

ARGUMENT DOCKET

No. 35743

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner Below/Appellant

V.

Mingo County Case No.:09-JN-34;35;36;3
(Chief Judge Thornsbury)

TARA
VERNER
DOROTHY
MARCUS ALLISON,
JOSHUA G
JIMMY G

Respondant Below/Appellees

IN THE INTERESTS OF
THE MINOR CHILDREN:

NOAH P.	DOB: 04/05/09
IAN A.	DOB: 02/21/03
CARSON P.	DOB: 03/18/04
MICAH P.	DOB: 09/29/08

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CIRCUIT COURT
MINGO COUNTY, WV
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BRIEF OF APPELLEES VERNER AND DOROTHY P.

FROM THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

TO THE HONORABLE JUSTICES OF
THE SUPREME COURT OF APPEALS

OF WEST VIRGINIA

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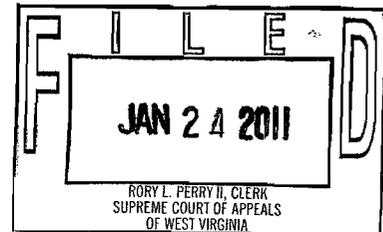


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COUNTERSTATEMENT OF THE CASE

Appellees Verner and Dorothy P. do not accept Appellant's "Statement of the Case" as being accurate and hereby provide a "Counterstatement" showing all relevant facts.

Appellees are the material grandparents of four minor children, Ian A., Noah A., Carson P. and Micah P. See: Motion to Intervene, 2/24/10. The Appellees intervened in the action between the children's biological parent(s) and the Department. The P's showed that the children had lived with them and been in their care and custody for virtually all of their entire lives. The Appellees have provided full financial support for the children and their mother for the children's entire lives. Transcript, p. 232. The grandparents also requested permanent custody of the children. Id. The Appellees filed a related Motion for Physical Custody on 2/24/10.

The transcript of the hearing shows that the Department's representative testified that the mother had a history of beating and abusing her children. Transcript, pp. 7, 9. The Department was well aware that Verner P., the children's grandfather, tried to "control" the mother and protect the children. Transcript, p. 13. The "domestic violence" charge against Verner P. stemmed from his actions taken to prevent abuse of one of the children. Id., pp. 17-18; 26. The Department representative testified that it was her belief that Dorothy P. would be compliant with Department services and had done nothing to harm the children. Id., p. 26. There is nothing in the record indicating that Dorothy or Verner P. had anything to do with the death of an infant sibling of the children, which occurred in 2004. Transcript, p. 37.

Verner P. testified that he and his wife have cared for the children since they were born. Transcript, p. 38.

The court ordered that the P's be allowed to retain physical custody and that they must work with the Department to ensure the safety of the children. Transcript, pp. 55-56.

Following the temporary award of physical custody to the Appellees, the Department complained that the childrens' mother was in the home contrary to the court's Orders. Transcript, p. 79. This was clarified by counsel for the Department, whose witness could not be positive that she had seen the mother there after the Order was entered. Id. The record also shows that the mother was not in the home when the children were in the home. Id.; Transcript, p. 192.

DHHR asked for a change in custody in January 2010. This was based on one occasion when Dorothy P was at the hospital for several hours and Appellees allowed the mother to remove the youngest child from the home while Dorothy was at the hospital. Transcript, pp. 84, 91. The Department asserted that they had a "problem" with the Appellees keeping the mother out of their home. Id.

The DHHR witness also testified that they were concerned that the Appellees were in such poor health that they would not be able to care for the children much longer. Transcript, p. 84. When questioned about specific health issues that might affect the Appellees' ability to raise the children, DHHR admitted that they knew of no such health issues. Transcript, p. 94. No documentary evidence was provided in support of the specious assertion that Dorothy and Verner P were too ill to be custodians for the children. Despite this shocking lack of evidence in support of their position, the Department asked that the children be put into foster care as no relative placement could be found. Transcript, p. 85.

