CIP UPDATE ON THE LAW OUTLINE
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I. Introduction: **Welcome**. As a preliminary matter, this review does not include all new statutes, rules changes, or cases decided by the state supreme court since the last conference; but instead, is intended to cover those matters of particular significance.

II. Update of Significant Case Law:

A. Remember, **Memorandum Opinions have no precedential value, period; per curiam decisions can be cited as legal authority and used to demonstrate how established law can be applied to new factual situations; signed opinions enunciate new principles of law, setting future precedents.**

B. In the last 2 terms of court, the supreme court has issued **five signed opinions with new developments of law** and **five per curiam** decisions which we will discuss today.

1. In re Aaron H., Slip Op. no. 11-1394 (W. Va., filed Nov. 8, 2012)(per curiam)(foster parent v. grandparent adoption preference)

   a) Despite grandparent preference statute, child who had lived 2/3 of his life with foster parents and never knew his grandfather prior to the Ch. 49 case, was placed with foster parents for adoption. Grandfather had not been able to complete his home study in another state, partially due to DHHR delays.

   b) Court found, again, that grandparent preference "must be tempered by a court's consideration of the child's best interests" and if, on balance, the grandparent placement fails to serve the best interests of the child, "the child may be placed elsewhere." Despite the system failures, the child was best placed with his foster parents and so the placement was affirmed.

2. In re T. W., Slip Op. no. 11-1628 (W. Va., filed Nov. 14, 2012) (signed opinion, McHugh)(Voluntary relinquishment is a

disposition, and cannot circumvent addressing the threshold question which is the issue of abuse or neglect)

a) "In an abuse and neglect case, the offer of a voluntary relinquishment of parental rights does not obviate the statutory requirements regarding the necessity for proceeding with the adjudicatory and dispositional phases of the abuse and neglect case. Prior to accepting an offer of voluntary termination of parental rights, a reviewing court must conduct the hearing required by West Virginia Code §§ 49-6-2 and 49-6-5." Syl. pt. 9.

b) Father wanted to relinquish his rights to two children living with him in West Virginia at the outset of the case, contingent on no further proceeding against him in the abuse and neglect case. The relinquishment was accepted and the case was dismissed as to all 4 children, with respect to 2 of whom lived with their mother in Maryland and the father retained visitation rights. The supreme court found that adjudication and a dispositional hearing were required prior to accepting the relinquishment, particularly since the 2 Maryland children were subject to the same circumstances giving rise to the abuse allegations when they visited in West Virginia.

c) Contra, see In re D. P., Slip Op. no. 12-0141 (W. Va., filed Nov. 21, 2012)(per curiam)(affirming lower court's decision to place child in legal guardianship of grandmother and dismissing the case without an adjudication after the lower court found the father had been extradited to Pennsylvania to face criminal charges and "didn't have a snowball's chance in hell of ever regaining custody of his daughter" (who would be 18 in a matter of months). The court found it was not in child's best interest to assert procedure over substance, requiring an adjudicatory hearing in this case. The court cited In re T.W. as an example of when having the hearings was in the child's best interest.)

3. In re Brooke B., Slip Op. no. 11-1085 (W. Va., filed Jan. 24, 2013)(signed opinion, Ketchum)

a) Jurisdiction and venue for legal guardianship proceedings under W. Va. Code §44-10-3 is in the county where the minor resides. "It is the minor's residency alone that controls, and

not the residency of any other person such as a parent, guardian, or other person with custody or control of the minor." Syl. pt. 12. It is, generally, a question of fact.

b) While decided before the effective date of the new guardianship statute, infra, the new statute would not change this holding in any material part.

4. In re Hunter II, Slip Op. no. 12-0173 (W. Va., filed Mar. 14, 2013)(signed opinion, Ketchum)

a) The Grandparent Visitation Act, W. Va. Code §48-10-101, et seq, is the exclusive means through which a grandparent may seek visitation with a grandchild and the child's best interests are expressly incorporated into the Act. Syl. pts. 1-2.

b) The Act automatically vacates a grandparent visitation order after a child is adopted by a non-relative. It does not allow a grandparent to file a post-adoption petition for visitation when the child has been adopted by a non-relative. Syl. pt. 3

c) This case **answers the question does a child's "right" to continued association with a grandparent with whom there is a close emotional bond continue post-adoption by a non-relative when the court determines that it is in the child's best interest**. Answer: **No.** While it has been clear that the statutory right of the grandparent is extinguished by such an adoption, it was unresolved as to whether the child's right to continued association was also extinguished. We now know the answer.

