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

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IN THE INTEREST OF:

**JPT; MJT, III; NET and CMT,  
Children Under the Age of 18 Years**

**On Appeal from a May 11, 2009  
Order of the Circuit Court of  
Kanawha County, 07-JA-54;  
07-JA-55; 07-JA-56; & 07-JA-57**

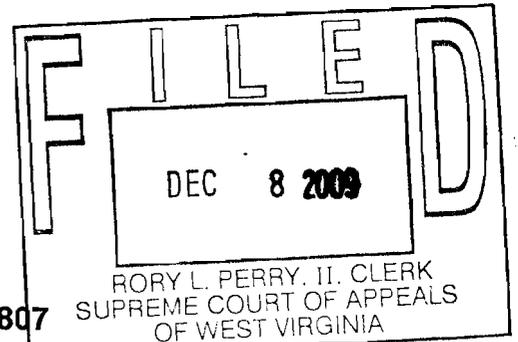
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**APPELLEE, MICHAEL J. T**

**, RESPONSE BRIEF**

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**KIND OF PROCEEDING AND NATURE OF THE RULING BELOW**

Comes now, Michael J. T , (hereinafter "T " or "Father") by counsel, Mark A. Swartz and Allyson H. Griffith of Swartz Law Offices, PLLC, in response to Jean Kennedy's (hereinafter "Ms. Kennedy," "Respondent Mother" or "Appellant") appeal from an *Order* entered by the Honorable Paul Zakaib on the 11<sup>th</sup> day of May, 2009.<sup>1</sup> This *Order* was the last of a series of orders entered in an abuse and neglect proceeding first commenced on March 23, 2007.

On March 23, 2007, the State of West Virginia on behalf of the West Virginia Health and Human Resources, and the Bureau for Children and Families, by and through Amy L. Paxton, Assistant Prosecuting Attorney for Kanawha County, West Virginia filed an Abuse and Neglect Petition in the Circuit Court of Kanawha County. The children involved were: NAT, now age 18<sup>2</sup>; JPJ, now age 16; MJT, III, now age 14; and CMT, age 7 in July of 2009. Both parents were named as Respondents when the petition was filed.

Hearings pertaining to the abuse and neglect case were held in the Circuit Court on: the 4<sup>th</sup> day of April, 2007; the 21<sup>st</sup> day of May, 2007; the 11<sup>th</sup> day of October, 2007; the 17<sup>th</sup> day of December, 2007; the 16<sup>th</sup> day of May, 2008; the 23<sup>rd</sup> day of May, 2008; the 10<sup>th</sup> day of September, 2008; and the 22<sup>nd</sup> day of April, 2009. A series of Orders were entered as a result of all of these hearings. Appellant filed numerous petitions for appeal from same, all of which, save this one, were denied.

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<sup>1</sup> See Attached Exhibit 1; *Order*, entered May 11, 2009.

<sup>2</sup> A "Dismissal Order for a Child Over the Age of Eighteen" was entered on March 6, 2009.

## STANDARD OF REVIEW

Pursuant to *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208, 1999 W. Va. LEXIS 114 (1999), this Court determined that

when examining the correctness of a circuit court's award or denial of costs and attorney's fees, we accord the lower court's decision great deference. "The trial [court] . . . is vested with a wide discretion in determining the amount of . . . court costs and counsel fees, and the trial [court's] . . . determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion." Syllabus point 3, [in part,] *Bond v. Bond*, 144 W. Va. 478, 109 S.E.2d 16 (1959).<sup>1</sup> Syl. Pt. 2, [in part,] *Cummings v. Cummings*, 170 W. Va. 712, 296 S.E.2d 542 (1982) [(per curiam)]." Syllabus point 4, in part, *Ball v. Wills*, 190 W. Va. 517, 438 S.E.2d 860 (1993).<sup>2</sup> Quoting Syl. pt. 2, *Daily Gazette Co., Inc. v. West Virginia Dev. Office*, 198 W. Va. 563, 482 S.E.2d 180 (No. 25437 May 19, 1999).

## STATEMENT OF THE FACTS

The Petitioner's mantra should be all too familiar to this Court by now. She has filed one petition for appeal after another. Her petitions for appeal from the final Orders terminating and implementing the termination of her parental rights for the three youngest children have all been refused. Her petitions for appeal from the final Orders refusing her belated and baseless requests for an improvement(s) period have all been refused.

In each petition, she revisits her "story." In her Appellant's brief on this appeal at page 1, we hear it again when she says: "the unchallenged and uncontroverted medical and forensic evidence was that the parties' youngest daughter was sexually abused by Father. No evidence or testimony was given that mother sexually abused her daughter."

