

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ANDREW Y and DAWN Y,

Petitioners,

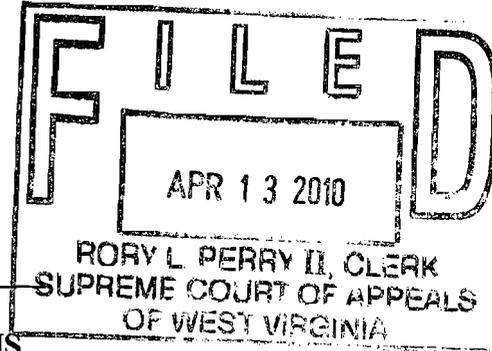
v.

Supreme Court No. \_\_\_\_\_

Circuit Court No. 09-A-31 (Cabell)

HONORABLE DAVID M. PANCAKE,  
Circuit Judge,

Respondent.



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COMPLAINT FOR WRIT OF MANDAMUS

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Robert B. Kuenzel, State Bar No. 8972  
Avis, Witten & Wandling, L.C.  
511 Dingess Street  
P.O. Box 420  
Logan, West Virginia 25601  
(304) 752-2838

*Counsel for Petitioners*

## COMPLAINT FOR WRIT OF MANDAMUS

1. The Petitioners, Andrew Y and Dawn Y, currently are residents of Milton, Cabell County, West Virginia, and both are citizens of the United States and the State of West Virginia.
2. The Petitioner, Dawn Y, is the legal and biological mother of Abigail A.
3. The Petitioner, Andrew Y, is the husband of said Dawn Y and the step-father of Abigail A.
4. The Petitioner's filed a Petition for Adoption in the Circuit Court of Cabell County, West Virginia, on or about November 5, 2009.
5. That the Petitioners were seeking to perfect the adoption of Abigail A. by her step-father, Andrew Y.
6. That the adoption petition was filed as a stepparent adoption as defined in West Virginia Code §48-22-116.
7. That the child had been residing with her mother and step-father in Cabell County, West Virginia, for six (6) months or more in accordance with West Virginia Code §48-22-501.
8. That counsel for the Petitioners has written and called Judge Pancake in an attempt to have a hearing in this matter set as set forth in West Virginia Code §48-22-501.
9. That the Petitioners must cause notice to be published in accordance with West Virginia Code §§48-22-601 and 602 as the putative father's whereabouts currently are unknown.
10. That, despite letters to the Court and numerous phone calls attempting to have a hearing in this matter scheduled, the only response from the Court's staff is "the petition is on the Judge's desk." And, "Once he is ready to set a hearing, he will write you to advise you of some possible dates for the hearing."
11. That, to date, some five (5) months after the filing of the Petition for Adoption, the Court

has yet to set a hearing in this matter.

12. That, in further support of this Complaint for Writ of Mandamus, the Petitioners incorporate by reference the Memorandum of Law attached hereto.

**RELIEF REQUESTED**

WHEREFORE, a Writ of Mandamus is hereby demanded to accord the relief Petitioners are entitled to as a prevailing grievant, including costs and reasonable attorney's fees expended in support of this action.

Respectfully submitted,  
Andrew Y and Dawn Y,  
By counsel



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*Counsel for petitioner*

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MEMORANDUM OF LAW IN SUPPORT OF  
COMPLAINT FOR WRIT OF MANDAMUS

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(304) 752-2838

*Counsel for Petitioners*

**MEMORANDUM OF LAW IN SUPPORT OF  
COMPLAINT FOR WRIT OF MANDAMUS**

**I. Facts**

1. The Petitioners, Andrew Y and Dawn Y, currently are residents of Milton, Cabell County, West Virginia, and both are citizens of the United States and the State of West Virginia.
2. The Petitioner, Dawn Y, is the legal and biological mother of Abigail A.
3. The Petitioner, Andrew Y, is the husband of said Dawn Y and the step-father of Abigail A.
4. The Petitioner's filed a Petition for Adoption in the Circuit Court of Cabell County, West Virginia, on or about November 5, 2009.
5. That the Petitioners were seeking to perfect the adoption of Abigail A. by her step-father, Andrew Y.
6. That the adoption petition was filed as a stepparent adoption as defined in West Virginia Code §48-22-116.
7. That the child had been residing with her mother and step-father in Cabell County, West Virginia, for six (6) months or more in accordance with West Virginia Code §48-22-501.
8. That counsel for the Petitioners has written and called Judge Pancake in an attempt to have a hearing in this matter set as set forth in West Virginia Code §48-22-501.
9. That the Petitioners must cause notice to be published in accordance with West Virginia Code §§48-22-601 and 602 as the putative father's whereabouts currently are unknown.
10. That, despite letters to the Court and numerous phone calls attempting to have a hearing in this matter scheduled, the only response from the Court's staff is "the petition is on the Judge's desk." And, "Once he is ready to set a hearing, he will write you to advise you of

some possible dates for the hearing.”