d) The Court carefully distinguished this grandparent visitation decision from all other continued association cases recognizing the right of children to continued association with foster parents, siblings, etc. See fn. 10. See also, Justice Workman's Concurrence Opinion

5. In re Darrien B., Slip Op. no. 12-0994 and 12-1014 (W. Va., filed May 17, 2013)(per curiam)

a) Termination of parental rights was reversed and remanded for further evidentiary hearings since the parents had been prevented from calling certain witnesses, the record and

orders were insufficient, and the proceedings were not in compliance with the Rules.

b) Another matter with which the Court was dissatisfied was the DHHR and lower court's treatment of the father's prior voluntary relinquishment of parental rights to his biological daughter after allegations of sexual abuse had been substantiated. While mentioned in the petition and acknowledged by the lower court, the issue was not developed below and was not utilized as a separate basis for seeking termination of parental rights in the case.

c) The Court, citing In re Kyiah, remanded this issue for full exploration on the record and decision as to whether the prior relinquishment could serve as a separate or additional basis for termination of parental rights in this case. Again, **this case underscores that though voluntary, a relinquishment in the face of evidence that would sustain an involuntary termination of parental rights can still serve as grounds for no reasonable efforts and mandatory TPR.**

6. In re Walter G., Slip Op. no. 12-0973 (W. Va., filed May 24, 2013)(per curiam)

a) Appeal of an adjudicatory order of neglect against mother following the death of one of her twin sons. By time of appeal, mother had successfully completed her improvement periods, the surviving twin had been returned, and the case dismissed.

b) While the mechanism by which the deceased twin had ingested a lethal dose of Suboxone (an opiate) was never discovered, there was no evidence that it was intentional or the result of mother's lack of supervision since she had left him with a responsible caretaker while she was working. All the evidence was that mother was a very involved parent and that the twins had been well taken care of and were happy.

c) This was not a Jeffrey R. L. case because mother had fully cooperated in efforts to discover the facts surrounding the twin's death. The Court did not fault the DHHR or the lower court for pursuing the case and evaluating mother's fitness, but in light of the entire record, in hind sight, the adjudication was reversed.

7. In re Jessica and Shawnta M., Slip Op. no. 12-0808 (W. Va., filed June 5, 2013)(per curiam)(no factual evidentiary basis to sustain TPR of mother who had successfully completed improvement periods, but having refused DHHR assistance to find a place to live. She found a perfectly appropriate place to live on her own.)

8. In re Lilith H., Slip Op. no. 12-1178 and 12-1186 (W. Va., filed June 5, 2013)(per curiam)

   a) Single example of physical altercation outside of house between father and grandfather, in which mother intervened and was struck, observed by the children, did not constitute domestic violence rising to the level of child abuse for purposes of Chapter 49 adjudication and mother's intervention did not constitute neglect.

   b) Petition should have been amended to bring in all of the allegations and evidence regarding filthy conditions of the home and children, and violent relationship between the parents so could be properly addressed. The case was remanded for this purpose.

9. In re Timber M., Slip Op. no. 12-1138 (W. Va., filed June 5, 2013)(signed opinion, Loughry)

   a) "In cases involving the abuse and neglect of children, when it appears from this Court's review of the record on appeal that the health and welfare of a child may be at risk as a result of the child's custodial placement, **regardless of whether that placement is an issue raised on appeal, this Court will take such action as it deems appropriate and necessary to protect that child**." Syl. pt. 6 (emphasis added) (In accord, see Workman concurrence; contra, see Benjamin concurrence)

   b) TPR of mother affirmed based on knowingly allowing the sexual abuse of her daughter by stepfather (mother's husband) and refusal to acknowledge any problem, so no improvement period.

   c) After TPR of mother, lower court placed children in legal and physical custody of biological father, Kevin. There were substantiated allegations of sexual abuse by Kevin of his

stepdaughter who was 12 years old at the time. He was indicted on 6 counts involving sexual abuse and incest which were later dropped because the child did not want to proceed further. She never retracted her allegations. Throughout the Chapter 49 case against his ex-wife, he minimized her culpability and the social summary said he would not protect the children and did not want custody. The record was silent as to why the DHHR changed its mind and recommended placement of the children with him.

d) Greatly concerned about this placement, the Court utilized Rule 2 of Appellate Procedure (suspending the Rules to allow the Court to do substantial justice) and Rule 2 of the Child Abuse and Neglect Procedural Rules (rules shall be liberally construed to achieve safe...homes and shall not be applied or enforced in any manner to endanger or harm a child) to address the issue, though not raised by anyone on appeal or below.

e) The Court vacated the order of disposition with respect to placement, remanded the case for further proceedings thereon to address the "glaring evidentiary gap" to determine whether permanent placement with Kevin is appropriate and entry of an order that fully explains the propriety of the placement. The DHHR was directed to take immediate action to ensure the safety and welfare of the children.