The trial court placed the children in foster care following the dispositional hearing, in order to ensure their safety while a home study was conducted on the P's. Transcript, p. 98. The court also impressed upon counsel for the Appellees the serious nature of the Orders demanding that the biological mother be kept out of the home at all times. Id. At the next hearing, in February, 2010, Appellees appeared before the court and assured the circuit court that they would protect the children and comply

with the court's orders at all times in the future. With that assurance of the best interests of the children, the court returned physical custody to the grandparents. Transcript, p. 118. Under questioning by the court, DHHR admitted that they had not shown that the Appellees committed any act of neglect or abuse against the children during the improvement period provided by the court at the November hearing. Transcript, p. 120. The court mandated a date for the completion of a home study on the Appellees. Id., p. 121.

Following the court's ruling, DHHR presented a new claim, which had not been revealed to the court or counsel for the Appellees, that being an assertion that one of the children might have been sexually abused in the past. Transcript, p. 125. For this reason and in an abundance of caution, the court required that the children remain in foster care during completion of an investigation into that claim. DHHR admits that following psychological and physical examination of the children, there was no evidence tending to support the foster parents' claim that the child "admitted" sexual abuse, or supporting any finding of sexual abuse of the children. Transcript, pp. 212-15.

At the March, 2009 hearing, Ms. Fields again testified on behalf of DHHR that the grandparents "cannot see how important is it to make sure [the mother] is not in the home where the children are at." Transcript, p. 236. Fields had no evidence whatsoever that the mother had been in the home since the January or February hearings. Id. She admitted that the children are healthy and that during visitations they are happy to see and be with their grandparents. Transcript, p. 236. Fields also expressed "concern" over Dorothy P's "health", but had no evidence indicating that Dorothy had a health condition preventing her from being a custodial parent. Transcript, p. 239.

Field worker Meunich testified for the Department regarding the home study. She explained that problems with the home were explained to Appellees and they were given an opportunity to fix those. The problems included several missing heating vent covers, and small holes in interior walls

and doors. Transcript, p. 178. Cleanliness was not one of the issues mentioned in that hearing on necessary remediation. Id. A second witness for the Department testified that on her home visit's the children were clean and happy, and that the home may have been "messy" but was not unclean. Transcript, p. 234.

Meunich also asserted that because of the domestic violence on Verner P's recent record, she would not approve him in the home study. Transcript, p. 183. That "violence" was the actions of the grandfather in protecting the minor children from their mother. Id.

When questioned about the cleanliness of the home during her next visit, Meunich testified that some dishes needed washing and the floor needed to be vacuumed. Transcript, p. 185. She also asserted that it is Department policy that the children must each have their own bed, even if they choose not to sleep separately. Transcript, p. 190. Meunich also complained about the grandparents' admitted earlier use of corporal punishment. Transcript, p. 189.

Dorothy P. testified that she is the full time caretaker for the children and has been most of their lives. Transcript, pp. 260. She stated that the house may be messy at times, with four children, but that it is not "nasty." Id, p. 261.

Dorothy admitted that initially she and Verner did not understand that the childrens' mother could not be in the home at all, but that she fully understands the seriousness and binding nature of the court's ruling now. Transcript, p. 262. She affirmed that she would permanently keep the children separated from their mother. Transcript, p. 264. She related her health conditions and the appropriate management of those conditions. Transcript, pp. 265-66. She stated that she wanted custody of the children. Id., p. 267. Ms. P. also discussed Verner's health conditions, showed the court that Verner had completed his cancer treatments and that he was in good health and cancer free. Transcript, p. 279.

DHHR did not provide any witnesses that could rebut the P's evidence of good health and of

ability to properly care for the children. The Department provided no evidence showing that the mother had been in the home following the court's reminder to the P's that she must never be in their home. The Department was unable to provide any evidence indicating that the children had been physically or sexually abused. The Department did not refute the medical findings that there was no evidence of sexual abuse. The Department did not provide any testimony indicating that the home was unsafe or unclean during the multiple visits by multiple DHHR personnel over the period of almost a year.