Let us place the story she tells at pages 1 through 9 of her Appellant's brief in context:

- The Family Court did not buy this story.
- The Prosecutor did not buy this story. The State chose to proceed to trial only against the Appellant Mother.
- Judge Zakaib did not buy this story. He entered a series of now final and non-appealable Orders terminating Kennedy's parental rights regarding the three youngest children. In addition, Judge Zakaib denied her requests for an improvement period.
- When Judge Zakaib made the referenced Orders, he found facts and reached conclusions which are now the law of this case. They are *res judicata* and now unassailable by either party to this appeal. They determine the facts and state the conclusions upon which Judge Zakaib relied when he made the Order at issue. Some include:
  - The Respondent Jean Kennedy has ***again*** accused Michael T of sexual abuse of the parties' youngest child, now age five, Clare T<sup>3</sup> [Emphasis supplied.]
  - Ms. Kennedy's recent accusations are false and her conduct has resulted in further abuse of Clare T<sup>4</sup>
  - That Dr. Clayman concludes that while "Jean Kennedy does demonstrate adequate cognitive/intellectual ability with regard to her capacity to fulfill her role as a parent. . . her emotional status is such that serious concerns exist about her judgment that would be compromised as she pursues her uncompromising crusade against T<sup>5</sup>
  - That Dr. Clayman concludes that "[G]iven the nature of her psychological problem, it is not likely that treatment will be of any noticeable assistance as she has made it clear that she intends to prove that Michael T has committed sexual assault on his two daughters and this colors all of what she does in her personal life."<sup>6</sup>

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<sup>3</sup> Order Terminating Jean T Visitation Pending Final Adjudication at page 2.

<sup>4</sup> Order Terminating Jean T Visitation Pending Final Adjudication at page 2.

<sup>5</sup> See Final Order of Adjudication at page 13.

<sup>6</sup> See Final Order of Adjudication at page 14.

- That no credible evidence exists to support a finding that Father, Michael J. T , is an abusing or neglectful parent or that he physically, emotionally, or sexually abused any of his four children.<sup>7</sup>
  - That upon clear and convincing evidence, the Respondent Mother, Jean Kennedy, is an abusing parent within the meaning of West Virginia Code, Chapter 49, Article 1, Section 3(b).<sup>8</sup>
  - That upon clear and convincing evidence, the Respondent Mother, Jean Kennedy, has made **continued** and **repeated false allegations** of sexual abuse by the Respondent Father, Michael J. T upon Clare Marie T<sup>9</sup>
- CPS did not buy this story.
  - The Kanawha County Sheriff's Department did not buy this story.
  - The State Police did not buy this story.

The evidence regarding the fraudulent February, 2007 allegations against Father was that Ms. Kennedy took her youngest daughter, then age 4, to Women's and Children's Hospital on a Sunday evening; she gave an alleged history of sexual abuse earlier in the day by the child's father. The four year old was thoroughly and completely examined and evaluated by a sexual assault nurse and a physician. She was discharged around 9:00 p.m. Sunday with a normal genital urinary examination. She went home with her Mother that evening and to Sacred Heart Grade School in the morning. Her Mother picked her up after school and took her to Mother's family doctor (Dr. Cavendar) Monday afternoon after school. Dr. Cavendar examined CMT Monday afternoon, she testified that the child had "a lot of vaginal discharge;"<sup>10</sup> her "vaginal tissue [was] swollen throughout –bulging out of the introitus, and it was very tender, red,

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<sup>7</sup> See Final Order of Adjudication at page 14.

<sup>8</sup> See Final Order of Adjudication at page 15.

<sup>9</sup> See Final Order of Adjudication at page 16.

<sup>10</sup> See page 36 line 8 of transcript of Susan L. Cavendar; testimony taken on the 23<sup>rd</sup> day of February, 2007 in the Family Court; transcript accepted and made a part of the record in the abuse and neglect proceedings in Circuit Court.

inflamed;”<sup>11</sup> “very red streaks –streaks on the majora, and the rest of them, including minora, were irritated and inflamed;”<sup>12</sup> “the perineal body . . . was all irritated.”<sup>13</sup>

The Circuit Court properly concluded that all the evidence clearly and convincingly showed that CMT was abused sometime after being discharged from CAMC around 9:00 p.m. on February 4<sup>th</sup>, and before (she was at Sacred Heart School in the morning) Monday afternoon when she was examined by Dr. Cavendar, who said that the conditions she observed could only have been caused by sexual abuse.<sup>14</sup>

There is no dispute that Mr. T had no contact with CMT after he dropped her off at his ex-Wife’s home Sunday afternoon. CMT had a normal exam on Sunday evening at CAMC, but she was a mess by Monday afternoon when Dr. Cavendar described CMT as a victim of sexual abuse. The abuse Cavendar described was so severe it caused the labia of a three year old to protrude and be visible on an external examination. This abuse occurred on Ms. Kennedy’s watch—a very inconvenient truth for Ms. Kennedy, one would think. Despite all this, Mother continued her unrelenting crusade against T

One more example: After CPS placed CMT in foster care, Kennedy *again* accused the Appellee of sexually abusing CMT. This was the conduct which provoked

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<sup>11</sup> See page 37 & 38 lines 22, 23, & 1 of transcript of Susan L. Cavendar; testimony taken on the 23<sup>rd</sup> day of February, 2007 in the Family Court; transcript accepted and made a part of the record in the abuse and neglect proceedings in Circuit Court.

