

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

The Infant-Children-Appellees concur with the descriptions and procedural history which the Appellant sets forth in the section of his Brief under this same heading, as far as such goes, but the Infant Children add thereto that: (1) the children by the G.A.L. and/or the mother by her counsel submitted to the court by proffer without any objection to submission by proffer from the Appellant, that the mother and the children wanted the court to order the Appellant to pay child support post-disposition, that such an order was in the best interests of the children, that the children and their mother were indigent and receiving state assistance, and that the Appellant at that time was some \$8,000.00 in arrears of his child support obligations under an order issued by the Harrison County Family Court; (2) in addition to continuing the child support order established by the Harrison County Family Court as part of the disposition in this case, the Harrison County Circuit Court also ordered that the Harrison County Family Court, and not the Harrison County Circuit Court, would retain continuing jurisdiction over the continued child support order. *See, Order Following Adjudicatory Hearing: Order Accepting Voluntary Relinquishment of Parental Rights: . . .,*” pg. 6 paragraphs 32 and 33 . . ., entered on 08/05/02; (3) the Circuit Court received no evidence and made no findings as to either the financial status of each parent or the amount of the monthly obligation imposed on the Appellant under the Harrison County Family Court child support order; and, (4) the

G.A.L. on the record and by the Request for Relief made in his *Children's Memorandum of Law for Child Support*, requested that the court, per Rule 17(c)(5), R.P.C.A.N.P., require each of the parents to complete and submit verified financial statements to aid the court in imposing an appropriate child support obligation in accordance with the *Guidelines for Child Support Awards*, W.Va. Code § 48-13-101, *et seq.*, as is mandated by Rule 16-a, R.P.C.A.N.P., and that the court denied that relief and did not order each parent to complete and submit any financial statements before entering its final orders.

STATEMENT OF FACTS

The Infant-Children-Appellees agree with the Statement of Facts given by the Appellant, as far as it goes, but they add thereto that by the G.A.L.'s *Children's Memorandum of Law for Child Support* dated April 28, 2008, and/or by the on-the-record proffers of the G.A.L. and/or counsel for Donna M., it was submitted to the Circuit Court that each of the children and their mother, Donna M., had recently impressed upon the G.A.L. that they all wanted and needed Stanley M.'s child support; that they were indigent; and, that Stanley M. was at that time some \$8,000.00 in arrears of his child support obligation per the order of the Harrison County Family Court. *See, Children's Memorandum of Law for Child Support*, page 7 of 9, footnote 3.

CROSS-ASSIGNMENT OF ERROR

In ordering the continuation of Stanley M.'s monthly child support obligation as such had been previously ordered by The Harrison County Family Court, The Circuit Court of Harrison County clearly erred because there is no factual basis for determining whether the continuation of the Family Court's ordered child support obligation is a child support obligation that meets the requirements imposed on child support orders per Rule 16-a of the *Rules of Procedure for Child Abuse and Neglect Proceedings*, and because the Circuit Court acted contrary to law in divesting itself of continuing jurisdiction over the child support order.

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ARGUMENT IN OPPOSITION TO APPELLANT'S ASSIGNMENT OF ERROR

I. Neither a "consent" nor a "relinquishment" per W.Va. Code § 48-22-303 has any proper application in child abuse or neglect proceedings; and, in this case, the Appellant was not misled by the language of the written form he signed before the Circuit Court on April 2, 2008 in furtherance of the consensual termination of his parental rights.

Contrary to the Appellant's Argument, neither a "consent" nor a "relinquishment" per W.Va. Code § 48-22-303 has any proper application in child abuse or neglect proceedings. The consensual termination of parental rights in a child abuse or neglect proceeding is governed exclusively by W.Va. Code § 49-6-7, and the use of any form or on-the-record colloquy designed to comply with the requirements of W.Va. Code § 48-22-303 to effect a consensual termination of parental rights in child abuse or neglect proceedings is improper, and is contrary to the best interests of the child.

Adoption proceedings are governed by W.Va. Code § 48-22-101, *et seq.*, while child abuse and neglect proceedings are governed exclusively by W.Va. Code § 49-6-1, *et seq.* W.Va. Code § 49-6-7 provides for the "[c]onsensual termination of parental rights" in child abuse and neglect cases, and it simply and succinctly states that "[a]n agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and

fraud.” W.Va. Code § 49-6-7. It is true that many decisions from this Court involving the consensual termination of parental rights in a child abuse case have, somewhat confusingly, used the terms “relinquishment” and “voluntary relinquishment,” as does Rule 35 of *The Rules of Procedure for Child Abuse and Neglect Proceedings*. However, no such terminology is actually used in the text of W.Va. Code § 49-6-7, and Rule 35, R.P.C.A.N.P. was obviously promulgated in reference to the consensual termination of parental rights per W.Va. Code § 49-6-7. Moreover, in all the decisions involving the consensual termination of parental rights in the context of a child abuse or neglect case, this Court has only found W.Va. Code § 49-6-7 to be applicable, and the G.A.L. believes that this Court has never in such cases referred to a “consent” or “relinquishment” per W.Va. Code § 48-22-303 or even suggested that a “consent” or “relinquishment” per the adoption statutes is in any way applicable or proper in a child abuse case – and rightly so. A “consent” or “relinquishment” under the adoption statutes is a very different thing from a consensual termination of parental rights in a child abuse or neglect proceeding, and such adoption “consents” and “relinquishments” are neither applicable nor proper in a child abuse case.

