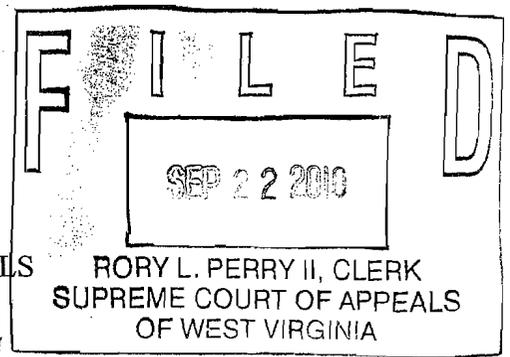


Docket No.: \_

IN THE SUPREME COURT OF APPEALS

OF

WEST VIRGINIA



STATE OF WEST VIRGINIA,

Petitioner,

Vs.

TRISTEN K

Infant under the age of eighteen (18) years,

AND

JOSHUA K

ALEXSIS S

Parents of said infant,

Respondents.

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FROM THE CIRCUIT COURT OF MARION COUNTY

JUVENILE CASE NOS. 10-JA-2

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PETITION FOR WRIT OF PROHIBITION

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

Susan L. Riffle  
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**TABLE OF CONTENTS**

Table of Authorities.....ii

Kind of Proceedings and Nature of Ruling Below ..... 1

Statement of Facts ..... 1

Assignments of Error.....2

Standard For Issuance of a Writ of Prohibition.....3

Argument And Relief Prayed For.....5

Certificate of Service .....9

**TABLE OF AUTHORITIES**

**CASES**

In re Carlita B., 408 S.E.2d 365, 185 W. Va. 613, 623 (1991) ..... 6, 8

In re Katie S., 479 S.E.2d 589, 198 W. Va. 79 (1996) ..... 7

In re Miranda T., 678 S.E.2d 18, 223 W. Va. 512 (2009)..... 6

State v. Kaufman, 470 S.E.2d 205, 196 W. Va. 251 (1996) ..... 5, 6, 8

State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor, 668 S.E.2d 217 (W. Va. 2008) ..... 3

**OTHER AUTHORITIES**

Rules of Procedure for Child Abuse and Neglect Proceedings ..... 7

West Virginia Constitution, Article VIII, §3 ..... 3

West Virginia Code, §49-6-12..... 7

West Virginia Code §53-1-1..... 3

## **KIND OF PROCEEDINGS AND NATURE OF THE RULING BELOW**

This is a Petition for Writ of Prohibition from the September 9, 2010, ruling of the Circuit Court of Marion County, Judge Janes presiding, granting the Respondent Parents in an abuse and neglect proceeding a three month Pre-Adjudicatory Improvement Period where the Petition was filed on January 5, 2010, and the Adjudicatory Hearing has been continued due to circumstances beyond the control of the Infant Respondent, the Respondent Parents, or the State of West Virginia.

## **STATEMENT OF FACTS**

On January 5, 2010, the West Virginia Department of Health and Human Resources filed a Petition for Abused or Neglected Children alleging among other things that the father of the child put his hand over the baby's mouth while yelling at him to be quiet and picks the baby up by his shirt with his "little head thrown back". According to the Petition, Mr. K admitted to Corporal Adam Scott of the West Virginia State Police that he covers the baby's mouth when he cries and that he took the baby into the woods to go "coon hunting".

With regard to the mother, the Petition alleges that she allowed the father to cover the baby's mouth, and witnessed the father calling the child a "fucking retard". The Petition further alleges that the mother was holding the baby in a "thrown back position" without supporting his head. It is also alleged that Ms. S speaks to the child and also to Corporal Scott as though she thought the child should be able to reason.

Tristen was born on August 5, 2009, and since the time of the filing of this Petition has been in the home of his paternal grandmother where he is well cared for. The parents were arrested by Corporal Scott for child abuse. Ms. S posted bond

prior to the Preliminary Hearing which was held on January 15, 2010. Mr. K did not post bond until late July or early August.

Initially, the Adjudicatory Hearing was scheduled for March 15, 2010. This hearing was continued by the Court in order to complete a criminal jury trial. The Adjudicatory Hearing was then rescheduled for May 6, 2010. The May 6, 2010, hearing was continued because the father was not transported from the North Central Regional Jail. The Adjudicatory Hearing was then rescheduled for July 1, 2010. This hearing was continued because a material witness for the State was not available (Corporal Scott). The Adjudicatory Hearing was then rescheduled for September 9, 2010. It was at the September 9 hearing that the parents moved the Court for a Pre-Adjudicatory Improvement Period, which was granted over the Guardian ad Litem's objection.

