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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 35750 AND 35751

IN THE

Supreme Court of Appeals of West Virginia

IN THE MATTER OF HUNTER H.
CIRCUIT COURT PETITION NO. 07-CJA-50

On Petition for Appeal From the
Circuit Court of Ohio County, West Virginia,
Hon. James P. Mazzone, Judge

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Table of Contents 1

Table of Authorities 2

Kind of Proceeding and Nature of Ruling Below 3

Statement of Facts 4

Assignments of Error 5

Standard of Review 6

Discussion of Law 7

A. The Circuit Court failed to apply a best interest analysis, and instead gave overriding weight to the "grandparent preference" 7

B. The Circuit Court issued findings of fact that were clearly erroneous and implausible in light of the entire evidence presented. 16

C. The Circuit Court erred in failing to admit into evidence DHHR contact sheets and a Pre-Petition letter from a DHHR caseworker to the Prosecuting Attorney's office on the basis of attorney-client privilege. 23

D. The Court erred when it inappropriately favored Grandmother as indicated in a two-page section entitled "Conclusion" at the end of its Order which contained various thoughts and opinions that were not based upon the evidence presented. 26

E. The Court erred when it failed to grant Foster Parents' Motion to Stay and failed to provide for a transition period for the child. 29

Conclusion 32

Certificate of Service 34

TABLE OF AUTHORITIES

West Virginia Cases

Carter v. Carter,
196 W. Va. 239, 470 S.E.2d 193 (1996) 11

In re: Elizabeth F. and Kyia F.,
--- W. Va. ---, 696 S.E.2d 296 (2010) 9, 11, 13

In re: Katelyn T. and Joel T.,
--- W. Va. ---, 692 S.E.2d 307 (2010) 14

In re: Katie S.,
198 W. Va. 79, 479 S.E.2d 589 (1996) 10, 11

In re: Willis,
157 W. Va. 225, 207 S.E.2d 129 (1973) 11

In the Interest of Tiffany Marie S.,
196 W. Va. 223, 470 S.E.2d 177 (1996) 7

Marano v. Holland,
179 W. Va. 156, 366 S.E.2d 117 (1988) 25

Michael K.T. v. Tina L.T.,
182 W. Va. 399, 387 S.E.2d 866 (1989) 10

Napoleon S. and Linda S. v. Walker,
217 W. Va. 254, 617 S.E.12d 801 (2005) 9-11

State v. Michael M.,
202 W. Va. 350, 504 S.E.2d 177 (1998) 10

State ex rel. McCormick v. Zakaib,
189 W. Va. 258, 430 S.E.2d 316 (1993) 25

West Virginia Statutes

W. VA. CODE § 49-2-14 (2010) 7

W. VA. CODE § 49-3-1 (2010) 9, 15

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Prior to filing a Petition, the West Virginia Department of Health and Human Resources ("DHHR") investigated allegations of abuse and neglect involving the minor child, Hunter H., who was seventeen months old. On August 16, 2007, Hunter H's maternal grandmother and intervener below, Donna D. ("Grandmother") signed a West Virginia Safety First/Protection Plan. Eight days later on August 24, 2007, Hunter H. was removed from her care and placed with the Petitioners, Foster Parents Jerry and Joyce Wetterau, ("Foster Parents"). DHHR filed a Petition and Grandmother was named as a respondent custodian. For each of the three years that the underlying proceedings took place Hunter H. continuously resided with the Foster Parents.

After holding evidentiary hearings in April and May 2010, the Circuit Court, on August 5, 2010, issued an Order for immediate and permanent placement of Hunter H. with Grandmother and for adoption by Grandmother, despite the fact that she had never received more than supervised visitations with Hunter H. during the entire course of the underlying proceedings. The Foster Parents' Motion to Stay this removal was denied by the Circuit Court and on August 13, 2010, Hunter H. was removed from the Foster Parents' home and placed with Grandmother. Based upon the evidence presented, the Circuit Court's findings of fact were clearly erroneous and failed to consider all the evidence presented and an analysis of the child's best interest. In issuing its Order, the Circuit Court also improperly included a two-page "Conclusion" section in which it emphasized that Grandmother had participated in the proceedings *pro se*[1] and then discussed certain "facts"

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[1] Although not noted by the Court, Grandmother had privately retained counsel early in the proceedings; however, Grandmother's counsel requested and was granted leave to withdraw from further representation of her. Although given the time and option, Grandmother chose not to retain new counsel.

that the Court believed important to note. It is from these Orders that the Foster Parents respectfully appeal.