When a parent “consents” per W.Va. Code § 48-22-303 of the adoption statutes, they are relinquishing their parental rights in favor of a particular individual or individuals, and not to any agency, for the sole purpose of the child’s adoption by that

individual or individuals. W.Va. Code § 48-22-108. A “relinquishment” per the adoption statutes is the parent’s voluntary surrender of their child and their parental rights to an “agency,” but again, for the sole purpose of the child’s adoption. W.Va. Code § 48-22-115. An “agency” is defined as The WVDHHR or a licensed adoption agency. W.Va. Code § 48-22-104. A parent’s “consent” or “relinquishment” per the adoption statutes is an agreement between the parties and it may be revoked by the mutual consent of the parties at any time prior to the child’s actual adoption, and may be unilaterally revoked by the parent upon the happening of any contingency which the adoption “consent” or “relinquishment” might provide. W.Va. Code § 48-22-303; § 48-22-305(1) and (3). A parent’s “consent” or “relinquishment” per the adoption statutes may be effected entirely extra-judicially without any court approval or other court involvement, as long as it is in writing, it contains all the statutorily required recitals and is duly notarized. *See generally*, W.Va. Code § 48-22-303. Moreover, there is no requirement whatsoever that a parent’s “consent” or “relinquishment” for the child’s adoption be in the best interests of the child. *Id.* An adoption “consent” or “relinquishment” per W.Va. Code § 48-22-303 stands in sharp contrast to a consensual termination of parental rights per W.Va. Code § 49-6-7.

When a parent in a child abuse case agrees to the termination of their parental rights per W.Va. Code § 49-6-7, they are merely signaling to the court and the other

parties in the proceedings that they do not contest the court's ordering the termination of their parental rights as part of the court's disposition of the child abuse case – period. The parent does not consent to any individual's adoption of the child, nor does the parent relinquish their child or parental rights to any individual or agency. Unlike an adoption “consent” or “relinquishment” which effectively terminates parental rights upon execution, the actual termination of parental rights in a child abuse case must be court ordered and thus, it is never entirely extra-judicial or completely effected merely by the written agreement of the parties. Most importantly, and also starkly unlike an adoption “consent” or “relinquishment,” the termination of parental rights in a child abuse case is not, and can never be, effected without the court first finding, for the record, that it is in the best interests of the child, after all the other parties to the proceeding, including the child, have had an opportunity to be heard and raise their objections or concurrences to the proposed termination.

It is axiomatic that in ordering a disposition of any child abuse case, even those where the court terminates parental rights following a parent's consent to termination per W.Va. Code § 49-6-7, if the child is thereafter placed outside the home the court is required to adopt a permanency plan for the child which the court finds is in the child's best interests – be it a plan for adoption, permanent legal guardianship, permanent placement with a fit and willing relative, continued foster care, emancipation, etc. Thus,

in stark contrast to the adoption statutes providing that a “consent” or “relinquishment” is only for the purposes of the child’s adoption, the permanency plan for a child in a child abuse case following the consensual termination of parental rights is not, and cannot be, limited to just that of adoption. And finally, a consensual termination of parental rights in a child abuse case can never be revoked entirely extra-judicially either by the happening of a contingency or by the subsequent mutual agreement of the parties prior to an actual adoption of the child, as an adoption “consent” or “relinquishment” may be revoked per W.Va. Code § 48-22-305. West Virginia Code § 49-6-7 is quite clear that the only way a parent may later invalidate their agreement to the consensual termination of their parental rights is if they prove to the court that they were the victim of fraud, or that they were suffering from duress when they so agreed. W.Va. Code § 49-6-7.¹

That neither a “consent” nor a “relinquishment” per the adoption statutes is applicable to the consensual termination of parental rights in a child abuse case per W.Va. Code § 49-6-7 is clearly illuminated by the facts of this case. In this case, following Stanley M.’s consensual termination of his parental rights per § 49-6-7, the circuit court properly ordered the termination of the Appellant’s parental rights and ordered the children to continue in the sole and exclusive physical and legal custody of their mother. The Appellant did not consent to the adoption of his children by any

¹ Neither before the circuit court nor in his appeal to this Court did the Appellant ever raise either fraud or duress as grounds for justifying invalidating his consensual agreement to the termination of his parental rights in this case. In fact, the Appellant has never sought and does not now seek to in any way invalidate his agreement on April 2, 2008 to the termination of his parental rights. On this appeal, the Appellant only seeks to modify the circuit court’s subsequent disposition orders of August 5, 2008, and not as such pertain to the court-ordered termination of his parental rights, but only as such pertain to his court-ordered child support obligation.

particular individual, nor did he relinquish his children or his parental rights to The WVDHHR or a licensed adoption agency. Thus, as a matter of law, the Appellant's consensual termination of his parental rights in this case is neither a "consent" nor a "relinquishment" per W.Va. Code § 48-22-303.

