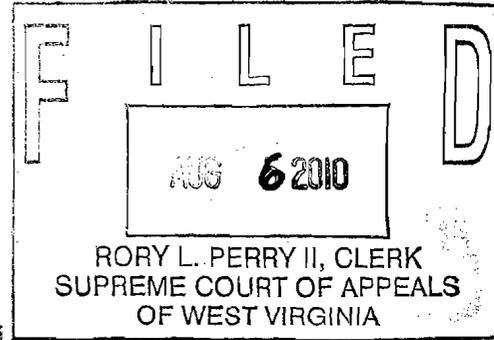


**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS**  
**at**  
**CHARLESTON, WEST VIRGINIA**  
**No. 35660**

**IN RE:**  
**EMILY**  
**and**  
**KALEB**



**Wood County Abuse and Neglect**  
**Cases No. 08-JA-64 and 10-JA-02**  
**The Honorable Jeffrey B. Reed, Presiding**

**OPENING BRIEF**

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
No. 35660

IN RE: WOOD COUNTY JUVENILE NEGLECT  
EMILY & DELINQUENCY NO. 08-JA-64  
KALEB 10-JA-02

**OPENING BRIEF ON BEHALF OF  
APPELLANTS**

Now come the Appellants, \_\_\_\_\_, and \_\_\_\_\_  
hereby file their Opening Brief in support of their second appeal of the ruling of  
the Wood County Circuit Court.<sup>1</sup>

The Appellants appeal the February 23, 2010 *Order* of the Circuit Court of  
Wood County, West Virginia, the Honorable Jeffrey B. Reed presiding,  
dismissing and denying the *Second Amended Petition* filed by Appellants alleging  
abuse and neglect. (*Exhibit A hereto.*) The case was dismissed following hearings  
before the Circuit Court which were mandated by this Court following an appeal  
of the Circuit Court's summary dismissal of the original abuse and neglect  
*Petition. In Re: Emily \_\_\_\_\_*, \_\_\_ W.Va. \_\_\_, 686 S.E.2d 41 (October  
29, 2009). An *Amended Petition* and then a *Second Amended Petition* were  
thereafter filed to update the factual allegations and to include the after-born  
child of Sylvia Marie G \_\_\_\_\_, KALEB \_\_\_\_\_ who was born on July 3,  
2009.

**I. Nature of Proceeding and Ruling in Lower Tribunal**

Following lengthy proceedings in Wood County Family Court, the  
Appellants filed their original *Petition* in Wood County Circuit Court pursuant to  
West Virginia Code §49-6-1 *et seq.* This *Petition* alleged that the Appellants'  
granddaughter, EMILY \_\_\_\_\_ was an abused and neglected child

<sup>1</sup> West Virginia Code §49-6-1 provides that "the department or a reputable person . . .  
may present a petition setting forth the facts" believed to comprise abuse or neglect.  
See also, State ex rel. Paul B. v. Hill, 201 W.Va. 248, 496 S.E.2d 198 (1997).

and sought relief pursuant to Chapter 49, Article 6 of the West Virginia Code. This *Petition* was assigned to Judge Jeffrey Reed, who summarily dismissed the *Petition* without hearing on September 23, 2008.

After an appeal to this Court, the case was remanded for an evidentiary hearing upon the allegations set forth in the *Petition*. Evidentiary hearings were held on January 14, 2010 and February 9, 2010. At the conclusion of these hearings, the Wood County Circuit Court again dismissed the pending *Second Amended Petition*.

In its *Adjudication Order*, the Circuit Court found that “there has been no abuse and neglect at the time the *Petition* was filed because at the time the *Petition* was filed there was in place a *Family Court Order* that provided that Emily Goodrich was in the custody of the maternal grandparents, and also because none of the domestic violence occurred in the presence of the children or in the home of the children.” *Order of 2/23/10 at 4*. Appellants appeal this second dismissal.