The circuit court appointed a Guardian ad Litem for the children. There is nothing in the record to indicate that the Guardian Ad Litem spoke with witnesses, reviewed medical records or evaluations, visited the homes or schools of the children, or otherwise took appropriate investigatory steps prior to rendering her opinion. The Guardian's Report, dated 3/19/10, focuses almost exclusively on the co-sleeping death of a seven month old sibling while with his drug abusing mother. *Id.*, p. 3. That tragic incident is clearly unrelated to the issue of the propriety of the Appellee's physical custody of the children. The Report also contends, without any basis being found in the record or the sworn testimony, that Appellees were "uncooperative with DHHR" and were "hostile." *Id.*, p. 2. No evidence is cited in support of these assertions, which are not part of the court's findings or the testimony in any of the multiple hearings on the case.

The Guardian entered a report on 11/3/10 in lieu of a brief before the appellate court. Much as in the record below, this "report" is merely speculation and does not reference documents in the record, sworn testimony, medical evidence or other evidence subject to review. This "report" is insufficient to support a reversal of the trial court's ruling below.

The trial court entered a Final Order on 10/29/10. In the Supplemental Final Disposition Order Section, at para. 29, the court properly noted that Appellees Dorothy and Verner F have provided

financial and emotional care and support for the minor children since their birth. Id., para. 29. The P's have even physically prevented the children's mother from using violence against the children. Id., para. 38. As the court properly found in the Preliminary Hearing Conclusions of Law, para. 11, it is in the best interests of the children to remain in the custody of the Appellees. The court required the Department to provide in-home services to ensure that the Appellees were aided in their provision of care to the minors. Preliminary Hearing Order, para. 16.

The court erroneously determined that living in the home of the Appellees was not in the best interests of the children. Preliminary Hearing Order, para. 16. The Appellees moved for temporary custody on 2/22/09. The court denied their request, finding it not in the "best interests" of the children. The court also referenced the Department's "reasonable efforts" towards aiding the P's in the care of the children. Id. No cite to testimony or the record was cited in support of the court's erroneous determination.

The Final Dispositional Hearing notes that the children have spent most of their lives with Appellees. Id., para aa. At that time, neither the home study nor the psychological evaluations of Appellees had been completed by Appellant, despite many months having elapsed while the children were stuck in foster care. Id., paras y and z. The court found that the children were happy in Appellees' home (Id., para. Xx) and recommended that the Department work with the Appellees to ensure that they could be the custodial placement for the children. Id, para zz.

Appellee Dorothy P's testimony was cited in the Final Dispositional Hearing Order, showing that she is in relatively good health, (Id., para e), that she has cared for the children their entire lives (Id., para f), that she did not fully understand the seriousness of the case initially, but now agrees that she can and will protect the children from the harm caused by the biological parent(s). Id, paras (g) and (l).

In the Findings, at the Final Dispositional Hearing, the court found that the Appellees are

psychological parents of the children. *Id.*, Section 5, para. 23. That the Appellees are compliant with the court's orders, (*Id.*, para. 25) and that the Appellees must be granted an improvement period pursuant to W.Va. Code Section 49-6-5(c).

At the Supplemental Hearing, the court noted that the Department's testimony showed that the Appellees were making every effort to act in the best interests of the children (*Id.*, para b), that the children are happy with the Appellees (*Id.*, para j), and that the P's home was large enough for the children to live in. *Id.*, paras (j) and (l). The Supplemental Hearing findings also show that the home has three bedrooms and four bathrooms, (*Id.*, Section 6, para e. The testimony from Appellee Verner P was that he has always attempted to comply with the court's orders (*Id.*, para h), that he is in good health (*id.*, para o), and that he complies with the court's rulings keeping the children away from contact with the biological mother. *Id.*, paras x, y, z, bb. Dorothy P's testimony was also addressed and the court noted that she stated that she is in relatively good health (*Id.*, Section 8, para a) that she is capable of caring for the children, (*Id.*, paras b, c, d, e, h). The children's former foster parent testified that when the children were ill and hospitalized, the Cabinet worker Ms. Fields denied him the right to notify the Appellees. *Id.*, Section 9, para c. The foster parent testified that the children are safe when with Appellees. *Id.*, para o. He testified that the children love Appellees and want to be with them. *Id.*, para r.