STATEMENT OF FACTS[2]

This case arises out of an abuse and neglect action filed by the WV DHHR after investigation into allegations of child abuse and neglect involving Hunter H. On August 16, 2007, Grandmother signed a West Virginia Safety First/Protection Plan. Eight days later on August 24, 2007, Hunter H. was removed from her care and placed with the Foster Parents, where he continuously resided throughout the proceedings. The DHHR filed a Petition for Relief from Abuse and Neglect and Grandmother was named as a respondent custodian, along with her husband. Both Grandmother and her husband were later dismissed, because they were not being considered for placement.

In December 2007, Grandmother failed her home study. A second home study was requested by DHHR in August 2008, but it was never conducted. Grandmother remained married to her husband for nearly two years, despite being told by the DHHR of its concerns regarding her husband. Grandmother never received anything more than supervised visits with Hunter H.

In March 2009, the DHHR recommended that Hunter H's mother's parental rights be terminated and that permanent placement of Hunter H. be with one of his grandmothers. At the time of this recommendation, parental rights to both parents had not been terminated and Grandmother did not have an approved home study. On May 12, 2009, Hunter H's mother voluntarily relinquished her parental rights. Also in May 2009,

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[2] The Petition in this case was submitted pursuant to Rule 4A of the West Virginia Rules of Appellate Procedure. The Foster Parents have designated the transcript of the hearing testimony for purposes of this appeal. Since that transcript has not yet been received, the Statement of Facts is largely counsel's recitation of those facts. However, given its importance to the proceedings, counsel had previously submitted the transcript of expert Sandra Street's testimony, which was attached as Exhibit A.

the DHHR requested yet another home study for Grandmother, which was approved in July 2009. The DHHR then requested immediate transfer of Hunter H. to Grandmother. The Guardian objected and filed written objections with the Court. The DHHR subsequently requested an addendum to the home study, which was completed in August 2009. The Foster Parents filed their Motion to Intervene, and on November 4, 2009, Hunter H's biological father voluntarily relinquished his parental rights. The Foster Parents' Motion to Intervene was granted on December 30, 2009.[3]

Hearings were held by the Circuit Court to address the issue of permanent placement on April 16, 2010; April 23, 2010; May 3, 2010; and May 7, 2010. During the course of the hearings, the Guardian requested time to present additional witnesses, which request was objected to by the State and denied by the Court. At the conclusion of the proceedings, the parties were asked to submit proposed findings of fact and conclusions of law. The Foster Parents submitted theirs on June 7, 2010, setting forth 142 findings of fact and 17 conclusions of law. The Court issued its order regarding permanent placement on August 5, 2010. The Foster Parents filed a Motion to Stay on August 9, 2010. The Guardian ad Litem filed a Motion to Stay and Notice of Intent to Appeal on August 12, 2010. These Motions were denied on August 12, 2010. By order of the Circuit Court, the next day Hunter H. was removed from the Foster Parents' home--where he had resided for nearly three years--to be placed with Grandmother. It is from these Court orders that the Foster Parents now appeal.

ASSIGNMENTS OF ERROR

A. The Circuit Court incorrectly applied the statutes, case law, and best interest analysis as they relate to the "grandparent preference" for the adoption of

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3 Both the maternal and paternal grandmothers were also granted the right to intervene.

children whose parents' parental rights have been terminated through abuse and neglect proceedings.

B. The Circuit Court issued findings of fact that were clearly erroneous and implausible in light of the entire evidence presented when it failed to consider all evidence presented, including the only expert testimony presented, incorrectly stated the evidence presented, and chose to extract only select portions of the evidence to support its conclusion for removal of the child.

C. The Circuit Court erred in failing to admit into evidence DHHR contact sheets and a Pre-Petition letter from a DHHR caseworker to the Prosecuting Attorney's office on the basis of attorney-client privilege, when the letter had been made available to and was read by the Guardian ad Litem, even though the letter contained information relevant to the issue of permanent placement.

D. The Court erred when it inappropriately favored Grandmother as indicated in a two-page section entitled "Conclusion" at the end of its Order which contained various thoughts and opinions that were not based upon the evidence presented.

E. The Court erred when it failed to grant Foster Parents' Motion to Stay and failed to provide for a transition period for the child.

STANDARD OF REVIEW

The Circuit Court's orders are subject to a hybrid standard of review. "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not

be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Sly. pt. 1, *In the Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

DISCUSSION OF LAW

Based upon the totality of the evidence presented, the Circuit Court's decision to permanently place Hunter H. with his maternal grandmother was clearly erroneous. The Court failed to consider all evidence presented and incorrectly interpreted evidence presented as set forth in its findings of fact. The Court also failed to correctly apply the relevant DHHR policy, statutes, and case law, when it did not include a best interest analysis in rendering its order. Thus, this Court should reverse the decision of the Circuit Court and grant permanent placement of the child with the Foster Parents.