<sup>12</sup> See page 38 lines 7-9 of transcript of Susan L. Cavendar; testimony taken on the 23<sup>rd</sup> day of February, 2007 in the Family Court; transcript accepted and made a part of the record in the abuse and neglect proceedings in Circuit Court.

<sup>13</sup> See page 38 lines 11 & 12 of transcript of Susan L. Cavendar; testimony taken on the 23<sup>rd</sup> day of February, 2007 in the Family Court; transcript accepted and made a part of the record in the abuse and neglect proceedings in Circuit Court.

<sup>14</sup> See page 39 line 14; see page 41 lines 14-20 of transcript of Susan L. Cavendar; testimony taken on the 23<sup>rd</sup> day of February, 2007 in the Family Court; transcript accepted and made a part of the record in the abuse and neglect proceedings in Circuit Court.

the guardian *ad litem* to move to terminate all contact between Mother and CMT. As noted in further detail below, the Court entered an Order<sup>15</sup>, in January of 2008, to protect CMT from her Mother.

### **Facts leading up to the Abuse and Neglect Proceeding**

The parties separated on or about June 6, 2005. They had four children who at the date of separation were 14, 12, 10 and 2. Ms. Kennedy filed her Divorce Petition on June 8, 2005. At a temporary hearing on August 31, 2005, the Family Court Judge was sufficiently disturbed by what she heard<sup>16</sup> to order no overnight visitation with Ms. Kennedy and to direct that all visitation with Ms. Kennedy be supervised.

A series of Family Court hearings followed; all of which tended to focus on parenting. At a March 15, 2006 hearing, Mother made *no mention of sexual abuse of the children--whether suspected or actual*. Eight days later, on March 23, Ms. Kennedy shopped her case to Magistrate Court. In her petition, she falsely swore that (a) a divorce was *not* pending and that (b) she had never been a party to a proceeding concerning the custody of the minor child(ren) at issue. She claimed that Dr. T sexually abused the parties' then 3 year old daughter CMT. Ms. Kennedy alleged that the abuse had been occurring "for at least one month or longer"—predating the March 15<sup>th</sup> Family Court hearing at which she failed to make any such claim.

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<sup>15</sup> *Order Terminating Jean T Visitation Pending Final Adjudication.*

<sup>16</sup>Ms. Kennedy recorded her regular conversations with God in a book that she is drafting entitled "Visits with Jesus." She reported in her journal that God tells her to buy Powerball tickets; He helps her negotiate for real estate on Kanawha Boulevard in Charleston and tells her what to offer and what the final price will be; God told her that she was done with her husband and that he, God, would crush Dr. T. Ms. Kennedy interpreted a dream that one of her women friends allegedly had—a dream in which her friend dismembered Dr. T and put his pieces in garbage bags which were then distributed to the children. (Portions of the diaries were received in evidence in the Circuit Court abuse and neglect matter as well as the Family Court and were otherwise discussed at hearings).

Ultimately the Family Court determined that these abuse allegations were without merit. This Order was appealed to the Circuit Court, and the appeal was denied by Judge Stucky. A petition for appeal from Judge Stucky's Order was refused by this Court on September 7, 2006.<sup>17</sup>

On or about February 10, 2007, Ms. Kennedy filed her second, baseless domestic violence petition with the Magistrate Court of Kanawha County.<sup>18</sup> More hearings were held in Family Court. On April 12, 2007, the Family Court entered an order denying a domestic violence protective order. This Order specifically determined that Ms. Kennedy failed to prove any allegations of domestic violence or abuse against Dr. T

In mid March, 2007, Mother disappeared with CMT and failed to reappear for scheduled visitation(s) with Father. As a consequence, the matter was referred to CPS. On March 23, 2007, CPS filed an Abuse and Neglect Petition with the Circuit Court of Kanawha County naming both parents as Respondents. The Prosecutor quickly determined that there was no basis to allege abuse by Father and proceeded to trial solely upon allegations of abuse by Ms. Kennedy.<sup>19</sup>

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<sup>17</sup> See WV Supreme Court Docket No 06-101. (Jean T n/k/a Jean Kennedy v. Michael T

<sup>18</sup> Again, this Magistrate Court filing came weeks prior to a hearing set in Family Court regarding final parenting/custody.