The court's Supplemental Dispositional Hearing Conclusions of Law noted that the best interests of the child must control. *Id.*, para. 9. The court correctly found that there was no evidence showing that Appellees had breached the court's order or endangered the children. *Id.*, para. 17. The court further noted that the P's were attempting to improve and to comply with the Department's recommendations. *Id.*, para. 23. The court permitted the children to continue to reside with the P's and directed DHHR to continue to provide in-home and other services to the family. *Id.*, para. 28.

Ms. Fields, testifying for the Department, claimed that the mother had “phoned her from the grandparents’ home many times” during the pendency of the action. Transcript, pp. 8-9. No evidence supporting this assertion was found, and Fields admitted that even if that had actually occurred, it would have been months earlier, prior to the court hearing in which the court impressed upon Appellees their duty to keep the mother out of their home even when the children were not present. Transcript, p. 209.

The Department claims, at p. 1 of the Brief for Appellant, that Verner P “perpetuated domestic violence” against his daughter in front of the children. The Department fails to note the crucial fact that this minor violence was committed to prevent the biological mother of the children from attacking a child. That fact was noted by the trial court and is contained in the initial Petition For Custody of Minor Children In Danger filed by the Department in 8/26/2009. In that document, at p. 5, Exhibit 2, DHHR noted that Verner P. prevented his daughter from slapping an infant in the head. While violence is not appropriate, protection of an infant is good grounds for committing a minor wrongful act.

In its Brief, the Department relates a claim of possible sexual abuse by one of the minor children. The record contains a Psychosocial Assessment of the child at issue, filed in the Record on 2/25/10, which shows that the claim was unsupported by the child’s testimony or any other evidence. A medical examination of the child, filed on 3/5/10, found a normal physical exam and normal labs.

The Record contains a “Parent/Guardian Placement Evaluation”.

Appellant DHHR claims that the biological father of one of the minor children “will appeal” the court’s ruling (Brief for Appellant, p. 2. However, the Department has no standing to protect the court’s ruling against Jimmy G., the putative father. This Court should take for naught any such argument made by Appellant.

The Department asserts, at p. 3 of the brief, that the Appellees “have repeatedly ignored or minimized” the court’s order mandating that the P’s prevent the childrens’ mother from having access to

them. No evidence is cited in support of this contention, and the statement is directly opposite to the testimony below and to the trial court's findings. Appellant is simply making a false and unsupported argument to bolster its weak claims.

As Appellant notes, at p. 9 of the Brief for Appellant, the circuit court recognized that Appellees had raised the children, had a strong bond with the children, had actively participated in services and were willing to continue to improve their care and parenting.

DHHR relies strongly on speculation contained in the report of the Guardian Ad Litem. Brief for Appellant, p. 11. The Guardian ad Litem does not cite evidence or sworn testimony supporting the Report, but simply expresses concern about the death of an infant five years ago, during a time the infant was co-sleeping with its drug addicted mother, and an unsupported assertion that the P's might not be able to keep the children's mother away from them. Neither of those issues are relevant and neither require reversal of the circuit court's ruling.

The Department cites portions of the Home Study completed on Appellees, claiming that the Appellees failed to provide evidence of their current medical condition. Brief for Appellant, p. 12. This claim is refuted a page later, when DHHS cites portions of the relevant records. The record contains sworn testimony and other evidence entered in hearings before the circuit court which clearly address those issues. The circuit court did not express a need for additional evidence as to the mental or psychological health of the custodial grandparents.

The Homestudy Report, dated 5/3/10, notes that both Mr. and Mrs. P. provided the Department with a statement of their current medical conditions from their treating physicians. See: Homestudy Report, pp. 3, 5. The report noted that at that time, Mrs. P affirmatively stated that she recognized the importance of abiding by the Department's requests and the circuit court's orders. Id., p. 7. The Home Study Report indicated that the home has three bedrooms and two working bathrooms. Id., p. 8.