This Court has previously exposed the inapplicability and impropriety of "consents" under the adoption statute if they are effected in the context of a child abuse case, and declared with a bright line that a parent may not "consent" to the child's adoption per the adoption statutes when child abuse and neglect proceedings are pending against that parent. Syl. pt. 2, *Alonzo v. Jacqueline F.*, 191 W.Va. 248, 445 S.E.2d 189 (1994) ("Where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding."). For all the reasons given above which also amply demonstrate the inapplicability and impropriety of allowing the consensual terminations of parental rights in a child abuse case to be either affected or effected by a "relinquishment" per the adoption statutes, and with the further support of this Court's rationale in *Alonzo v. Jacqueline F.*, the G.A.L respectfully encourages this Honorable Court to make a bright-line declaration in this case to clarify that a parent's "relinquishment" per the adoption statutes is also improper and prohibited when child abuse and neglect proceedings are pending against that parent. Thus, the G.A.L. also

respectfully encourages this Court to prohibit the use in a child abuse case of either an on-the-record colloquy or a written form to effect a parent's consensual termination of parental rights per W.Va. Code § 49-6-7, if the colloquy or form is designed to effect or makes reference to an adoption "relinquishment" under W.Va. Code § 48-22-303 (e.g., WVDHHR Form SS-FC/ADP-47), or if the colloquy or written form recites terms or conditions of the parent's agreement (including terms providing for revocation of the agreement and any recital that the agreement is for the purposes of the child's adoption), other than just those needed to establish that the parent does agree to the termination of his or her parental rights, and does so voluntarily, free from fraud and duress, and with knowledge of their legal rights – which is all that is required by Rule 35, R.P.C.A.N.P and W.Va. Code § 49-6-7.²

Whether it is obtained entirely extra-judicially or in conjunction with the pre-adoption litigation authorized by W.Va. Code § 49-3-1 in order to allow the department to consent to a child's adoption, an adoption "relinquishment" pursuant to W.Va. Code § 48-22-303 has no proper application to the consensual termination of parental rights in a child abuse case. The Appellant's reliance on either the language of W.Va. Code § 48-22-303 or on language in the form he signed which is deigned with a view towards a "relinquishment" under the adoption statute, is misguided and misplaced, and provides no support for his position in this appeal.

² In this case, before accepting the consensual termination of his parental rights, Judge Matish engaged the Appellant in an on-the-record oral colloquy in accordance with Rule 35, R.P.C.A.N.P. and Syl. pts. 1 and 2 of *In re Tesla N.M.*, 211 W.Va. 334, 566 S.E.2d 221 (2002).

II. When the circuit court terminates a parent's parental rights as part of its disposition of a child abuse or neglect case, whether the termination of parental rights is contested or uncontested, the circuit court must also enter an order pursuant to Rule 16-a, R.P.C.A.N.P. imposing a monthly child support obligation on one or both of the terminated parents, and such order continues through the child's infancy until modified by order of the circuit court or until the infant child might be adopted, unless the court finds that such an order is contrary to the best interests of the child; and, in this case, the Harrison County Circuit Court did not err in entering disposition orders which terminated the Appellant's parental rights but did not relieve the Appellant of any and all obligation to pay child support, because it was in the best interests of the children to terminate the Appellant's parental rights while requiring him to continue to pay child support.

In ordering the disposition of a child abuse or neglect case, there is no consideration more important to the circuit court than what is best for the child – the best interests of the child is “the polar star” that guides every decision the court makes. *In re James G.*, 211 W.Va. 339, 345, 556 S.E.2d 226 (2002). The circuit court must enter orders for the disposition of a child abuse or neglect case in accordance with W.Va. Code § 49-6-5. *See*, Rule 36(a), R.P.C.A.N.P. and W.Va. Code § 49-6-5(a). If the circuit court enters disposition orders which include the termination of parental rights, the court must

do so in accordance with W.Va. Code § 49-6-5(a)(6), because that is the only disposition alternative under the statute which encompasses the termination of parental rights. *See generally*, W.Va. Code § 49-6-5. Thus, contrary to the distinction drawn by the Appellant in his Brief, if the disposition of child abuse or neglect proceedings includes the termination of parental rights, the circuit court must order a disposition in accordance with W.Va. Code § 49-6-5(a)(6), regardless of whether the disposition is contested or uncontested.