#### **ASSIGNMENTS OF ERROR**

1. The Circuit Court erred in granting the parents a Pre-Adjudicatory Improvement Period to the mother given the length of time between the filing of the Petition and the mother's Motion for Pre-Adjudicatory Improvement Period and the granting of the Improvement Period, and erred in granting a Pre-Adjudicatory Improvement Period to the father given the length of time between the filing of the Petition and granting of the Improvement Period and the failure of the father to request the Improvement Period in writing.

2. The Circuit Court erred in failing to move forward with the Adjudicatory Hearing as nine months had elapsed since the date of the filing of the Petition.

## STANDARD FOR ISSUANCE OF A WRIT OF PROHIBITION

The West Virginia Supreme Court of Appeals has original jurisdiction over writs of prohibition by virtue of Article VIII, §3 of the West Virginia Constitution, which states, in relevant part, “The supreme court of appeals shall have original jurisdiction of proceedings in habeas corpus, mandamus, prohibition and certiorari.” Further, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” West Virginia Code §53-1-1.

The issue in this case is not whether the Circuit Court has jurisdiction, but rather whether the Circuit Court exceeded its legitimate powers in granting the respondent parents a Pre-Adjudicatory Improvement Period nine (9) months after the filing of the Petition. It should be noted that the respondent father had not filed a written Motion for a Pre-Adjudicatory Improvement Period and the Mother’s Motion had been filed on or about the 13<sup>th</sup> day of January, 2010.

The standard for the consideration and issuance of a writ of prohibition by this Court is set in Syllabus Points 1 and 2 of State ex rel. Tucker County Solid Waste Authority v. West Virginia Division of Labor, 668 S.E.2d 217 (W. Va. 2008):

In determining whether to entertain and issue the writ of prohibition for cases not involving the absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining

whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a crea statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

With regard to these five factors, the Petitioner does not have any other means to obtain the desired relief, the denial of the Pre-Adjudicatory Improvement Periods and the holding of an Adjudicatory Hearing. The Petitioner will not be harmed; however, the child for whom she is Guardian ad Litem could be irreparably harmed if the relief requested is not granted. If the parents do not successfully complete their Pre-Adjudicatory Improvement Periods and the case is set for Adjudication following the end of the Improvement Period the case will have lingered on the Court's docket for almost one year without adjudication during which time a young child has moved no closer to permanency. The lower tribunal's order is clearly erroneous as the Rules of Procedure for Child Abuse and Neglect Proceedings clearly state that the Adjudicatory Hearing should be held within thirty (30) days of the entry of the Preliminary Hearing Order. While Petitioner cannot say this is an oft repeated occurrence, in this case and in others in which Petitioner has been involved, child abuse and neglect hearings have been continued by the Court to accommodate trials, both criminal and civil, which did not conclude prior to the previously scheduled hearing. Petitioner does not believe this case raises any new and important problems or issues of law of first impression.

This Court has also held that prohibition is available to abused and/or neglected children to restrain courts from granting improvement periods of a greater extent and duration than permitted under West Virginia Code .... State v. Kaufman, 470 S.E.2d 205, 196 W. Va. 251 (1996).

### **ARGUMENT**

I. THE CIRCUIT COURT ERRED IN GRANTING THE PARENTS A PRE-ADJUDICATORY IMPROVEMENT PERIOD TO THE MOTHER GIVEN THE LENGTH OF TIME BETWEEN THE FILING OF THE PETITION AND THE MOTHER'S MOTION FOR PRE-ADJUDICATORY IMPROVEMENT PERIOD AND THE GRANTING OF THE IMPROVEMENT PERIOD, AND ERRED IN GRANTING A PRE-ADJUDICATORY IMPROVEMENT PERIOD TO THE FATHER GIVEN THE LENGTH OF TIME BETWEEN THE FILING OF THE PETITION AND GRANTING OF THE IMPROVEMENT PERIOD AND THE FAILURE OF THE FATHER TO REQUEST THE IMPROVEMENT PERIOD IN WRITING.

The Petition in this matter was filed on January 5, 2010, and the Preliminary Hearing was held on January 15, 2010. The mother filed a Motion for Pre-Adjudicatory, Post-Adjudicatory, and Post Dispositional Improvement Period on January 13, 2010. The Order following the Preliminary Hearing was entered on February 2, 2010. The entry of the Preliminary Hearing Order triggered the timeline for the scheduling of the Adjudicatory Hearing unless a Pre-Adjudicatory Improvement Period was granted by the Court. As previously stated, the Adjudicatory Hearing in this matter was continued three times: once due to a criminal trial that was not finished in the time allotted, once due to the father not being transported from the North Central Regional Jail and once due to the unavailability of a material witness for the State. The Adjudicatory Hearing was finally scheduled for September 9, 2010.

Prior to September 9, the mother had been participating in services offered by the Department of Health and Human Resources. The mother had completed the Step

Program for parenting skills by the March 18 MDT. She had a psychological evaluation, visits with her son, and participated in Adult Life skills training. While the mother has been progressing with services, the MDT does not feel it is appropriate to begin reunification at this time. Therefore, it is appropriate for the mother to have a Post Adjudicatory Improvement Period, as she has essentially had a nine (9) month Pre-Adjudicatory Improvement Period already.