The Report provided evidence of repairs to areas of concern (vents, cleanliness) which had been noted by the reviewer. Id. The Report showed that Appellees were actively engaged in ensuring that their home met the standard required by the Department. Id.

The Home Study did not approve of placement of the children with Appellees. This was based on large part on the domestic violence report stemming from Verner P. hitting his adult daughter in an attempt to prevent her attack on an infant. Home Study Report, p. 11. Similarly the Home Study Report referenced a “child maltreatment” finding based on the same incident, as CPS found the minor child involved in the attack by his mother had witnessed Verner P’s defense of him. The Home Study also found the home to “smell dirty” and to have “soiled” carpets and furniture. The Home Study did not reference any lack of cleanliness that might adversely impact the children. The Home Study complained that the children shared a bed, even while noting that each child over two (2) years of age had a bed and space available to him or her. Id. There is nothing in the Home Study Report stating that conditions were dangerously unsafe for any of the children. In the absence of such a showing, the Report does not support a denial of fitness. Poverty alone should not remove these loving grandparents from a finding of fitness to care for their grandchildren.

Information regarding Verner P. is contained in the “Profile of Prospective Father” in the Home Study Report. This information reflects that Mr. P is a military service veteran (Vietnam) who suffers from Post Traumatic Stress Disorder. Home Study Report, p. 3. This condition is properly treated by medication and counseling. Id. Information regarding Dorothy P. is contained at p. 5 of the Home Study Report. While Dorothy P. has a documented heart condition, she is managing this condition with medicine and is under a physician’s care.

A psychological evaluation on both Dorothy and Verner P. is appended as Exhibit 5 to the Appellant’s Brief. The evaluation of Dorothy P. includes irrelevant and unsupported claims that

DHHR is “concerned that Mr. P does not take his medications appropriately” (Id., p. 1) and that the children were removed from the home “due to domestic violence between the biological mother and Verner P.” - which this Court will note is the occasion when Verner P. was forced to use physical force to prevent the mother from abusing one of the children. The report also claims that Verner P. “smirked and rolled his eyes” when discussing the safety of the children with the evaluator. Id., p. 3. There is no evidence that Verner P. takes the situation lightly or that he would “smirk” while discussing the custody and safety of his grandchildren. Such subjective phrases are inappropriate and irrelevant.

The Evaluation objects to the use of corporal punishment by Verner P. Id, p. 3. There has been no showing that the punishment used was unlawful. In addition, there is ample evidence in the record and in the circuit court’s Orders asking that DHHR provide in-home services and parenting training to the P’s in order that they may use best practices in raising the children. Any failure of the P’s to use best practices would only be due to failure of Appellant to provide appropriate training and support for such practices.

While the Evaluation claims that the foster parent reported “fear” of Verner P. and claims of sexual abuse by one child, (Id., p. 4), the medical and counseling documentation reviewed by the circuit court shows no evidence of any such fear or abuse. The counseling records for the children show that they love and miss their grandparents and that they do not show any signs of having been sexually abused.

In the Evaluation, the report of the “interview’ with the DHHR employee, Vickie Fields, shows clearly that this individual was biased against the placement of the children with their grandparents. Ms. Fields called the floors of the P’s home “nasty” (although there is nothing in the Home Study Evaluation stating that the floors were nasty), and claimed, without support in the documentation contained in the Record, that the P’s had “health problems” which interfere with their ability to parent.

Evaluation, p. 4.

The Evaluation claimed that Dorothy P. had depression and mental health issues rendering her unfit. This conclusion was reached despite the fact that Dorothy P. reported no such conditions, and showed the evaluator that she has not had problems with depression in the past fifteen years.

Evaluation, p. 6. The evaluator noted that this grandmother, who has a daughter addicted to drugs and who had just had her four loving grandchildren removed from her home without cause, was “in a depressed mood”, had “low morale” and was “worried” about the future. Evaluation, p. 9.