## II. Statement of the Facts

EMILY (hereafter “EMILY”) was born on \_\_\_\_\_, to SYLVIA \_\_\_\_\_, the Appellants’ daughter.<sup>2</sup> (*Second Amended Petition at ¶¶2, 5*.) EMILY’s father was ultimately determined to be \_\_\_\_\_ . (*Second Amended Petition at ¶6*.)

KALEB was born to SYLVIA \_\_\_\_\_ on \_\_\_\_\_ . (*Second Amended Petition at ¶¶2, 5*.) SYLVIA \_\_\_\_\_ testified that the father of this child was either CARL \_\_\_\_\_ or KENNETH \_\_\_\_\_ . (*Second Amended Petition at ¶7*.) Paternity testing was *Ordered* by the court-below. The results of this test just recently excluded both of these persons as the father of KALEB \_\_\_\_\_

As the original *Petition* and the *Second Amended Petition* alleged, SYLVIA MARIE \_\_\_\_\_ and CARL \_\_\_\_\_ have been involved in a violent and \_\_\_\_\_

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<sup>2</sup> Sylvia \_\_\_\_\_ is the biological daughter of Donna \_\_\_\_\_ and John \_\_\_\_\_ step-daughter.

stormy relationship since well before EMILY was conceived. Indeed, the court below found that the “exhibits and testimony about the incidents of domestic violence and ... the relationship between the Respondent-Father and the Respondent-Mother can adequately be described as a history that is replete with acts of physical violence and threats of physical violence.” *Order of 2/23/10 at 3*. This domestic violence was corroborated by “the testimony of Petitioner Donna” and “through court documents.” *Id.*

Due to the ongoing violence between these two parties, neither child currently lives in the care of his/her mother or her father. EMILY remains in the Appellants’ care and custody by virtue of an *Order* from the Wood County Family Court entered in case 06-D-881 (*Carl* and *Sylvia v. Donna* and *John* ).<sup>3</sup> (*Second Amended Petition at ¶8.*) EMILY has lived with the Appellants since MS. granted guardianship of EMILY to her mother and step-father shortly after EMILY was born on August 14, 2006. This was done because of concerns about the Respondent-mother’s ability to care for the child resulting from the Respondent-mother’s longstanding emotional and mental health problems. (*Second Amended Petition at ¶10.*)

As for KALEB , he also resides with the Appellants although this custody arrangement has not been judicially sanctioned by the Family Court. However, the Circuit Court “stay[ed] the effect of [the] *Order* to allow the maternal grandparents to go before a Family Court Judge to obtain an order as it related to Kaleb D and to allow for the requested DNA testing.” (*Order of 2/23/10 at 7.*) The Circuit Court further noted that this stay “should also cover a period of time for any aggrieved party to file an appeal.” Since his father is currently unknown and SYLVIA is unable to parent him, it appears likely that he too will be raised by his grandparents.

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<sup>3</sup> The Family Court’s *Order* granting custody of EMILY to the Appellants has been repeatedly challenged by CARL . (*Second Amended Petition at ¶11-12.*) Before a final *Order* was entered by the Wood County Family Court granting custody to the Appellants, no less than four separate *Petitions* were filed in Family Court regarding custody of EMILY.

The Appellants and SYLVIA G and CARL litigated custody of EMILY GRACE in Wood County Family Court until May 5, 2008. (*Second Amended Petition at ¶11*) The final Order in case 06-D-881 entered on July 10, 2008 designated DONNA J. and JOHN E. as primary residential custodians of EMILY “until further Order of the Court.” Further, SYLVIA, CARL and the paternal grandparents were granted weekly monitored visits at the Kids First Visitation Center which they have faithfully attended. (*Second Amended Petition at ¶12 and Exhibit 2 thereto.*)

The history of the documented incidents of domestic violence and domestic violence proceedings between SYLVIA MARIE and CARL is summarized in the *Second Amended Petition*:

- a. March 20, 2006 – Donna filed a *Domestic Violence Petition* on behalf of her daughter, Sylvia, 06-D-132 (06-DV-118). An Order was issued for 180 days by Judge Annette L. Fantasia. (*Exhibits 4, 5 and 6.*)
- b. March 21, 2006 – Carl filed a *Domestic Violence Petition* 06-D-133 (06-DV-120) alleging that Sylvia Marie threatened to kill him and his family.<sup>4</sup>
- c. April 5, 2006 – Petition 06-D-133 (06-DV-120) was dismissed at the request of Carl. (*Exhibit 7.*)
- d. August 14, 2006 – EMILY was born. Sylvia was 17 years of age (DOB 2/22/89) Emily and her mother stayed with Donna and John following Emily’s birth.
- e. November 14, 2006 – Sylvia and Carl jointly filed a *Petition* in the Wood County Family Court seeking custody of Emily (*Exhibit 2.*)
- f. November 28, 2006 – Carl charged with Violating of a Domestic Violence Protective Order in case 06-M-5750. He eventually pled guilty and received unsupervised probation for six months. (*Exhibit 9.*)

g. November 29, 2006 – Donna filed a *Domestic Violence Petition* on behalf of her daughter, Sylvia (still a minor at the time) and against (06-DV-586). A six month protective *Order* was issued prohibiting Carl having contact with Sylvia, Donna and John, and Emily until June 8, 2007. (*Exhibits 10 and 11.*)

h. December 6, 2006 – Josephine, Carl Lee mother and paternal grandmother of Emily filed a *Domestic Violence Petition* against Sylvia alleging phone threats in case 06-D-694; (06-DV-204). This *Petition* was dismissed on December 21, 2006. (*Exhibits 12 and 13.*)

i. July 28, 2007 – Sylvia filed a *Domestic Violence Petition* in case 07-D-441; (07-DV-381) alleging that Carl had abused her, kicked her and punched her. An *Order* was granted. (*Exhibit 15.*)

j. August 8, 2007 – *Order* in case 07-DV-381 was terminated at the request of Sylvia. (*Exhibit 16.*)

k. August 24, 2007 – Sylvia a *Domestic Violence Protection Order* against Carl in case 07-D-503 (07-DV-430) alleging that she had been kicked and punched. An *Order* was granted and was subsequently terminated at the request of the parties on February 4, 2008. (*Exhibits 17 and 18.*)

l. September 28, 2007 – Carl is charged with violating a *Domestic Violence Protective Order* in case 07-M-4540. This charge was ultimately dismissed. (*Exhibit 19.*)

m. October 24, 2007 – Carl is charged with violating a *Domestic Violence Protective Order* in case 07-M-4976. This charge was ultimately dismissed. (*Exhibit 21.*)

n. April 9, 2008 – Carl filed a *Domestic Violence Petition* in case 08-D-197; (08-DV-180) alleging that Sylvia Roach cut him, and threatened him. An *Order* was entered on April 16, 2008 to last for six months. (*Exhibit 22.*)

o. April 9, 2008 – Sylvia filed a *Domestic Violence Petition* in case 08-D-199; (08-DV-182) alleging that Carl held her against her will. An *Order* was entered on April 16, 2008 for six months. (*Exhibit 23.*)

p. August 4, 2008 – Carl was charged with Domestic Battery of Sylvia in case 08-M-4329. (*Exhibit 24.*) The charge was ultimately dismissed in a plea agreement.

q. October 9, 2008 – Carl was charged with telephone harassment and stalking of Fallon Geer in cases 08-M-3698 and 3699. He ultimately pled guilty to telephone harassment. (*Exhibit 25.*)

r. December 16, 2008 – Sylvia is arrested and charged with Telephone Harassment of Carl in case 08-M-6490. (*Exhibit 26.*)

s. January 21, 2009 – Sylvia filed a *Domestic Violence Protection Order* against Carl in case 09-D-21; (09-DV-18) alleging that he was calling and harassing her. An Order was issued for 180 days. (*Exhibit 27.*)

t. April 29, 2009 – Carl was charged with violating a Domestic Violence Protective Order in case 09-M-1796. He pled guilty and was sentenced to 30 days, which was suspended for one year unsupervised probation. (*Exhibit 28.*)