A. The Circuit Court failed to apply a best interest analysis, and instead gave overriding weight to the "grandparent preference".

Because the Circuit Court did not apply a best interest analysis, and instead focused on whether the "grandparent preference" required placement with Grandmother, the Court erred. West Virginia Code §49-2-14(b), which should have controlled Hunter H's removal from the Foster Parents' home, states as follows:

> "When a child has been placed in a foster care arrangement for a period in excess of eighteen consecutive months and the State Department determines that the placement is a fit and proper place for the child to reside, the foster care arrangement may not be terminated unless such termination is in the best interest of the child <u>and</u>: (1) The foster care arrangement is terminated pursuant to subsection (a) of this section; (2) The foster care arrangement is

> terminated due to the child being returned to his or her parent or parents; (3) The foster care arrangement is terminated due to the child being united or reunited with a sibling or siblings; (4) The foster parent or parents agree to the termination in writing; (5) The foster care arrangement is terminated at the written request of a foster child who has attained the age of fourteen; or (6) A circuit court orders a termination upon a finding that the State Department has developed a more suitable long-term placement for the child upon hearing evidence in a proceeding brought by the Department seeking removal and transfer." [Emphasis added.][4]

There was no dispute that subsections (1) through (5) above were not applicable.

During the course of the underlying proceedings, DHHR caseworker Anna Grafton and DHHR adoption specialist Beth Anderson testified that the selection of the Grandmother for permanent placement of Hunter H. was based upon DHHR policy, state statutes for grandparent preference, and the Social Security Act.[5] The DHHR's Adoption Policy dated October 25, 2004, includes Section 7.0 entitled "Adoption Placement Review Committee (APRC)." Section 7.1 states that this Committee is the vehicle for the selection process in cases in which an adoptive choice has not previously been made by the Multi-Disciplinary Committee or in the event of a disruption of a placement. Section 7.3 of the Adoption Policy is entitled "Selection Criteria" and states as follows:

> "Families will be evaluated based upon their ability to meet the social, emotional, physical and financial needs of the child as well as any special needs the child may have. Each child's cultural heritage must be respected in any trans-racial/trans-cultural placement consideration. Sibling visitation and location must be considered if a separation has been sanctioned by the court. Community resources must also be a major consideration in looking at potential placements.
>
> The inter-jurisdictional location of a potential adoptive family is never to be a consideration in the placement of a child if that family appears to best meet the needs of the child.

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[4] The Court did not mention or address this statute in its findings of fact and conclusions of law.

[5] Neither witness could identify which specific statutes or provisions of the DHHR policy or Social Security Act applied.

> A Grandparent or an adult relative with a positive home study certifying the home for adoption must be given preference over the non-relative home even if the non-relative home has the appearance of a better placement choice. Unless the relative has been aware of the abuse or neglect of the child and did not intervene, the Department cannot assume the relative will fail to protect the child from the birth parent. (§49-3-1(a)(3) & SS Act IV-E471)."

[Emphasis included in policy]. West Virginia Code §49-3-1(a)(3), which provides the "grandparent preference," states as follows:

> "For purposes of any placement of a child for adoption by the department, the department shall first consider the *suitability* and willingness of any known grandparent or grandparents to adopt the child. Once any such grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based upon the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents."

[Emphasis added.]

Prior to its recent opinion in In re: Elizabeth F. and Kyia F., --- W. Va. ---, 696 S.E.2d 296, No. 35486, 2010 W. Va. LEXIS 59 (June 2, 2010), this Court interpreted West Virginia Code §49-3-1(a)(3) on one prior occasion. Napoleon S. and Linda S. v. Walker, 217 W.Va. 254, 617 S.E.2d 801 (2005). This case, heard after the implementation of the DHHR Adoption Policy, presented the Court its first opportunity to address the interplay between the statutory grandparent preference and the overriding standard of the best interest of the child. In Napoleon S., the Court held that the statute contemplates that placement with grandparents is presumptively in the best interest of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that placement is not in the best interest of the child. Id. at Syl. Pt. 4. By specifying in West Virginia Code §49-3-1(a)(3) that the home study must show that the grandparents "would be suitable adoptive parents," the Court held that the Legislature

implicitly included the requirement for an analysis by the DHHR and circuit courts of the best interests of the child, given all circumstances of the case. Id. at Syl. Pt. 5. As the Court noted, other states "have been swift to emphasize that the existence of a preference does not translate into a perfunctory grant of custody." Id. at 260, 617 S.E.2d at 807.