Obviously, these are normal mental states for an individual under such difficult circumstances.

Similarly, the Psychological Evaluation of Verner P., found at Exhibit 6 to Appellant’s Brief, criticized Verner P. for his PTSD following his service in Vietnam, and for his anger at DHHR and the childrens’ Guardian ad Litem for removing his children from his home. Evaluation, p. 2. The evaluator referenced testimony by the DHHS worker Vickie Fields that immediately after the children were removed from the home, Verner P. was unkempt and angry. Id., p. 4. As the transcripts of the hearings before the circuit court reveal, that was not Verner’s usual state, but merely a reflection of his distress at the time of the removal. Verner P’s testimony before the evaluator was that he loved and missed his grandchildren and grieved at their absence. Id., p. 3.

As the Evaluation notes, Verner P. is under medical care for his PTSD and takes prescribed medication to ensure that he remains in good mental and physical health. Evaluation, p. 6. Appellees made a motion requesting that the circuit court interview the children. Motion, 4/21/10. The circuit court had ample opportunity throughout the pendency of this case to question, observe and evaluate the witnesses. The fact-based determination of the court should not be reversed on appeal.

SUMMARY OF ARGUMENT

The circuit court’s determination was properly based on the evidence in the record and the

testimony before it. The court applied the legal requirement of the best interests of the children in deciding what placement would be best. The court's finding that the children should reside together, without separation of siblings, in the home of the grandparents who have cared for them their entire lives, should be affirmed on appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellees would show this Court that the matter should properly be set for oral argument pursuant to Rule 19, as the record below shows that the trial court did not abuse its discretion in entering the judgment appealed from. In addition, the judgment entered was in accordance with the law and in keeping with the weight of the evidence.

ARGUMENT

(A) STANDARD OF REVIEW

On appellate review, this court must be mindful of the standard expressed in Syl., *Carr v. Hancock*, 607 SE2d 803 (W. Va. 2004), which held that "The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused." Such abuse of discretion must be shown by the party complaining, in this case, DHHR. No such showing has been made in the present case. For this reason, the findings must be affirmed. *Lucas v. Lucas*, 592 SE2d 646 (W. Va. 2003).

(B) DHHR DOES NOT HAVE STANDING TO RAISE AN ARGUMENT IN FAVOR OF JIMMY G

Jimmy G, putative father to one of the minor children, has filed an appellate brief. DHHR is attempting to force this individual to take custody, even where the psychological parents of the child

(Appellees herein) have accepted custody and Jimmy G. has agreed to provide the child support required by law. (See: Brief for Appellant, pp. 17-20). Obviously, DHHR's show of favoritism explains their attack on the P's. The problem is that DHHR has no standing to appeal that portion of the circuit court's ruling. Where a party has no standing, its claim may not be heard by the court. See: *Bowyer v. Hi-Lad*, 609 SE2d 895 (W. Va. 2004). The plain language of W. Va. Code § 49-6-6 (1977) (Repl. Vol. 2004) permits that only a child, a child's parent or custodian, or the West Virginia Department of Health and Human Resources to move for a modification of the child's disposition where a change of circumstances warrants such a modification. Under all of the circumstances in this case, the Department has no standing and cannot claim that it has a right to argue in favor of custody by Jimmy G., who has a duty to make, or waive, his own argument. *State ex rel Roy Allen S. v. Stone*, 474 SE2d 554, 568 (W. Va. 1996). This Court should ignore or strike that portion of the brief as not properly before this Court.

As the courts have consistently held, a father who fails to follow through on his duty to care for and support his child has no claim to custody of that child, particularly when those "empty promises" are used to try to defeat "years of custody, love and support by the grandparents." See: *In re Petition of Carter*, 640 SE2d 96 (W. Va. 2006).