11. That, to date, some five (5) months after the filing of the Petition for Adoption, the Court has yet to set a hearing in this matter.

## II. Venue

Venue in the above styled matter is proper in accordance with West Virginia Code §53-1-1, et seq., and the Court’s original jurisdiction.

## III. Law

West Virginia Code §48-22-501 states,

The petition for adoption may be filed at any time after the child who is the subject of the adoption is born, the adoptive placement determined and all consents or relinquishments that can be obtained have been executed. **The hearing on the petition may be held no sooner than forty-five days after the filing of the petition and only after the child has lived with the adoptive parent or parents for a period of six months**, proper notice of the petition has been given and all necessary consents or relinquishments have been executed and submitted or the rights of all nonconsenting birth parents have otherwise been terminated.

(Emphasis added)

Further, this Court noted that, “We emphasize delay in achieving a permanent home for children can be devastating. ‘Unjustified procedural delays wreak havoc on a child’s development, stability and security.’ ” In re: Katie S., 198 W.Va. 79, 86, 479 S.E.2d 589, 596 (1996), (*citing*, In Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991)(Syl. Pt. 1, in part)(in holding that procedural delays that leave children in foster care while determining whether father’s abandonment constituted abuse/neglect were ‘ludicrous’. *See*, Katie S., at 87, 597)).

#### **IV. Argument**

The Petitioners, Andrew Y and Dawn Y are seeking to perfect an adoption by Andrew Y, the step-father of Abigail A.

As an adoptive parent, Andrew Y. has waited six (6) months before filing his petition for adoption as set forth in West Virginia Code §48-22-501; then, Andrew Y. must wait an additional forty-five (45) days for the Court to set a hearing as further set forth in West Virginia Code §48-22-501; in addition to waiting as set forth in West Virginia Code §48-22-501, the Petitioner, Andrew Y., has waited over one hundred fifty-five (155) 0 days, one hundred six (106) work days, approximately five (5) months, for the Circuit Court of Cabell County, West Virginia, to set a hearing in this matter.<sup>1</sup>

This Court has noted that, **“We emphasize delay in achieving a permanent home for children can be devastating. ‘Unjustified procedural delays wreak havoc on a child’s development, stability and security.’ ”** In re: Katie S., 198 W.Va. 79, 86, 479 S.E.2d 589, 596 (1996), (citing, In Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991)(Syl. Pt. 1, in part)(in holding that procedural delays that leave children in foster care while determining whether father’s abandonment constituted abuse/neglect were ‘ludicrous’. *See, Katie S.*, at 87, 597)(Emphasis added)).

In the instant Petition, the Petitioners, Andrew Y and Dawn Y, both reside in Milton, Cabell County, West Virginia, and both are citizens of the United States and the State of West Virginia. As stated, Andrew Y is seeking to perfect a step-parent adoption as set forth in West Virginia Code §48-22-116.

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<sup>1</sup>The Petitioner understands that once the petition was filed, he had to wait 45 days as required by West Virginia Code §48-22-501; nonetheless, it has been over 110 days without a hearing even being scheduled.

The Petitioner, Dawn Y, is the legal and biological mother of Abigail A. Immediately following Dawn Y's marriage to Andrew Y, Andrew Y indicated a desire to adopt Abigail A. The Petitioners are desirous to provide a loving home, with both a mother and father, to a child who otherwise has not known her father. However, the Petitioners are being stymied in their efforts of provide this child with the legally stable and secure home because an adoption hearing cannot be obtained.

The Petitioner's filed a Petition for Adoption in the Circuit Court of Cabell County, West Virginia, on or about November 5, 2009, seeking to perfect the adoption of Abigail A by her step-father, Andrew Y. As set forth above, the child had been residing with her mother and step-father in Cabell County, West Virginia, for six (6) months or more in accordance with West Virginia Code §48-22-501.