10. In re Marley M., Slip Op. no. 12-0957 (W. Va., filed June 19, 2013)(signed opinion, Benjamin)

a) "Where during the pendency of an abuse and neglect proceeding, a parent offers to voluntarily relinquish his or her parental rights and such relinquishment is accepted by the circuit court, such relinquishment may, without further evidence, be used as the basis of an order of adjudication of abuse and neglect by that parent of his or her children." Syl. pt. 4.

b) "A parent whose rights have been terminated pursuant to an abuse and neglect petition may request post-termination visitation. Such request should be brought by written motion, properly noticed for hearing, whereupon the court should hear evidence and arguments of counsel in order to consider the factors established in Syllabus Point 5, In re Christina L. …,

except in the event that the court concludes the nature of the underlying circumstances renders further evidence on the issue manifestly unnecessary." Syl. pt. 5.

III. Update of Significant Statutory Changes [all in effect week of July 9-13]:

A. W. Va. Code §44-10-3 (H.B. 2815)--the long awaited new **Infant Guardianship statute.**

1. Circuit court and family court continue to have concurrent jurisdiction.

2. Venue is the county where the minor has resided for the past 6 months unless extraordinary circumstances for a sooner filing.

3. Any responsible person with knowledge of the facts may petition, except parent whose rights have been terminated. No guardianship may be considered if the child is involved in another court proceeding relating to custody or guardianship. So cannot preempt a pending Chapter 49 case.

4. Guardian may be appointed if, by clear and convincing evidence, it is in the child's best interest and (a) the parents consent; (b) the parents rights have been terminated; (c) parents are unwilling or unable to exercise their parental rights; (d) **parents have abandoned their rights by a material failure to exercise them for a period of more than 6 months**; or, (e) there are extraordinary circumstances that would, in all reasonable likelihood, result in serious detriment to the child if petition is denied. [**Note:** abuse not explicitly on list—not a substitute for a Chapter 49 case; but new statute can be used by grandparents who have been taking care of the child for over 6 months...]

5. Whether or not one or more of the above conditions exist, court may appoint a temporary guardian for 6 months if an immediate need exists or that a period of transition into the custody of a parent is needed, if in the best interest of the child. This temporary guardianship may be extended an additional 6 months.

6. Any suitable person may be appointed, with a priority for a parent, subject to conditions above.

7. For a petition to revoke or terminate the guardianship filed by a parent, the burden of proof is on the moving party to show by a preponderance of the evidence that there has been a material change of circumstances and that the revocation is in the child's best interest.

B. W. Va. Code §§49-5D-3 and 49-5D-3c—new **MDT statutory changes**

1. Allows members of the MDT to participate in meetings by telephone and video conferencing; and convener may obtain an order of the circuit court setting the meeting and directing attendance.

2. Applies the MDT process to status offenders and/or delinquents, including when committed to the custody of the Division of Juvenile Services, setting forth who is to be on the team, the assessment process, etc., and authorizing the directors of detention centers to call such meetings in certain circumstances.

C. W. Va. Code §49-6-9a—authorizing **Family Court to order DHHR to take emergency custody** of a child who is in the physical custody of a party to an action or proceeding before the family court.

1. The family court must find that there is clear and convincing evidence that there is imminent danger to the physical well-being of the child; there is no pending Chapter 49 case; and, there are no reasonable available alternatives to the emergency custody order.

2. Copy of the order must be sent to the circuit court, the DHHR, and the prosecuting attorney.

3. Upon receipt of the order, the DHHR must immediately respond and assist the family court in emergency placement of the child.

4. Upon receipt of the order, the circuit court shall enter an administrative order in the name of the child, directing the DHHR to submit within 96 hours from the time the child was taken into custody, an investigative report to both the family and circuit court which must include a statement as to whether the DHHR plans to file a Chapter 49 petition.

5. If no Chapter 49 case is filed within 96 hours, then the emergency custody order expires. If a Chapter 49 petition is

filed, then the emergency order is extended until the preliminary hearing is held.

6. The DHHR must immediately notify parents, grandparents, guardian or custodian of the child and the reasons therefore if their whereabouts are known or can be discovered with due diligence; or, the child's closest relative. An inquiry shall be made of relatives and neighbors and, if an appropriate relative or neighbor is willing to assume custody of the child, the child shall temporarily be placed in that person's custody.