The disposition of child abuse and neglect proceedings pursuant to W.Va. Code § 49-6-5(a)(6) clearly and unambiguously authorizes the circuit court to terminate any “parental rights and responsibilities” of a parent, but only if the court finds: (1) that “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future;” and, (2) that the termination is “necessary for the welfare of the child.” *See*, W.Va. Code § 49-6-5(a)(6), first sentence. However, W.Va. Code § 49-6-7 also deals with the termination of parental rights in a child abuse or neglect case, providing for the “[c]onsensual termination of parental rights,” and Rule 35(b)(1) of *The Rules of Procedure for Child Abuse and Neglect Proceedings* interprets W.Va. Code § 49-6-7 as only requiring the disposition hearing to be an evidentiary hearing if the parent or another party to the proceedings contests the termination of parental rights. W.Va. Code § 49-6-7; Rule 35(b)(1), R.P.C.A.N.P.

“Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.” Syl. pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975). “Statutes in *pari materia*, [sic] must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.” Syl. pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361. *Accord* Syl. pt. 2, in part, *Beckley v. Kirk*, 193 W.Va. 258, 455 S.E.2d 817 (1995) (internal quotations and citations omitted).

Reading W.Va. Code § 49-6-5(a)(6) *in pari materia* with W.Va. Code § 49-6-7 in light of Rule 35(b), R.P.C.A.N.P., means: (1) If the termination of parental rights is contested by a party, then the court must hold an evidentiary hearing and make the two factual findings that “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future” and that the termination is “necessary for the welfare of the child;” and, (2) If the termination of parental rights is not contested, then the court need not find that “there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future,” but if the termination of the parent’s parental “responsibility” to pay child support is contested by a party, then the court must still find that it is “necessary for the welfare of the child” to

order the parent relieved of such responsibility.

By the Legislature's 2006 amendments to W.Va. Code § 49-6-5(a)(6) which came some three years after this Court's decision in *In re Stephen Tyler R.*, 213 W.Va. 725, 584 S.E.2d 581 (2003), and which changed the statute's previous language of "parental rights and/or responsibilities" to the phrase of "parental rights and responsibilities," the Appellant argues that our circuit courts are now prohibited from imposing a child support obligation upon a parent whose parental rights are terminated in child abuse and neglect proceedings. However, both the legislative history of the statute and the clear and unambiguous language of the statute itself compel the opposite conclusion.

In 2006 our State Legislature did amend W.Va. Code § 49-6-5(a)(6) changing the statute's previous language of "parental rights and/or responsibilities" to the currently-found phrase of "parental rights and responsibilities." However, this minor grammatical change was merely a small part of comprehensive amendments to the Code for the expressed purpose of having the circuit court take into account in child abuse cases the special circumstances posed when one of the parents is a non-abusive battered parent, and there is no hint whatsoever that the Legislature ever intended to prohibit the circuit court from imposing a child support obligation on a parent whose parental rights are terminated by the disposition.³ Moreover, W.Va. Code § 49-6-5(a)(6) was and still is clear and

³ See, the following: Senate Bill No. 739 (February 20, 2006)(the end note states that "[t]he purpose of this bill is to effectuate a 'battered parent' finding in appropriate cases of domestic violence;" Committee Substitute for H.B. 4694 (February 23, 2006)(the end note states that "[t]he purpose of this bill is to amend the provisions of the West Virginia Code related to child abuse and neglect to provide for specific consideration, findings and determinations when the surrounding circumstances indicate that one of the parents is a battered parent, and to insure that

unambiguous in previously expressly authorizing the terminations of “parental right and/or responsibilities,” and in now expressly authorizing the termination of “parental rights and responsibilities,” only “when necessary for the welfare of the child.” See, the first sentence in both the previous version and the current version of W.Va. Code § 49-6-5(a)(6).

This unambiguous requirement under the statute that the termination of parental rights and the termination parental responsibilities be “necessary for the welfare of the child” cannot just be ignored. It is an axiom of statutory construction that this language is not superfluous and that it must be given meaning and effect. Moreover, the unambiguous and now repeatedly-enacted requirement that terminations ordered pursuant to the statute be “necessary for the welfare of the child” is the most important requirement imposed by the statute, because it is clearly a requirement imposed by “the polar star” of the best interests of the child. And, nothing is more important that what is best for the child.

It is also true, as the Appellant contends, that this Court’s holding in *In re Stephen Tyler R.* recognizing the circuit court’s authority to simultaneously impose a child support obligation on a parent whose parental rights the court terminates by the disposition of the child abuse and neglect proceedings was predicated on the “and/or” found in the phrase “parental rights and/or responsibilities” in the previous version of

certain support services are made available to the battered parent;” and, Enrolled Committee Substitute for H.B. 4694 (March 11, 2006)(the final version which became law 90 days later). Copies of these legislative documents were downloaded from the State Legislature’s website and attached as Exhibits to the *Children’s Memorandum of Law for Child Support* the G.A.L. submitted to the Circuit Court.