The Appellants also adduced evidence at the January 14, 2010 hearing that SYLVIA and CARL continue to see one another. As recently as January 10<sup>th</sup>, 2010 SYLVIA spent the night with CARL at his parents' home where SYLVIA was picked up by her mother. As is evident from this summary, these Respondent-parents have engaged for years in a pattern of physically assaultive behavior, arguments and violence against one another, separating for a time after the filing of some type of legal proceeding and then reuniting to begin the pattern again. (*Second Amended Petition ¶14d at p. 6.*)

As a result of the ongoing pattern of violence between the Respondent-mother and Respondent-father, the *Guardian Ad Litem* and the Wood County Family Court found each parent unfit to assume custody of Emily, stating that "both parents, since Emily's birth, have failed to demonstrate that they can establish a home environment that is stable, safe, nurturing, free of domestic violence and otherwise appropriate for a child of such

tender years. (*Second Amended Petition* ¶14e, ¶at p. 6.) The *Guardian Ad Litem* further recommended a number of steps that each parent take in order to rectify the conditions of abuse and neglect caused by the ongoing domestic violence, including supervised visits at Kids First; a prohibition on the parents residing in the same home where Emily lives; completion of a Batterer's Intervention Program; participation and completion of a program geared towards eliminating domestic violence; abiding by the protective orders in effect; completion of parenting classes; and most importantly, maintaining a home environment that is stable, safe, nurturing, free of domestic violence, and other appropriate for Emily. (*Second Amended Petition* at ¶14f, at pp.6-7.)

The *Guardian Ad Litem* further concluded that "Abuse and Neglect Proceedings should be commenced as soon as it becomes evident that either party is failing to comply fully with the conditions set forth herein so that parental rights can be terminated and visitation ended." (*Id.*) The *Guardian Ad Litem* reasoned that "if the parents do not take the appropriate steps as outlined herein to become adults upon whom Emily is able to depend on to help nurture her to maturity as a healthy adult, then steps should be taken to have their parental rights terminated and to protect Emily from further exposure to these individuals and any knowledge of their self-destructive ways of life that will be a constant emotional burden to Emily when she is of an age to care and worry about the safety of her parents." (*Id.*)

Since the entry of Family Court *Order* on July 10, 2008, EMILY's parents have done nothing whatever and have taken no steps at all to rectify the conditions outlined herein. (*Second Amended Petition* ¶14h.) Accordingly, the Appellants pursued this action reasoning that EMILY is entitled to have permanency and stability in her placement.

This assertion was rejected by the court-below:

The Court does not believe, as counsel have argued, that you can make a finding of abuse and neglect based upon what is in the best interest of the children or upon what is best in terms of permanency of the children because a finding of abuse and neglect has to fit the statutory definition of abuse and neglect.

The Court is also concerned about where you draw the line in terms of conduct of the parents out of the presence of the children that may or may not have some effect on the children. Here, there has been no evidence of any adverse effect on the children, or even that the children are aware of the acts of domestic violence. (*Order of 2/23/10 at 4-5.*)

Notwithstanding the Circuit Court's conclusion that the children were not abuse or neglected, the court-below declined to alter the placement of physical custody for the children.

The Appellants continue to assert that the longstanding and repeated incidents of domestic violence between EMILY's parents constitutes abuse as defined by West Virginia Code §49-1-3(4). Appellants further assert that if EMILY cannot ever live with either or both of her parents due to their violent conduct, and if EMILY's parents are unable or unwilling to correct these conditions which gave rise to Emily's continued removal from their care, then the parental rights of Sylvia and Carl should be terminated so that the best interests, health, safety and welfare of this child can be protected and served. The same applies as to Sylvia rights to KALEE

The Appellants accordingly assert that the Court clearly erred in its findings and conclusions, and they appeal the dismissal of this abuse and neglect *Second Amended Petition*.