(C) THE CIRCUIT COURT'S CUSTODIAL DETERMINATION IS SUPPORTED BY FACTS AND LAW

Appellant claims, at p. 20 of the Brief for Appellant, that "there is no dispute that Dorothy P. and Verner P. have repeatedly ignored court orders" requiring them to keep the children apart from their biological mother and that "they have never demonstrated a reasonable likelihood that they could substantially correct the conditions of neglect abiding in their home". *Id.* In fact, there is nothing in the record except for speculation by DHHR employees, tending to show that the P's have allowed the

mother around the children since being ordered by the circuit court not to do so, and there is no evidence in the record whatsoever of neglect by Mr. and Mrs. P. The sworn testimony of the Appellees and the evidence contained in the record refutes DHHR's unfounded assertions. This Court will note that DHHR never references actual sworn testimony or documentary evidence in support of their contentions, preferring to rest solely on speculation and conjecture. Similarly, at the hearings, the Department's witnesses did not produce photographs, medical evidence, expert witness testimony, or proof of any danger to the children, neglect or abuse of the children by the grandparents, or evidence supporting a finding that the best interests of the children would be served by removing them from the loving care of the couple who has raised them. The Department's ephemeral considerations do not support overturning the determination by a trial judge who spent years evaluating the witnesses and testimony.

This Court has expressly recognized the importance of continuity and stability in a child's life:

The aim of the governing statute is to secure the best interests of the children whose custody is to be determined and to promote stability and certainty in their young lives. "The primary objective of this article is to serve the child's best interests, by facilitating . . . [s]tability of the child. . . [and] . . . [c]ontinuity of existing parent-child attachments[.]" W. Va. Code §§ 48-9-102(a)(1,3).

In re Clifford K., 619 S.E.2d 138, 160 (WV, 2005). The circuit court found that the P's were the psychological parents of the minor children and the sole sources of stability and continuity in their lives. The court correctly held that denying custody to Verner and Dorothy P. would not be in the best interests of the children. That finding must be affirmed.

As the law provides, this appreciation for stability in a child's life has also been a frequent refrain of this Court. "[S]tability in a child's life is a major concern when formulating custody arrangements." *Snyder v. Scheerer*, 436 SE2d 299, 307-08 (W. Va. 1993). Therefore, "in cases where a child has been in one home for a substantial period, '[h]is environment and sense of security should not be disturbed without a clear showing of significant benefit to him.'" *In re Brandon*, 394 SE2d 520, 523 (W. Va.

1985). Courts recognize that "[a] child has a right to continued association with individuals with whom he has formed a close emotional bond . . . provided that a determination is made that such continued contact is in the best interests of the child." Syl. pt. 11, in part, *In re Jonathan*, 482 SE2d 893 (W. Va. 1997).

The court discussed West Virginia Code § 49-3-1(a), which provides guidance on the standard to be employed regarding grandparent preference. As quoted above, the statute provides that the DHHR "shall" offer placement to the grandparents "[i]f the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents." W. Va. Code § 49-3-1(a)(3). Thus, in the view of this Court, West Virginia Code § 49-3-1(a) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination.

The circuit court also addressed the importance of allowing the siblings to remain together. The preference for keeping siblings in the same home was codified in W. Va. Code § 49-2-14(e) and adopted by this Court in the case *In re Carol B.*, 550 SE2d 636 (W. Va. 2001). Common sense aided the court in determining that it would be difficult, if not impossible, to find a home willing and able to raise all four children, ranging from an infant to a pre-teen, one of whom is deaf, three of whom have bowel problems, and all of whom require counseling and remedial services. Obviously, the loving grandparents, with the aid of DHHR services as mandated by the circuit court, was an appropriate placement.

The circuit court appropriately and lawfully provided the Appellees with an improvement period after returning the children to the home. DHHR was required to provide support and services to aid the family. The court found that improvement was being shown, and that as stability being a paramount concern, a custody award to the P's was appropriate. This ruling does not constitute an abuse of

discretion. See: Syl. pt. 5, *In the Interest of Carlita B.*, 408 SE2d 365 (1999).