W.Va. Code § 49-6-5(a)(6), and, as noted above, it is also true that this phrase has now been changed to “parental rights and responsibilities” in the current version of the statute. But this only means that in *In re Stephen Tyler R.* this Court had no need to look beyond the “and/or” in the previous version of the statute’s phrase of “parental rights and/or responsibilities” to quickly recognize the circuit court’s authority to impose a child support obligation on parent whose parental rights are terminated, and that because this phrase has now been changed to “parental rights and responsibilities” in the current statute, this Court will now have to look elsewhere in the statute for such authority. It does not mean, as the Appellant also argues, that the statute now prohibits a circuit court from simultaneously imposing a child support obligation on parent when that parent’s parental rights are terminated. Quite the contrary, the statute, both then and now, clearly and unambiguously does provide authority for the circuit court to simultaneously terminate a parent’s parental rights while ordering that parent to pay child support, and this Court doesn’t have to look far to find it. It’s in the very first sentence of the statute which clearly and unambiguously mandates that the termination of parental rights and the termination of a parental responsibility, like the parental responsibility to financial support the child, is only authorized “when necessary for the welfare of the child.”

The termination of a parental right or a parental responsibility necessarily terminates a corresponding right of the child. For example, the termination of a parent’s

fundamental right to make decisions for the child and to have physical custody of the child necessarily terminates the child's fundamental right to have the parent make decisions on the child's behalf and to be in the custody of that parent. Likewise, the termination of a parent's fundamental responsibility to financially support the child necessarily terminates the child's fundamental right to receive the financial support of that parent. The minor grammatical change in W.Va. Code § 49-6-5(a)(6) relied on by the Appellant in no way erases the clear and unambiguous "polar-star" mandate found in both the previous and the current version of the statute which unequivocally declares it to be the public policy of our state that due process in child abuse and neglect proceedings guarantees that when the court orders the disposition of the case, the child's fundamental right to receive financial support from a parent will not be terminated by the court ordering the termination of that parent's corresponding fundamental responsibility to support the child, unless it is necessary for the child's welfare, or at least in the child's best interests, for the court to do so. And again, nothing, nothing, is more important than what is best for the child. *In re James G., supra.*

The Appellant also argues that this Court's decision in *In re Cesar L., _____* W.Va. _____, 654 S.E.2d 373 (2007), "effectively modified *In re Stephen Tyler R.* so that it is no longer discretionary for a circuit court to award child support while involuntarily terminating parental rights, but mandatory that parental obligations are

simultaneously terminated.” See, Appellant’s Brief, pg. 11. The Appellant fails to appreciate that the sole issue presented in *Cesar L.* was whether a parent who “voluntarily relinquished” their parental rights in a child abuse case pursuant to W.Va. Code § 49-6-7 had standing as a “parent” pursuant to W.Va. Code § 49-6-6 to later seek modification of the circuit court’s disposition orders, and that the case did not involve the issue presented in this case – whether a circuit court could, as part of its disposition orders in a child abuse case, simultaneously impose a child support obligation on a parent whose parental rights were terminated. See generally, *In re Cesar L. supra*. Moreover, it is mystifying why the Appellant thinks that *Cesar L.* somehow nullifies *Stephen Tyler R.* when the *Cesar L.* Court cites to *Stephen Tyler R.* in footnote 20 of its decision.⁴

⁴ This Court cited to *Stephen Tyler R.* in footnote 20 of *Cesar L.* to clarify that though a parent whose parental rights are terminated in a child abuse case loses standing as a “parent” per W.Va. Code § 49-6-6 to later petition the court for a modification of the disposition orders, if they were ordered to pay child support post-disposition, they would still be considered as “a parent or other person” ordered to pay child support” per W.Va. Code § 48-11-105(a), and thus they would have standing to later petition the court for a modification of the just the child support order (and not the other disposition orders) based on a substantial change in circumstances. See, *Cesar L., supra*, at fn20; W.Va. Code § 48-11-105(a)(underlined emphasis added). However, because the *Stephen Tyler R.* Court focused solely on the “and/or” in the phrase “parental rights and/or responsibilities” in the previous version of W.Va. Code § 49-6-5(a)(6), its holding that a circuit court has “the discretion” to order child support when it terminates parental rights is understandable, but it’s not entirely accurate in light of the language of the statute as a whole. As the Infant Children argue further, *infra*, an appreciation of the statute’s polar-star requirement that all terminations be “necessary for the welfare of the child,” together with reading the statute in *pari materia* with other applicable statutes, necessarily leads to the conclusion that a circuit court must impose a child support obligation on the terminated parent, unless it would be contrary to the welfare of the child to do so. So, while the Appellant is incorrect in contending that *Cesar L.* effectively modified *Stephen Tyler R.*, should this Court agree with the Infant Children and conclude by a decision in this case which is not *per curiam* that a circuit court must impose a child support obligation on the terminated parent unless it would be contrary to the welfare of the child to do so, then this Court will by this case have effectively modified the holding of *Stephen Tyler R.* insofar as that decision concluded that the circuit court’s authority in this regard is discretionary.

A closer scrutiny of previous decisions of this Court. and of our statutes and rules applicable to child abuse cases, reveals other important aspects of this Court's views and our state's public policy which the Appellant obviously also fails to appreciate.