### III. Assignments of Error

***The Circuit Court erroneously dismissed this Petition as the essentially uncontroverted evidence adduced by the Appellants constitutes abuse and neglect.***

#### IV. Points and Authorities, Statement of Law, and Argument

1. **EMILY** and **KALEB** are abused children since her/his health or welfare is harmed or threatened by:

(4) **Domestic Violence as defined in section two hundred two [§48-27-202], article twenty-seven, chapter forty-eight of this code. (West Virginia Code §49-1-3)**

2. **EMILY** and **KALEB** are entitled to permanency and stability.

#### Standard of Review

A Circuit Court's final order and ultimate disposition is reviewed under an "abuse of discretion standard." Challenges to findings of fact are reviewed under a clearly erroneous standard. Conclusions of law are reviewed de novo. Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996); In re Frances J.A.S., 213 W.Va. 636, 584 S.E.2d 492 (2003)

#### Argument

In the instant case, the court-below dismissed the abuse and neglect *Second Amended Petition* filed by the Appellants, ruling that the allegations of abuse or neglect had not been proven since the domestic violence at issue had not occurred in the presence of either of the children.

The issue presented in this case is not complicated: is it child abuse when two parents are rendered unfit, (and most likely permanently unfit), by virtue of the ongoing pattern of domestic violence in their lives, regardless of whether that domestic violence occurs while the child is present? The Appellants assert that domestic violence as alleged in the *Petition* does constitute child abuse and that the court-below erroneously concluded that it does not. Moreover, the Appellants assert that EMILY and KALEB should not be required to remain in limbo for their entire childhood while waiting for their parents (or parent) to remediate the abhorrent conditions in which they live.

Notwithstanding the fact that the safety of these two children has been thus far ensured by the Family Court and the court-below, the Family Court

can do nothing further to provide permanent safety and stability for EMILY and KALEB. Accordingly, it is now up to the Circuit Court to do so.

The statute defining child abuse, West Virginia Code §49-1-3 states: "An abused child means a child whose health or welfare is harmed or threatened by- (4) Domestic Violence as defined in section two hundred two [§48-27-202], article twenty-seven, chapter forty-eight of this code."

"Domestic violence" includes physical harm or attempting to cause physical harm, placing someone in fear of physical harm, creating fear of physical harm by harassment, psychological abuse or threatening acts, sexual assault or sexual abuse, and holding, confining, detaining or abducting someone when those acts are committed against a family or household member. West Virginia Code §48-27-202. The court-below acknowledged and found that there were many instances of documented domestic violence as defined by West Virginia Code §49-1-3(4).<sup>5</sup>

While domestic violence was not added to the statutory definition of child abuse until 2006, this Court has recognized the negative impact of domestic violence upon children for quite some time. Thus, in Mary Ann P. v. William R. P., 197 W. Va. 1, 475 S.E.2d 1 (1996), evidence of domestic violence was held to be relevant in deciding visitations. As the Court observed:

We have consistently acknowledged that domestic violence is potentially harmful to a child's welfare. In syllabus point two of Mary Ann P., we recognized:

"Children are often physically assaulted or witness violence against one of their parents and may suffer deep and lasting emotional harm from victimization and from exposure to family violence; consequently, a family law master should take domestic violence into account[.]" *Syl. pt. 1, in part, Henry v. Johnson*, 192 W. Va. 82, 450 S.E.2d 779 (1994)." *Syl. Pt. 2, Mary Ann P. v. William R. P.*, 197 W. Va. 1, 475 S.E.2d 1 (1996).

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<sup>5</sup> Domestic violence was added to W.Va. Code §49-1-3 by the legislature in 2006 and this provision became effective on June 9, 2006, a few months before EMILY's birth.