<sup>19</sup> Stated on the record at the adjudicatory hearing on May 21, 2007 (Ms. Amy Paxton, Assistant Prosecuting Attorney for Kanawha County); See also, "Emergency Motion to Terminate Visitation Pending Adjudication" which states on page 2 paragraph 4 "[t]hat at the adjudicatory hearing on the 21<sup>st</sup> of May, 2007 Amy Paxton, Assistant Prosecuting Attorney for Kanawha County, affirmed to the Court that she was proceeding **solely** against the Respondent Mother and was not moving against the Respondent Father [Dr. T ] in these proceedings." See also Kanawha County Circuit Court – Judge Zakaib; Civil Action No. 07-JA-54; 07-JA-55; 07-JA-56; 07-JA-57. *The main focus of these proceedings were/are the parties' youngest daughter, Clare, now age 5 and with the Mother, Ms. Kennedy only. The two boys continue to reside with Dr. T while the 18 year old resides with Ms. Kennedy.*

As noted, numerous circuit court hearings were held in the abuse and neglect case. The State presented testimony.<sup>20</sup> Respondent Mother presented testimony.<sup>21</sup> The Father presented testimony.<sup>22</sup>

Respondent Mother, *while the abuse and neglect case was ongoing and while CMT was in the care of foster parents*, made further false accusations of sexual abuse. In response to these allegations, the guardian *ad litem* filed an "Emergency Motion to Terminate Visitation Pending Adjudication." This Motion was heard on December 17, 2007. The Circuit Court entered its Order on January 8, 2008 which stated in relevant part: "Ms. Kennedy's recent accusations are false and her conduct has resulted in further abuse of CMT."

On June 2, 2008 the Circuit Court entered three Orders.<sup>23</sup> Dispositional hearings were held on 10<sup>th</sup> day of September, 2008 and the 22<sup>nd</sup> day of April, 2009.

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<sup>20</sup> The State presented testimony from the following witnesses: (a) Regina Confere, Licensed Social Worker with West Virginia Department of Health and Human Services; (b) Tracey Powell, R.N., sexual assault nurse at CAMC, Women and Children's Hospital; (c) P.E. Kobbah, M.D., Emergency Department Physician, CAMC, Women and Children's Hospital; (d) Cherie Chambers Cowder, M.A., Psychologist appointed by the Family Court, for the purpose of conducting a forensic evaluation of the Respondent mother, father, and minor children; (e) Ms. Jean Cavalier, Principal of Sacred Heart Elementary School; and (f) Ms. Shawna Bowles, M.S.W., Damous Psychological

<sup>21</sup> Respondent Mother presented testimony from the following witnesses: (a) Maureen Runyon, M.S.W., forensic sexual assault interviewer who conducted a videotaped interview of CMT; (b) Lawrence B. Kelly, M.S. former treating psychiatrist; and (c) Susan Cavender, M.S., family practice physician, treating physician for Jean Kennedy.

<sup>22</sup> Prior to the adjudicatory hearing on the 21<sup>st</sup> and 22<sup>nd</sup> days of May, 2007, Father filed a *Motion to Incorporate Testimony* from previous Kanawha County Family Court hearings via transcripts in which both parents were permitted to present and cross examine their witnesses. The Court granted the motion, reviewed and considered the transcripts which included testimony from (a) Kimberly Ewing, M.D., Emergency Department Physician, CAMC, Women and Children's Hospital; (b) Brittany Elswick, R.N., Emergency Department, CAMC, Women and Children's Hospital; (c) Bethany Akers, student nurse, Emergency Department, CAMC Women and Children's Hospital; and (d) Timothy Saar, Ph.D., Clinical and Forensic Psychologist.

<sup>23</sup> (1) Final Order of Adjudication; (2) Order Returning Physical Custody of CMT to Michael J. T , Jr.; and (3) Order Denying Respondent Jean Kennedy's Motion for Improvement Period.

On April 15, 2009, Father served and filed his Motion for Fees and Costs<sup>24</sup> seeking an award of all fees and costs incurred in the above captioned case because of Respondent Mother's continuing fraudulent misrepresentations, her bad faith, her vexatious and wanton conduct, and her oppressive actions. On the same date, he served and filed a Notice of Hearing which noticed the Motion for hearing on April 22, 2009. Respondent Mother responded to Father's Motion for Fees and Costs via facsimile on April 21, 2009—the day before the April 22<sup>nd</sup>, hearing. Mother and her counsel appeared in Court on April 22<sup>nd</sup>.