7. Proposed Abuse and Neglect Rule 3a(a) makes this process subject to the "overlap" procedure, including the JAA procedure. The proposed rule is out for a 60 day public comment period, beginning June 10, 2013. It is temporarily in effect from July 1, 2013.

D. S.B. 404 (pertaining to "educational neglect") did NOT pass, because a compromise was reached between the Department of Education and the DHHR on the issue. See attached "Educational Neglect Policy Directive" now in effect from the DHHR.

1. The new Directive applies to children 5-11 years of age.

2. It sets forth criteria that the DHHR will use to determine if school absences rise to the level of "educational neglect" for purposes of DHHR intervention, including but not limited to Chapter 49 proceedings.

Educational Neglect Policy Directive

While it is a parent's responsibility to ensure that their child receives an education regardless of their child's age, it is recognized that parents should have more control, influence and responsibility for children between the ages of 5 and 11 years of age. When a referral alleging a child is being neglected due to lack of education, Child Protective Services should examine the referral to determine if it is appropriate to for Child Protective Services intervention. Issues to consider prior to accepting the referral for educational neglect:

- the schools efforts to address the child's absences with caregiver
- the caregivers responses to the schools efforts
- any other allegations that would indicate the child is abused or neglected, or subject to conditions where abuse or neglect is likely to occur

The referral for Child Protective Services must be accepted if the allegations indicate that the school has made efforts to correct the absences yet has been unsuccessful due to the parent's lack of cooperation with the school, or if there is any other allegations that would indicate the child is abused or neglected or subject to conditions where abuse or neglect is likely to occur.

When the Department accepts the referral for assessment of alleged educational neglect, the Department must complete a vigorous and fair examination of the family. This assessment must not only include gathering information related to educational neglect, but also additional information necessary to make informed decisions regarding the caregiver(s) ability to protect their child from physical or mental harm. During the assessment, the CPS Social Worker must interview the child or children, parent(s)/caregiver(s), school officials as well as other collaterals who may know have relevant knowledge of the family.

A determination that abuse or neglect does or does not exist will be made at the conclusion of the Child Protective Services Assessment. Abuse or neglect is considered to have occurred when a preponderance of the credible evidence indicates that the conduct of the caregiver falls within the boundaries of the statutory definition of abuse or neglect. Abuse or neglect is considered to not have occurred when a preponderance of the credible evidence indicates that the conduct of the caregiver does not fall within the boundaries of the statutory and operational definitions of abuse or neglect.

In order to determine if a child is educationally neglected, the following must be considered by the CPS Social Worker and Supervisor:

- the child's caregivers are getting the child's school work and is the child turning in the school work
- the child's current and past grades to assist in determining if the current absences are directly related to the child's school performance
- school officials feel the child's absences are the cause of the child failing school
- the reason for the absences in order to assist in determining if caregiver is presently refusing, failing or unable to get the child to attend school and in turn supply the child with an appropriate education.
- reasons for absences that may indicate a child's caregiver <u>is able</u> to supply the child with an education include but are not limited to:
    - suspension

    - sickness of the child
    - legitimate family emergencies
- reasons for absences that may indicate a child's caregiver <u>is unable</u> to supply the child with an education include but are not limited to:
    - chronic oversleeping by the parent
    - the child does not wish to go to school and the caregiver does not enforce school attendance
    - the caregiver has not or will not participate in the school's student assistant team process or other school efforts to address the child's absences
    - substance usage, mental health issues, or other characteristics that indicate the caregiver will be unlikely to supply the child with a necessary education

If the CPS Social Worker and Supervisor believes that the preponderance of the evidence indicates a child's physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's caregiver to supply the child with necessary education, then a finding of educational neglect should occur and the case opened for Ongoing Child Protective Services.

If the CPS Social Worker and Supervisor feel that the preponderance of the evidence does not indicate a child's physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's caregiver to supply the child with necessary education, then a finding of educational neglect should not occur.

If the child is deemed safe and not neglected at the conclusion of the assessment, the Child Protective Services worker must refer to the appropriate community based resource(s) that can assist the family in addressing the child's absences. These resources include, but are not limited to, Family Resource Networks, the local school social worker or attendance director, or community behavioral health center.

At the conclusion of the Child Protective Services Assessment, the Department must also determine what, if any, protective measures are necessary to assure the child is safeguarded from mental or emotional harm from their parent, guardian or custodian's actions or inactions. Protective measures may include filing an abuse and neglect petition with Circuit Court, opening the family for ongoing, long term Child Protective Services, or referring the family to appropriate community based resources.