The language from this syllabus point “was originally generated by the West Virginia Legislature in the domestic violence statute, West Virginia Code § 48-2A-1(a)(2) (1992),” and the “findings of the Legislature” which “included the recognition that [f]amily violence is a major health and law-enforcement problem in this state and one that affects people of all racial and ethnic backgrounds and all socioeconomic classes . . .” and that [f]amily violence can be deterred, prevented or reduced by legal intervention.” Dale Patrick D. v. Victoria Diane D., 203 W. Va. 438, 442-443, 508 S.E.2d 375 (1998).

It has been the law of the State for over twenty years that “...spousal abuse is a factor to be considered in determining parental fitness for child custody” and that “a family law master should take domestic violence into account when making an award of temporary custody.” Nancy Viola R. v. Randolph W., 177 W. Va. 710, 714, 356 S.E.2d 464, 468 (1987); Henry v. Johnson, 192 W. Va. 82, 86, 450 S.E.2d 779, 783 (1994). So, is the Circuit Court correct in finding that acts of domestic violence between parents or caretakers must be committed in the presence of a child before such violence constitutes child abuse as stated in the Court’s *Order*?

Nowhere in the definition of abuse premised upon acts of domestic violence is it stated that domestic violence must be committed in the presence of the children in order for such conduct to constitute abuse. In fact, it is clear that the child’s “health or welfare” need only be *threatened* by an act of abuse or neglect, not actually harmed. West Virginia Code §49-1-3(4). Must the child be physically present to be threatened by such acts, that is, actually put in harm’s way? Appellants assert that physical presence is not required.

While no case precisely on point could be found, several cases are instructive on this issue. In the case of In Re Frances J.A.S., 213 W. Va. 636, 639, 584 S.E.2d 492 (2003), an abuse and neglect petition was filed based upon “allegations of domestic violence and alcohol abuse which affected . . . parenting abilities.” The evidence showed that there had been several police calls to the residence and an incident of domestic violence in May of 2000. (*Id. at footnote 4.*) However, there was no indication that these incidents of domestic violence

occurred in the presence of the children, or that their presence was necessary to a determination of abuse.

Similarly, this Court reversed a Circuit Court's dismissal of an abuse and neglect proceeding where the mother had never parented her baby and was subjected to domestic violence while pregnant with the child. In Re Brandon Lee B., 211 W. Va. 587, 567 S.E.2d 597 (2001). In reversing the Circuit Court's ruling, this Court found that an abuse and neglect a petition could be premised on unfitness and inability to parent due to a variety of issues, including domestic violence.

Like the Frances case, SYLVIA and CARL have engaged in domestic violence which permeates their lives, affects their parenting abilities and renders them unfit and unable to assume physical care and custody of their child. Like Brandon's mother, EMILY's parents have engaged in acts of domestic violence since before EMILY was born.

Fortunately for EMILY and KALEB, they have never been subjected to the violence in which EMILY's parents / KALEB's mother engage on a fairly constant basis. That is because shortly after her birth, her mother placed EMILY in the care of the Appellants. That single protective act has enabled the Appellants to protect EMILY. Although the Appellants have battled to keep EMILY safe and now KALEB as well, and they have been successful to date.

However lucky they are to have been removed from the care of her parents /his mother, EMILY's and KALEB's case is not finished as the current circumstances do not provide any permanency for EMILY or KALEB. Those circumstances include having parent[s] who have not to date been able to rectify the conditions which led to the child's continued removal from their care: ongoing domestic violence. Even though EMILY's removal from her parents' care was accomplished in Family Court without intervention by WVDHHR, it cannot be denied that EMILY has remained and hopefully will remain out of her parents' care by virtue of their unfitness due to domestic violence. This lack of permanency in EMILY's placement (and now in KALEB's placement) is not in her best interests as was recognized by the *Guardian Ad Litem*.