### DISCUSSION

On frequent trips back from the Kanawha County Courthouse to the undersigned's office in Saint Albans, the undersigned would often make note of a large billboard near the South Charleston stamping plant. This billboard displayed a picture of a young girl behind bars with the headline "Barred From Daddy Based on a Lie. False Allegations Hurt Children and Parents Alike." This billboard resonated with us; it pretty well summed up our client's experiences.

Every time Ms. Kennedy lied to the Magistrate Court, the Family Court, and/or CPS, his daughter CMT disappeared from his life. It takes a lot of time, and money, to convince the "system" that the accused father is not the problem, that the Mother's repeated accusations are false and fraudulent, and that the Mother is the abusive parent.

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<sup>24</sup> ***This Motion also included a lengthy section setting forth some of the hardships the four children and Father had to endure, for years, as a direct result of Mother's egregious conduct.***

The system is intended and constructed to err on the side of safety and caution—a reasonable policy choice. This design has however contributed to a gender bias. Dads seldom get the benefit of the doubt.

Ms. Kennedy is an intelligent, well-educated person; she makes a good first impression. She learned enough about the system to use it, and grossly abuse it. The fee award here is not about punishing someone who made an allegation of child abuse. The fee award here is about whether *the well recognized exception to the American Rule that a court may award attorneys' fees if the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons* should be applied to require Ms. Kennedy pay Mr. T's fees. The Circuit Court was correct when it determined that it should.

**I. – V. MS. KENNEDY ASSIGNS AS ERROR FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH WERE EXPRESSED IN FINAL ORDERS OF THE CIRCUIT COURT FROM WHICH PETITIONS FOR APPEAL WERE PREVIOUSLY TAKEN. ALL OF WHICH PETITIONS WERE REFUSED BY THIS COURT.**

Ms. Kennedy's first five assignments of error all pertain to matters which were resolved by final Orders of the Circuit Court; Orders which were entered *before* the Order she complains about on this appeal; Orders that she previously appealed and all Petitions refused by this Court.

The *only* issue on this appeal is whether or not the Circuit Court can reasonably be said to have abused its discretion when it awarded actual costs and fees to Mr. T.<sup>25</sup> We are long past arguing about the nature and extent of Ms. Kennedy's conduct and the mischief, harm and injuries it caused. Her conduct is *res judicata*. It is determined, described and categorized in the law of this case—embedded in the prior

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<sup>25</sup> *Pauley v. Gilbert*, 206 W. Va. 114, 522 S.E.2d 208, 1999 W. Va. LEXIS 114 (1999).

Orders of the Circuit Court. The time to argue those findings and conclusions was in the previously filed petitions for appeal—all of which were refused by this Honorable Court.

Relevant portions of Final Orders determining and describing Mother's conduct as fraudulent, wanton, oppressive and vexatious include:

On January 9, 2008 the Circuit Court entered an *Order Terminating Jean T* 's *Visitation Pending Final Adjudication*. In part, the Court found as follows:

The Respondent Jean Kennedy has again accused Michael T of sexual abuse of the parties' youngest child, now age five, Clare T .<sup>26</sup>

Ms. Kennedy's recent accusations are false and her conduct has resulted in further abuse of Clare T .<sup>27</sup>

On June 2, 2008 the Circuit Court entered a *Final Order of Adjudication*. In part, the Court found as follows:

That Dr. Clayman therein concludes that "Michael Joseph T , Jr. is capable of parenting all of his children"<sup>28</sup>

That Dr. Clayman concludes that while "Jean Kennedy does demonstrate adequate cognitive/intellectual ability with regard to her capacity to fulfill her role as a parent. . . her emotional status is such that serious concerns exist about her judgment that would be compromised as she pursues her uncompromising crusade against T ."<sup>29</sup>

That Dr. Clayman concludes that "[G]iven the nature of her psychological problem, it is not likely that treatment will be of any noticeable assistance as she has made it clear that she intends to prove that Michael T has committed sexual assault on his two daughters and this colors all of what she does in her personal life."<sup>30</sup>

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<sup>26</sup> Order Terminating Jean T 's Visitation Pending Final Adjudication at page 2.

<sup>27</sup> Order Terminating Jean T 's Visitation Pending Final Adjudication at page 2.

<sup>28</sup> See Final Order of Adjudication at page 13.

<sup>29</sup> See Final Order of Adjudication at page 13.

<sup>30</sup> See Final Order of Adjudication at page 14.