On numerous occasions, counsel has sought an adoption hearing date from the Court; however, each time counsel contacted the Court, he or his staff was advised that "the petition is on the Judge's desk." And, "Once he is ready to set a hearing, he will write you to advise you of some possible dates for the hearing."

Even though the forty-five (45) day waiting period has run, the Petitioners still must have the hearing set far enough in advance so they can cause notice to be published, in accordance with West Virginia Code §§48-22-601 and 602, as the putative father's has abandoned the child and his whereabouts currently are unknown.

WHEREFORE, as the Court has a duty to hear adoption matters; as the Petitioners have waited over six (6) months before the filing of the adoption petition in accordance West Virginia Code §48-22-501; as the Petitioners have waited more than forty-five (45) days in accordance with West Virginia Code §48-22-501; as over five (5) months have passed since the filing of the

petition and a hearing has yet to be set; and as this Court has noted that unjustified, procedural delays can be detrimental to children when permanency needs to be established, a Writ of Mandamus is hereby demanded to accord the relief the Petitioners are entitled to as a prevailing grievants, including costs and reasonable attorney's fees expended in support of this action.



**Robert B. Kuenzel, State Bar No. 8972**  
**Avis, Witten & Wandling, L.C.**  
**511 Dingess Street**  
**P.O. Box 420**  
**Logan, West Virginia 25601**  
**(304) 752-2838**

*Counsel for Petitioners*

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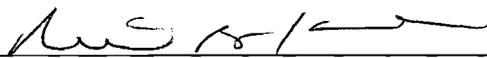
**HONORABLE DAVID M. PANCAKE,  
Circuit Judge,**

**Respondent.**

**MEMORANDUM OF PERSONS UPON WHOM THE RULE TO SHOW CAUSE  
IS TO BE SERVED, IF GRANTED**

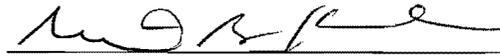
If a Rule to Show Cause is granted, the following persons should be served:

1. **Honorable David Pancake  
Circuit Judge  
Cabell County Courthouse  
P.O. Box 545  
Huntington, WV 25710**

  
\_\_\_\_\_  
**Robert B. Kuenzel, State Bar No. 8972  
Avis, Witten & Wandling, L.C.  
511 Dingess Street  
P.O. Box 420  
Logan, West Virginia 25601  
(304) 752-2838**

***Counsel for Petitioners***

WITNESS the following signatures and seals:

 (SEAL)  
Robert B. Kuenzel

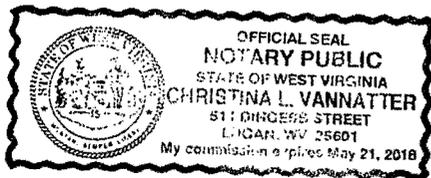
STATE OF WEST VIRGINIA,

COUNTY OF LOGAN, TO-WIT:

I, Christina Vannatter, a Notary Public in and for the County and State aforesaid, do hereby certify that ROBERT B. KUENZEL, whose name is signed to the foregoing Complaint for Writ of Mandamus, has this day signed and acknowledged the same before me in my said County and State.

Given under my hand this the 9<sup>th</sup> day of April, 2010.

My commission expires: May 21 2018.



Christina L Vannatter  
NOTARY PUBLIC

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**Supreme Court No. \_\_\_\_\_  
Circuit Court No. 09-A-31 (Cabell)**

**HONORABLE DAVID M. PANCAKE,  
Circuit Judge,**

**Respondent.**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Complaint for Writ of Mandamus, Memorandum of Law in Support of Complaint for Writ of Mandamus, Memorandum of Persons Upon Whom the Rule to Show Cause is to Be Served, If Granted, and Verification has been served upon the person(s) named below, by depositing a true and correct copy thereof, postage prepaid, in the United States mail, at Logan, West Virginia, this the 9<sup>th</sup> day of April, 2010:

**Honorable David Pancake  
Circuit Judge  
Cabell County Courthouse  
P.O. Box 545  
Huntington, WV 25710**

  
\_\_\_\_\_  
**Robert B. Kuenzel, State Bar No. 8972  
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