“A fundamental mandate, recognized consistently by this Court, is that the ultimate determination of child placement must be premised upon an analysis of the best interests of the child. As this Court has repeatedly stated, ‘Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.’” *Syl. Pt. 3, In re Katie S.*, 198 W.Va. 79, 479 S.E.2d 589 (1996). “[T]he best interests of the child is the polar star by which decisions must be made which affect children.” *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted).

West Virginia Code § 49-1-1(b) addresses this best interests requirement, providing in pertinent part as follows:

In pursuit of these goals it is the intention of the Legislature to provide for removing the child from the custody of his or her parents only when the child's welfare or the safety and protection of the public cannot be adequately safeguarded without removal; and, when the child has to be removed from his or her family, to secure for the child custody, care and discipline consistent with the child's best interests and other goals herein set out. It is further the intention of the Legislature to require that any reunification, permanency or preplacement preventative services address the safety of the child.

“In order to effectuate the legislative intent expressed in *W.Va.Code* § 49-1-1(a) [1997], a circuit court must endeavor to secure for a child who has been removed from his or her family a permanent placement with the level of custody, care, commitment, nurturing and discipline that is consistent with the child's best interests. *State v. Michael M.*, 202 W.Va. 350, 358, 504 S.E.2d 177, 185; *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589. *Accord State ex rel Roy Allen S. v. Stone* 196 W. Va. 624, 638, 474 S.E.2d 554, 568 (1996) (“Although a parent has a protectable interest in a child, a parent's rights are not absolute: the welfare of the child is the paramount consideration to which all of the factors, including common law preferential rights of the parents, must be deferred or subordinated.” “Ensuring finality for ... children is vital to safeguarding their best interests so that they may have permanency and not be continually shuttled from

placement to placement. *See Syl.pt. 1*, in part, *In re, Carlita B.*, 185 W. Va. 613, 626, 408 S.E.2d 365, 378 (1991).

By the same token, it is possible, although unlikely that these parents will be able to correct the conditions which led to EMILY's and now KALEB's continued removal from their /her care. This would allow unification of this family. EMILY and KALEB are entitled to have that opportunity as well.

It should also be noted that in addition to the issues of domestic violence noted in the Petition, allegations concerning psychological problems and deficiencies of both parents were alleged and established. These were not addressed by the Circuit Court although these conditions almost certainly contributed to the violence which erupts whenever these parties are together.

### **Conclusion and Relief Sought**

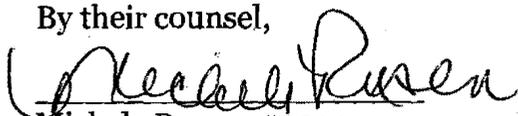
While EMILY and KALEB are safe at present, it is obvious from the actions of the Wood County Circuit Court that they remain out of the care and custody of her/his parents care and custody due to the longstanding domestic violence and mental and psychological deficiencies which prevent either parent from providing that care. That domestic violence poses a continuing threat to EMILY and to KALEB as it prevents her / his parents from carrying out their parental duties and responsibilities.

Under these circumstances, the *Appellants* have established child abuse as set forth in West Virginia Code §49-1-3(4). Accordingly, the Wood County Circuit Court erroneously found to the contrary and abused its discretion by improperly dismissing this *Second Amended Petition*.

WHEREFORE, for the reasons set forth herein, the Appellants respectfully request that this Court reverse the decision of the Wood County Circuit Court and remand this *Second Amended Petition* for a dispositional hearing.

Respectfully submitted,

By their counsel,

A handwritten signature in cursive script, appearing to read "Michele Rusen".

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**CERTIFICATE OF SERVICE**

**This 5th day of August, 2010, the undersigned certifies that the enclosed "Opening Brief" In Re: *Emily*, and *Kaleb*, No. 35660 was served upon the following persons, by mailing, first class postage prepaid, a true and accurate copy thereof to:**

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