That no credible evidence exists to support a finding that Father, Michael J. T , Jr., is an abusing or neglectful parent or that he physically, emotionally, or sexually abused any of his four children.<sup>31</sup>

That upon clear and convincing evidence, the Respondent Mother, Jean Kennedy, is an abusing parent within the meaning of West Virginia Code, Chapter 49, Article 1, Section 3(b).<sup>32</sup>

That upon clear and convincing evidence, the Respondent Mother, Jean Kennedy, has made continued and repeated false allegations of sexual abuse by the Respondent Father, Michael J. T , Jr. upon Clare Marie T .<sup>33</sup>

This Court refused Mother's Petition for Appeal regarding the Circuit Court's *Final Adjudication Order*.

On June 2, 2008 the Circuit Court entered an *Order Denying Respondent Jean Kennedy's Motion for Improvement Period*. In part, the Circuit Court found as follows:

Coupled with her refusal to accept responsibility for her own abusive behavior, the Respondent Mother's continued baseless accusations against her former husband are a further indication that termination of parental rights without an improvement period is appropriate and, in fact, the only suitable remedy available to the Court.<sup>34</sup>

The Respondent Mother has repeatedly failed to comply with orders and directives of the Family Court and the Circuit Court.<sup>35</sup>

The Respondent Mother's abuse of her children and her selective disregard for the Orders of the Family Court and this Court are grounded in the baseless and irrational beliefs which she continues to hold regarding Michael T , Jr.<sup>36</sup>

Regardless of what is presented to her, Kennedy [the Respondent Mother] maintains her firm belief that T has committed criminal acts, that he is evil and needs to be punished.<sup>37</sup>

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<sup>31</sup> See Final Order of Adjudication at page 14.

<sup>32</sup> See Final Order of Adjudication at page 15.

<sup>33</sup> See Final Order of Adjudication at page 16.

<sup>34</sup> Order Denying Respondent Jean Kennedy's Motion for Improvement Period at page 4.

<sup>35</sup> Order Denying Respondent Jean Kennedy's Motion for Improvement Period at page 4.

<sup>36</sup> Order Denying Respondent Jean Kennedy's Motion for Improvement Period at page 6.

<sup>37</sup> Order Denying Respondent Jean Kennedy's Motion for Improvement Period at page 6.

This Court refused Mother's Petition for Appeal regarding the Circuit Court's denial of Mother's Motion for an Improvement Period.

On July 17, 2009 the Circuit Court entered a *Final Dispositional Order*. In part, the Court found as follows:

Ms. Kennedy refuses to acknowledge any wrongdoing in this case. . . She accepts no responsibility for her abuse of these children and her repeated false accusations of abuse by her former husband.<sup>38</sup>

She . . . never sought or participated in psychotherapy to address the underlying cause(s) of her aberrant behavior and her abuse of her children.<sup>39</sup>

It has been determined that Ms. Kennedy has purposely perpetuated antagonism toward Dr. T<sup>40</sup>

Kennedy has perpetuated an air of accusation and suspicion regarding CMT and her father. It is not likely that she/[Kennedy] will relinquish her entrenched stance against T which will cause harm to [the] children. No grounds have been found to pursue charges against T, yet Kennedy has continued to vehemently assert that he has committed criminal acts. She/[Kennedy] remains adamant about the accusations made against T. Kennedy has continued to assert that T has sexually abused CMT. . . . Her [Jean Kennedy's] emotional status is such that serious concerns exist about her judgment that would be compromised as she pursues her uncompromising crusade against T. . . . Kennedy [has] distorted perceptions and [an] unwillingness to consider any interpretation of events in contradiction of her own beliefs. . . . [S]he has made it clear that she intends to prove that Michael T has committed sexual assault on his two daughters and this colors all of what she does in her personal life.<sup>41</sup>

Ms. Kennedy's abuse of her children and her selective disregard for the Orders of the Family Court and this Court are grounded in the baseless and irrational beliefs which she continues to hold. . . . Regardless of what is presented to her, Kennedy maintains her firm belief that T has committed criminal acts, that he is evil and needs to be punished.<sup>42</sup>

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<sup>38</sup> See Final Dispositional Order at page 6.

<sup>39</sup> See Final Dispositional Order at page 8.

<sup>40</sup> See Final Dispositional Order at page 9.

<sup>41</sup> See Final Dispositional Order at pages 10-11. (quoting Dr. Clayman's Fitness to Parent/Custody Recommendations which report was adopted by the Court on page 20 of the Final Dispositional Order).

<sup>42</sup> See Final Dispositional Order at page 12.

This Court refused Mother's Petition for Appeal regarding the Circuit Court's *Final Dispositional Order*.

On October 8, 2009, this Court also refused Mother's Petition for Appeal regarding the Circuit Court's denial of Mother's Motion for Relief from a Judgment or Order.