The trial court has the duty of determining which evidence is relevant and admissible and what weight to give the evidence submitted. The court's determinations are reviewable only for abuse of discretion. *Rozas v. Rozas*, 342 SE2d 201, 206 (W. Va. 1986). The trier of fact must make credibility determinations and use all evidence which will assist in an appropriate determination. *San Francisco v. Wendy's Intern. Inc.*, 656 SE2d 485 (W. Va. 2007). Appellate courts give trial judges a wide berth of respect with regards to these kinds of discretionary judgments. *Gentry v. Mangum*, 466 SE2d 171, 179 (W. Va. 1995). The Appellant has failed to show an abuse of discretion on the part of the circuit court. The court heard the evidence, reviewed documentary evidence, held numerous hearings and then following the law in finding that the best interests of this sibling group would be met by allowing them to stay with Appellees, the psychological parents and caregivers of the children throughout their lives.

Even if this Court were to decide that the Department has properly raised a question on the application of the law requiring a certain level of home safety and cleanliness in order to permit continuing custody by the P's, in accordance *Burnside v. Burnside*, 460 SE2d 264, 266 (W. Va. 1995), the Court's review is plenary and the review of the record and the statutes show that custody was properly granted. The record shows that the home study was not completed until after all parties were fully aware of the circuit court's belief that custody should be vested in the grandparents. At that point, DHHR introduced new statements in the report, which were contrary to all earlier statements, finding the home "nasty" and "soiled", rather than simply messy and older. Obviously, this "report" was not made in good faith and the court's decision to believe the sworn testimony at the hearing was in accordance with law and does not constitute either an abuse of discretion or a violation of applicable law.

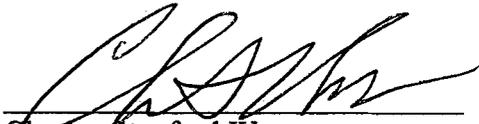
This Court has held that "The standard of proof required to support a court order limiting or terminating parental rights to the custody of minor children is clear, cogent and convincing proof." Syllabus Point 6, *In re Willis* , 207 SE2d 136, 138. W. Va.Code 49-6-1, et seq. (1998), provides a mechanism for testing and determining whether a natural parent is, in fact, a fit person to have the care and custody of his natural child as well as which other persons might be appropriate custodians. The statutory provisions provide mandatory procedures to ensure that the parties are accorded the required due process of law in the testing and determination procedure. *In re Samantha M.* , 518 SE2d 387, 392 (W. Va. 1999). The circuit court correctly applied the applicable law and made an appropriate ruling as to the best interests of the children. The Department failed to meet its burden of proof in showing unfitness of the proposed custodians or any potential risk to the children if they remained with their grandparents. Under such circumstances, the circuit court's ruling must be affirmed.

CONCLUSION

For the foregoing reasons, Appellees Verner and Dorothy P respectfully request that this Court AFFIRM the circuit court's ruling below.

Respectfully Submitted,
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No. 35743
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner Below/Appellant

V.

Mingo County Case No.:09-JN-34;35;36;3
(Chief Judge Thornsbery)

TARA
VERNER ,
DOROTHY P ,
MARCUS ALLISON,
JOSHUA
JIMMY

Respondant Below/Appellees

IN THE INTERESTS OF
THE MINOR CHILDREN:

NOAH P.	DOB: 04/05/09
IAN A.	DOB: 02/21/03
CARSON P.	DOB: 03/18/04
MICAH P.	DOB: 09/29/08

FILED
 CIRCUIT COURT
 MINGO COUNTY, WV
 2011 JAN 24 P 2:59
 ADMITTED TO RECORD
 SRANT PREECE
 MINGO CIRCUIT CLE

CERTIFICATE OF SERVICE

I, Charles Stanford West, hereby certify that on January 24, 2010, service of the forgoing BRIEF OF APPELLEES VERNER AND DOROTHY P., was made upon the State of West Virginia by fax and first class mail to the following: Michael Jackson, Assistant Attorney General for the State of West Virginia, Lauren Thompson, Counsel for Petitioner Jimmy G., Diana Carter Weidel, Guardian ad Litem for the minor children, and all other parties of record.

Dated this the 24th of January, 2010.



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