"It is the intent of the Legislature that to the extent practicable, the laws of the state should encourage and require a child's parent's to meet the obligation of providing that child with adequate food, shelter, clothing, education, and health and child care." W.Va. Code § 48-11-101(a). "The duty of a parent to support a child is a basic duty owed by the parent to the child[.]" Syl. pt. 6, *In re Stephen Tyler R., supra* (Quoting Syl. pt. 3, in part, *Wyatt v. Wyatt*, 185 W.Va. 472, 408 S.E.2d 51 (1991)). Child support orders are exclusively for the benefit of the child. *In re Stephen Tyler R., supra*, 213 W.Va. at 742-43 (citations omitted). "Upon the entry of such order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this state, and shall be divested of all obligations in respect to the said adopted child" W.Va. Code §48-22-703(a).

It is very clearly the very strong public policy of our state that every child receive the financial support of both their parents, and that the responsibility of each parent to

support the child continues until the child might be adopted by someone else to fulfill that responsibility. It is also our public policy to ensure that children and their custodial parent are not left in dire financial straits as a result of child abuse or neglect proceedings, and this Court recognizes that if in ordering the disposition of a child abuse or neglect case “the circuit court gives custody of the child to one parent or another responsible person in the abuse or neglect action, then in the absence of a support obligation upon the non-custodial parent, the custodial parent or responsible person must fall back on the resources of the Department.” *WVDHHR BCSE v. Smith*, 218 W.Va. 480, 624 S.E.2d 917, 924 (2005)(underlined emphases supplied); *See also*, W.Va. Code § 49-6-5(a)(5)(“Whenever the court transfers custody of a youth to the department, an appropriate order of financial support by the parents or guardians shall be entered in accordance with section five, article seven of this chapter.”)

As even the Appellant notes, in *Cesar L.* this Court held that “a final order terminating a person's parental rights, as the result of either an involuntary termination or a voluntary relinquishment of parental rights, completely severs the parent-child relationship, and, as a consequence of such order of termination, the law no longer recognizes such person as a ‘parent’ with regard to the child(ren) involved in the particular termination proceeding.” *In re Cesar L., supra*, 624 S.E.2d at 382 (underlined emphases added). Thus, *Cesar L.* clearly stands for the proposition that it is only after

parental rights are terminated by the circuit court's disposition orders, that the parent is then no longer a recognized as a "parent" with standing to seek any post-disposition modification of the disposition orders. But, of course, it is indisputable that any parent, including the Appellant in this case, is a "parent" for the purposes of the court's disposition of the abuse or neglect proceedings and thus, is a "parent" subject to the court's orders pertaining to the termination of "parental rights and responsibilities" per a disposition in accordance with W.Va. Code § 49-6-5(a)(6), including disposition orders entered consistent with the best interests of the child which terminate a parent's parental rights but continue his obligation to financially support the child – the disposition orders entered in this case. It is, therefore, also beyond argument that a parent who is subject to the circuit court's disposition orders in a child abuse case, the Appellant in this case, is also a "parent" for the purposes of applying Rule 16-a(a) of *The Rules of Procedure for Child Abuse and Neglect Proceedings*.

Rule 16-a, R.P.C.A.N.P. is entitled: "Required entry of support orders," and subpart (a) mandates that "[e]very order in an abuse and neglect proceeding that alters the custodial and decision-making responsibility for a child and/or commits the child to the custody of the Department of Health and Human Resources must impose a support obligation upon one or both parents for the support, maintenance and education of the child." Rule 16-a(a), R.P.C.A.N.P. The Rule codifies this Court's interpretation of

W.Va. Code § 49-7-5 as requiring that a child support order be imposed on the non-custodial parent not only when the child is transferred to the custody of The WVDHHR, but also in cases where the child's custody is exclusively vested in one parent. *WVDHHR v. Smith, supra*, 624 S.E.2d at 924, and at Syl. pt. 4. Of course, a disposition order which terminates a parent's parental rights, like the disposition order in this case, is "an order in child abuse and neglect proceedings that alters the custodial and decision-making responsibility for a child." But Rule 16-a(a), like every statute and Rule applicable in a child abuse or neglect proceeding, must also be read under the light of "the polar star" of what is best for the child. So, Rule 16-a(a), like the statutes it derives from, must be read to require that the court must enter a child support order imposing a child support obligation on one or both parents whenever the court enters an order altering custodial or decision-making authority with respect to the child, including a disposition order that terminates a parent's parental rights, unless, the court finds it is contrary to the child's best interests to do so.⁵

Sections 49-6-5(a)(6), 49-6-5(a)(5), 49-7-5 and 48-22-703(a) of the Code all deal with a parent's responsibility to financially support their child. Thus, these four statutes must be read in *pari materia* to discern the Legislature's intentions regarding the issue presented by this appeal. By reading the unambiguous language in W.Va. Code § 49-6-5(a)(6) only authorizing the termination of a parent's responsibility to financially support