The Circuit Court did not abuse its discretion when it awarded Father his fees and costs. Under the American Rule, each party is required to bear the cost of his or her own attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wildermess Soc'y*, 421 U.S. 240, 249-50, 95 S.Ct. 1612, 1618, 44 L.Ed. 141 (1975); see also *Key Tronic Corp. v. United States*, 511 U.S. 809, 814, 114 S.Ct. 1960, 1965, 128 L.Ed. 797 (1994); *Blackburn v. Reich*, 79 F.3d 1375, 1382-83 (4<sup>th</sup> Cir. 1996). ***One exception to the American Rule, material here, is that a court may award attorneys' fees if the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."*** *Alyeska*, 421 U.S. at 258-59, 95 S.Ct. at 1622 (citations omitted). [Emphasis added].

This Court has adopted this American Rule generally, but has also recognized the exception to the Rule noted immediately above:

This traditional exclusion of attorney's fees from "costs" recoverable by statute or court rule is derived from the principle that as a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement. *Daily Gazette Co. v. Canady*, W. Va. , , 332 S.E.2d 262, 263 (1985); 1 S. Speiser, *Attorneys' Fees* §§ 12:1, 12:3-12:4 (1973). This so-called "American" rule (contrasted with the rule in England) has, in other jurisdictions as well as in this jurisdiction, been subject to exceptions in certain types of cases. . . . **There is authority in equity to award to the prevailing litigant his or her reasonable attorneys' fees as "costs," without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.** *Hechler v. Casey*, 333 S.E.2d 799, 815 (1985); *Daily Gazette Co. v. Canady*, W. Va. , , 332 S.E.2d 262, 263-64 (1985); *Nelson v. West Virginia Public Employees Insurance Board*, W. Va. , 300 S.E.2d 86, 92 (1982); *Alyeska Pipeline*

*Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622, 44 L. Ed. 2d 141, 154 (1975). See also 1 S. Speiser, *Attorneys' Fees* § 12:11 (1973); annot., 31 A.L.R. Fed. 833 (1977). "**Bad faith" may be found in conduct leading to the litigation or in conduct in connection with the litigation.** *Hall v. Cole*, 412 U.S. 1, 15, 93 S. Ct. 1943, 1951, 36 L. Ed. 2d 702, 713 (1973).

*Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246, 1986 W. Va. LEXIS 617 (1986) [Emphasis added].

Michael T incurred thousands of dollars of unnecessary attorneys' fees and costs because of Jean Kennedy's continuing fraudulent allegations and her assertion of baseless, unfounded claims for vexatious, wanton, and oppressive purposes. The fraudulent allegations continue unabated. The first five assignments of error on this appeal continue the mantra; they are literally further evidence of the continuing assertion of baseless, unfounded claims for vexatious, wanton, and oppressive purposes.

"The rights of innocent [individuals] to be free from frivolous, unreasonable, or groundless lawsuits should not be trampled upon by failing to award attorneys' fees in appropriate cases." *Colbert v. Yadkin Valley Tel. Mbrshp. Corp.*, 960 F. Supp. 84, 1997 U.S. Dist. LEXIS 4238 (M.D.N.C. 1997) citing *Marquart v. Lodge 837, Intern. Ass'n of Machinists and Aerospace Workers*, 26 F.3d 842, 848 (8th Cir. 1994). [Emphasis added].

The Circuit Court properly awarded the Father all of the attorneys' fees and costs that he incurred in the captioned matter. The Appellant Mother was determined to have acted fraudulently, in bad faith, vexatiously, wantonly and for oppressive reasons. Under these circumstances, the Circuit Court had the discretion to do what it did. It cannot reasonably be said that the award of fees here was an abuse of discretion.

**VI. MS. KENNEDY'S 6<sup>TH</sup> ASSIGNMENT OF ERROR<sup>43</sup> IS THAT FATHER'S FEES WERE VOLUNTARILY INCURRED, BUT SHE MAKES NO ARGUMENT IN THIS REGARD.**

This assignment of error may be novel, but it is wrong on so many levels. We have four children whom the State alleged were victims of abuse. We have a Father who agreed that they had been abused by their Mother and who fully participated *as their Father* in the abuse and neglect proceedings because he loved his children and wanted to protect them. Indeed, what does Appellant suggest by this assignment of error? Is she saying a reasonable father would simply punt the matter to CPS and the circuit court and then what—go home?

On page 7 of Mother's brief she states that "[a]lthough Father had been provided court appointed counsel in the abuse and neglect proceeding, Father chose to employ his private divorce counsel and to proceed in the prosecution of his ex-wife, even after he had been dismissed as a party."<sup>44</sup> Truly, what is Mother's point here? Is the argument that after Mother was adjudicated to have abused her children and was denied an improvement period, Father had no reason to remain attuned to the proceedings which then focused upon disposition. Is the claim here actually that Father wasted his money following the abuse and neglect case, while also continuing to defend himself against Mother's continuous accusations, to a disposition which resulted in permanent placement of the three minor children with him?