The father was incarcerated in the North Central Regional Jail from the time of the filing of the Petition until within the last two months. The father is incarcerated as a result of his actions which also led to the filing of the Petition in this matter. As an inmate at North Central Regional Jail, he did not feel as though he could participate in any services.

Tristen was born on August 5, 2009, and is currently 13 months old. He has lived the majority of his young life with his paternal grandmother. He is doing very well in her care, and has become bonded to her.

This Court has made clear on many occasions that “the primary goal in case involving abuse and neglect, ..., must be the health and welfare of the children.” In re Miranda T., 678 S.E.2d 18, 223 W. Va. 512 (2009). This Court has also been protective of very young children as in this case.

[T]he early, most formative years of a child’s life are crucial to his or her development. There would be no adequate remedy at law for these children were they permitted to continue in this abyss of uncertainty. We have repeatedly emphasized that children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement.

State v. Kaufman, 470 S.E.2d 205, 196 W. Va. 251 (1996) quoting In re Carlita B., 408 S.E.2d 365, 375, 185 W. Va. 613, 623 (1991). This Court has also stated these early

formative years are the years under the age of three. In re Katie S., 479 S.E.2d 589, 198 W. Va. 79 (1996).

Tristen is now slightly over a year old. If the parents are not successful in their Pre-Adjudicatory Improvement Period, this child will be without permanency and floating in the abyss for just shy of one year by the time an Adjudicatory Hearing can be held. There is no provision in the West Virginia Code, the Rules of Procedure for Child Abuse and Neglect Proceedings, or case law from this Court which permits cases to linger on the Court's docket this long without adjudication, and certainly not to extend the time for adjudication by granting a Pre-Adjudicatory Improvement Period nine months after the Preliminary Hearing. Further, West Virginia Code, §49-6-12 clearly states that a motion for Pre-Adjudicatory Improvement Period must be in writing and the respondent must demonstrate he is likely to fully participate in the improvement period. This was not done by the father in this case.

There has been no acknowledgement of abuse or neglect by either parent in these proceedings. In order for an improvement period to be meaningful, the parents must acknowledge their actions which constitute abuse and/or neglect of the child.

## II. THE CIRCUIT COURT ERRED IN FAILING TO MOVE FORWARD WITH THE ADJUDICATORY HEARING AS NINE MONTHS HAD ELAPSED SINCE THE DATE OF THE FILING OF THE PETITION.

Rule 25 of the Rules of Procedure for Child Abuse and Neglect Proceedings clearly states that absent the granting of a Pre-Adjudicatory Improvement Period, the final adjudicatory hearing shall be held within thirty (30) days of the entry of the Order following the Preliminary Hearing. In the present case, the hearing has been continued for nine (9) months and now due to the improper granting of a Pre-Adjudicatory

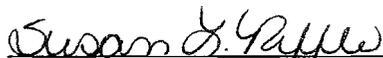
Improvement Period to the parents, the Adjudicatory Hearing will not be held for almost eleven (11) months.

This case is similar to State v. Kaufman, 470 S.E.2d 205, 196 W. Va. 251 (1996) wherein the adjudicatory hearing was held eight months after it was originally scheduled and the determination of neglect did not come until two months after the evidentiary hearing. In Kaufman this Court found that such “delays are in clear contravention of the directive in West Virginia Code §49-6-2(d) and case law that matters involving the abuse and neglect of children take precedence over almost every other matter with which a court deals on a daily basis, and such proceedings must be resolved as expeditiously as possible. See In re Carlita B., 185 W. Va. At 625, 408 S.E.2d at 377.”

Since the Kaufman case, the Rules of Procedure for Child Abuse and Neglect Proceedings were adopted. These Rules provide very specific time guidelines which simply were not followed in this matter.

WHEREFORE, the Guardian ad Litem on behalf of Tristen K. respectfully requests this Honorable Court to prohibit the Circuit Court from granting the parents a Pre-Adjudicatory Improvement Period and require the Court to set the matter for adjudication forthwith.

SUSAN L. RIFFLE  
Guardian ad Litem for  
Tristen K.



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**CERTIFICATE OF SERVICE**

I, Susan L. Riffle, do hereby certify that on the 21<sup>st</sup> day of September, 2010, I served the foregoing Petition for Writ of Prohibition, upon the following by hand delivering a true and accurate copy thereof:

Honorable David R. Janes  
Marion County Courthouse  
Fairmont, WV 26554

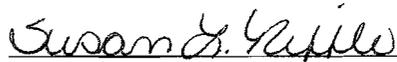
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\_\_\_\_\_  
Susan L. Riffle  
Guardian ad Litem for Tristen K.