⁵ There may very well be cases where it would not be in the best interests of the child to order a parent whose rights are terminated to also pay child support. For example, an abused child might consider any child support from the abuser to be akin to "blood money" and so emotionally repulsive that it should not be ordered. This case is not such a case.

the child “when necessary for the welfare of the child,” together with the unambiguous requirement under W.Va. Code § 49-6-5(a)(5) that anytime custody of a child is transferred a child support order must be entered, together with the requirement found by this Court in *Smith* is imposed by W.Va. Code § 49-7-5 mandating that a child support order be entered for the non-custodial parent whenever custody of the child is vested exclusively in one parent, together with reading the express recognition in W.Va. Code § 48-22-703(a) that a parent’s child-support responsibility continues through the child’s infancy until they are relieved of that responsibility by the child’s adoption, there is no conflict at all between and amongst the statutes, and the overall legislative intent is consistent and clear, to wit: When the circuit court terminates a parent’s parental rights as part of its disposition of a child abuse or neglect case, whether the termination of parental rights is contested or uncontested, the circuit court must also enter an order pursuant to Rule 16-a, R.P.C.A.N..P imposing a monthly child support obligation on one or both of the terminated parents, and such order continues through the child’s infancy until modified by order of the circuit court or until the infant child might be adopted, unless the court finds that such an order is contrary to the best interests of the child. But, if this Court reads W.Va. Code § 49-6-5(a)(6) as requiring the circuit court to terminate child support when it terminates parental rights, as the Appellant would have this Court do, then this Court would be interpreting W.Va. Code § 49-6-5(a)(6) in such a way that it

would necessarily be directly and irreconcilably in conflict with the legislative intent of W.Va. Code § 49-6-(5)(a)(5), W.Va. Code § 49-7-5 and W.Va. Code §48-22-703(a).⁶

If in ordering the disposition of a child abuse or neglect case the circuit court finds it to be in the best interests of the child to terminate a parent's parental rights but contrary to the child's welfare to terminate the parent's parental responsibility to continue to financially support the child, then the circuit court cannot just turn a blind eye to the bright light of "the polar star" of what's best for the child and order the parent relieved of any and all child support obligations. To do so would be wholly anathema to our clear and consistent strong public policy regarding a child's fundamental right to the financial support of both parents, and would signal a total eclipse of "the polar star" of the best interests of the child, if not its complete extinguishment. Yet, this is precisely what the Appellant asks this Court to order the Harrison County Circuit Court to do in this case.

If this Honorable Court were to agree with the Appellant and concluded that it is the intent of our Legislature to require in every case when a parent's parental rights are terminated in child abuse and neglect proceedings that parent must also be relieved of any responsibility to continue to financially support the child, then this Honorable Court would declare that it is our public policy to ensure that every abused child whose best interests mandate the termination of their abuser's parental rights and who is also from a family that is only financially secure because of the financial contributions of the abusive

⁶ Moreover, as noted previously, even if this Court read W.Va. Code § 49-6-5(a)(6) in isolation from the other statutes, the only way it could be interpreted the way the Appellant interprets it, is by ignoring "the polar star" of what's best for the child – which is impossible for this Court to do because "the polar star" guides everything a court does in a child abuse case.

parent, will, by order of the court, be left financially insecure. Such a public policy would further ensure that the children and the non-abusive parent will find themselves in legal proceedings which force them to make the Hobson's choice of either resigning themselves to a post-disposition immediate future of being dependent on charity and public assistance, or instead, zealously opposing termination of the abuser's parental rights. And, it would actually empower abusive parents who control the family purse strings, because it would discourage all of the abuser's financially-dependent victims -- the abused child, siblings in the home, the non-abusive parent, and others who care for them -- from coming forward to report the abuse. Fortunately for us all, no such unconscionable public policy has ever been intended by either the State Legislature or this Honorable Court, and as long as "the polar star" continues to shine at our State Capitol, it never will be.

Given that the Appellant and all the other parties agreed that it is in the best interests of all the Infant Children to terminate the Appellant's parental rights, and given that the children and their mother are all indigent and all need and desperately want the Appellant's financial support, in this case the Harrison County Circuit Court had more than a sufficient factual basis for finding it to be in the best interests of the children to enter disposition orders which both terminated the Appellant's parental rights and continued to impose on him an obligation to pay child support. And, given our strong

public policy as has been consistently established by the applicable statutes and by the Rules and precedent of this Honorable Court, and given that the best interests of the child is “the polar star” that guides every decision in child abuse and neglect proceedings, in this case the Harrison County Circuit Court not only had full legal authority to enter disposition orders which both terminated the Appellant’s parental rights and required him to pay child support, it would have been clear legal error for the Circuit Court in this case not to have done just that. Therefore, insofar as the final orders of the Harrison County Circuit Court terminated the Appellant’s parental rights with respect to the children while not also ordering the Appellant relieved of any obligation to continue to pay child support for the children, they are not clearly erroneous.