Although Mother fails to mention it, she also retained private counsel. Pursuant to *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E. 2d 177, 1996 W. Va. LEXIS 28 (1996),

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<sup>43</sup> Page 10 of Appellant's Brief.

<sup>44</sup> He was dismissed as a party Respondent in the June 8, 2009 Adjudication Order, entered about 15 months after the case was filed.

Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings incident to the filing of each abuse and neglect petition. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. ***In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel*** or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law." [Emphasis added].

We caution circuit courts to follow this procedure in order to prevent potential prejudice to unrepresented indigent parents in abuse and neglect proceedings. W. Va. Code § 49-6-2(a), provides, in part:

"In any proceeding under the provisions of this article, ***[the] parents . . . shall have the right to be represented by counsel at every stage of the proceedings*** and shall be informed by the court of their right to be so represented and that if they cannot pay for the services of counsel, that counsel will be appointed. If the other parties have not retained counsel and the other parties cannot pay for the services of counsel, the court shall, by order entered of record, at least ten days prior to the date set for hearing, appoint an attorney or attorneys to represent the other party or parties and so inform the parties."

**VII. THE HEARING ON APPELLEE'S FEE CLAIM WAS DULY NOTICED AND BRIEFED BY BOTH PARTIES.**

As noted above in the Statement of Facts, see page 8 above, Appellee served and filed his Motion for Fees and Costs on April 15, 2009; his brief accompanied the Motion. On the same day, April 15<sup>th</sup>, Appellee noticed the fee Motion for Hearing on April 22<sup>nd</sup>. This hearing date had previously been set to address other matters in the captioned matter. Appellant served and filed her Response to the fee Motion on April 21<sup>st</sup>. The fee Motion was addressed during the hearing held on the 22<sup>nd</sup>. Appellant and her counsel appeared in person.

The Circuit Court properly awarded Father all of his attorneys' fees and costs incurred in the captioned case.<sup>45</sup> Mother complains that she was not afforded due process. She was served with the Motion, the supporting brief and the Notice of Hearing. She filed a written Response the day before the hearing. She attended the hearing. She did not request a continuance, nor did she request an opportunity to supplement her submissions and responses. She was afforded due process.

### **CONCLUSION**

Conduct has consequences in our daily lives. The Appellant's crusade to destroy her Husband by fraud and her palpable and repeated abuse of her children are indefensible. She intentionally tormented her children and her ex-spouse.

By her fraudulent misrepresentations, bad faith, and vexatious and outrageous conduct, Appellant sought to enlist the aid of the very system created to protect children and spouses from harm and abuse. She abused the system and the circuit court to injure her ex-husband and her children. Her conduct in this litigation has consequences. The bad faith exception to the American Rule on attorneys' fees and costs was properly applied by the Circuit Court when it made the Order at issue here.

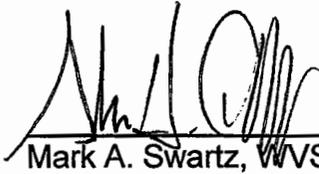
**WHEREFORE**, for the reasons set forth above, Michael T respectfully requests that this Court affirm the Circuit Court's Order.

Dated at St. Albans, West Virginia, this 8<sup>th</sup> day of December, 2009.

**MICHAEL J. T        JR**  
**By counsel**

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<sup>45</sup> Fees pertaining to the divorce were not submitted or included. Fees pertaining to the multiple fraudulent domestic violence petitions that Appellant filed domestic violence were not submitted or included. On page 9; footnote 1 of Appellant's brief, Mother lists 14 dates that allegedly include fees/expenses incurred for equitable distribution issues; however, only 1 of the dates, i.e., 04-03-07 mention or involve ED.



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**CERTIFICATE OF SERVICE**

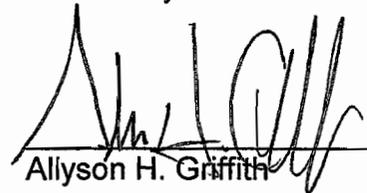
I hereby certify that a true and correct copy of the foregoing Response was served on the following via U.S. Mail:

Ms. Amy Paxton  
Assistant Prosecuting Attorney  
700 Washington St E Ste 400  
Charleston, West Virginia 25301

Ms. Barbara Utt  
300 Capitol Street, Suite 1120  
Charleston, WV 25301

Ms. Mary Downey  
1018 Kanawha Blvd. E. Ste 1200  
Charleston, WV 25301

this 8<sup>th</sup> day of December, 2009.



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Allyson H. Griffith