ARGUMENT IN SUPPORT OF CROSS-ASSIGNMENT OF ERROR

In ordering the continuation of Stanley M.’s monthly child support obligation as such had been previously ordered by The Harrison County Family Court, The Circuit Court of Harrison County clearly erred because there is no factual basis for determining whether the continuation of the Family Court’s ordered child support obligation is a child support obligation that meets the requirements imposed on child support orders per Rule 16-a of the *Rules of Procedure for Child Abuse and Neglect Proceedings*, and because the Circuit Court acted contrary to law in divesting itself of continuing jurisdiction over

the child support order.

This Court has made it crystal clear that once child abuse and neglect proceedings have been initiated in a circuit court pursuant to W.Va. Code § 49-6-1, *et seq.*, a family court which may have previously had jurisdiction over the issues of custody of and financial support for the child loses its jurisdiction, and those issues are then vested in the exclusive jurisdiction of the circuit court, and becomes the continuing responsibility of the circuit court.⁷ Rule 17(c)(5), R.P.C.A.N.P., requires the circuit court to have each parent complete and submit financial statements to, among other things, aid the court in determining an appropriate child support order when such is required by Rule 16-a. *See*, Rule 17(c)(5), R.P.C.A.N.P. Rule 16-a(a), R.P.C.A.N.P., requires the circuit court to enter a child support order imposing an obligation on at least one of the non-custodial parents whenever it enters an order that alters the physical custody or decision-making authority with respect to the child; sub-part (b) of Rule 16-a requires further that the child support obligation be imposed consistent with *The Guidelines for Child Support Awards*; and, sub-parts (c) and (d) of the Rule mandate that the child support order can only later be modified by the circuit court and that any remand or transfer to a family court for such a purpose is expressly prohibited. *See generally*, Rule 16-a, R.P.C.A.N.P.

In imposing a child support obligation on the Appellant in this case, the Harrison County Circuit Court merely ordered that the Appellant's child support obligation

⁷ *See*, Rules 16-a and 17(c)(5), R.P.C.A.N.P.; Rule 48(d), R.P.P.F.C.; W.Va. Code § 49-7-5; and, *WVDHHR v. Smith, supra*.

previously ordered by the Harrison County Family Court in divorce proceedings between the parents would continue under the jurisdiction of the Family Court. *See*, Order Following Adjudicatory Hearing dated August 5, 2008, pg. 6, paragraphs 32 and 33. The Circuit Court's orders in this regard are clearly erroneous for two reasons: (1) because the Circuit Court did not have the parents complete and return financial statements and did not otherwise receive evidence of the Appellant's financial status as is required by Rule 17(c)(5), R.P.C.A.N.P. and by W.Va. Code § 49-6-5(a)(5) *in pari materia* with W.Va. Code § 49-7-5, and because it did not make any findings as to the amount of the monthly child support obligation previously imposed on the Appellant by the Harrison County Family Court, the Circuit Court did not, and could not, determine whether the Appellant's monthly child support obligation per the Family Court's order was consistent with *The Guidelines for Child Support Awards* as is required by Rule 16-a(b), R.P.C.A.N.P.; and, (2) because the Circuit Court's order divesting itself of continuing jurisdiction over the issue of child support in favor of the jurisdiction of the Family Court is directly contrary Rule 16-a(a) and (b).⁸

⁸ To allow either a family court or a circuit court with previous jurisdiction over the parents in a domestic relations proceeding to either retain or regain jurisdiction over the issues of custody and/or child support after child abuse or neglect proceedings have been initiated, would result in much more than just procedural or jurisdictional confusion. It would substantially and unfairly prejudice the rights of the parties in the child abuse or neglect proceedings. No party in a domestic relations proceeding, either in a family court or a circuit court, has the right to have counsel appointed to represent them if they cannot afford counsel, like all parents and all children do in child abuse or neglect proceedings. Moreover, starkly unlike child abuse or neglect proceedings, the child is not even afforded party status in domestic relations proceedings and has no general right to be heard on the issues, no right to call and cross-examine witnesses, no right to object to any proposed determination, and no right to appeal any determination.

REQUEST FOR RELIEF

WHEREFORE, the Infant-Children-Appellees, by their counsel, respectfully request that this Honorable Court issue a Decision and Mandate for this appeal which upholds and affirms the decision of the Circuit Court of Harrison County to terminate the Appellant's parental rights while continuing to require the Appellant to provide financial support for the children, but which remands this case to the Circuit Court for further proceedings pursuant to Rules 16-a and 17(c)(5) of *The Rules of Procedure for Child Abuse and Neglect Proceedings* to establish an appropriate monthly child support obligation for the Appellant consistent with *The Guidelines for Child Support Awards* by entry of an order subject to the continuing jurisdiction of the Circuit Court.

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CERTIFICATE OF SERVICE

By my signature, above, I, David Mirhoseini, counsel for the Infant-Children-Appellees, certify that on March 16, 2009, I served a complete copy of the foregoing "Brief of the Infant-Children-Appellees: Caitlyn M., Carson M. and Steven M." on all

other the other parties to this appeal, via first-class mail, postage prepaid, and properly addressed to their respective counsel, to wit:

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