Indeed, this Court has recognized as a "fundamental mandate" that "the ultimate determination of child placement must be premised upon an analysis of the best interests of the child." Id. at 259, 617 S.E.2d at 806. In order to fulfill the intent of West Virginia Code §49-1-1(b), this Court has instructed that when a child has to be removed from his or her family, child custody, care and discipline must be secured consistent with the child's best interest. State v. Michael M., 202 W.Va. 350, 358, 504 S.E.2d 177, 185 (1998). Simply put, "[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); see also, Napoleon S., 217 W. Va. at 259, 617 S.E.2d at 806. Even beyond protection of the parents' substantial rights involving their children, "the primary goal in cases involving abuse and neglect, as in all family court matters, must be the health and welfare of the children. In re Katie S., Syl. Pt. 3, 198 W.Va. 79, 479 S.E.2d 589 (1996); see also, Napoleon S., 217 W. Va. at 259, 617 S.E.2d at 806.

Thus, even though the West Virginia Code provides a grandparent preference in determining adoptive placement of a child where parental rights have been terminated, it also incorporates a best interest analysis within that determination by requiring the DHHR to find that the grandparents would be suitable adoptive parents prior to granting them custody. This Court has made quite clear that while placement with grandparents is presumptively in the child's best interest, this preference may be overcome when the record viewed in its entirety establishes that such placement is not in the best interest of the child.

Furthermore, the Legislature has implicitly included the requirement for an analysis by the DHHR and circuit courts of the best interest of the child, given all circumstances of the case. Napoleon S., Syl. Pts. 4 and 5.

In its recent decision in Elizabeth F. and Kyia F., this Court specifically addressed the preference given to grandparents to adopt their minor grandchildren when parental rights have been terminated through abuse/neglect proceedings. The Court reaffirmed and explicitly recognized that a crucial component of the grandparent preference is that the placement must serve the child's best interest. "Absent such a finding, adoptive placement with the grandparents is not proper." Elizabeth F. and Kyia F., --- W. Va. ---, 696 S.E.2d 296, 302 (2010).

As with its prior decisions, the Court emphasized that the best interest of the child is an integral part of the implementation of the grandparent preference and the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody. Id. at 302-303 (citing In re Willis, Syl. pt. 8, 157 W.Va. 225, 207 S.E.2d 129 (1973)); see also, Katie S., Syl. pt. 3, 198 W.Va. 79, 479 S.E.2d 589 (1996); Carter v. Carter, Syl. pt. 5, 196 W.Va. 239, 470 S.E.2d 193 (1996). The Court concluded that "...adoption by a child's grandparents is permitted only if such adoptive placement serves the child's best interests. If, upon a thorough review of the entire record, the circuit court believes that a grandparental adoption is not in the subject child's best interests, it is not obligated to prefer the grandparents over another, alternative placement that does serve the child's best interests." Id. at 303, *17 (citing Napoleon S., Syl. Pts. 4 and 5.).

Based upon the evidence submitted, the Circuit Court failed to appropriately apply and consider Section 7.3 of the DHHR Adoption Policy and West Virginia Code §49-3-1(a)(3) in conjunction with the analysis of the best interest of the child. Not a single DHHR

worker testified that placement of Hunter H. with Grandmother was in his best interest. In fact, upon cross-examination, Petitioners' counsel specifically inquired as to each and every reason being asserted as the basis for DHHR's recommendation for placement with Grandmother. Not one of the workers assigned to the case at the time, or involved in the decision, stated that it was in the child's best interest to be placed with Grandmother. Each witness was provided with more than ample opportunity to state that such placement was in the child's best interest. The DHHR cannot now argue, as it has attempted to do in its Response, that it considered best interest simply because the statutes include an "implicit best interest analysis". The facts are that none of the workers testified that it was in Hunter H's best interest to be placed with Grandmother.

Anna Grafton of the DHHR testified that at the DHHR staffing on March 31, 2009, when it decided to recommend termination of the parental rights of the biological mother, it also decided that the permanency decision for the child was placement with one of the child's grandmothers.[6] Ms. Grafton admitted that this decision came before Mother's parental rights were terminated. More importantly, the decision also came prior to Grandmother having an approved home study since the request for another home study was not made until May 2009. Thus, by virtue of the DHHR workers' own testimony, the DHHR was willing to place this child with a grandparent that did not have an approved home study. Given these facts, the DHHR could not have considered an analysis of the child's best interest when making its recommendation for permanent placement. Nevertheless, the Circuit Court relied on these workers' testimony and the DHHR's

[6] The paternal grandmother was granted leave to intervene below, but withdrew her request for permanent placement during the course of the hearings.

recommendation, and in doing so, it failed to consider the record in its entirety and include a best interest analysis in rendering its decision.

In its Response to the Petition, the DHHR stated its belief that Elizabeth F. and Kyia F., --- W. Va. ---, 696 S.E.2d 296, 302 (2010), was being cited for the proposition that the Circuit Court should look solely at a child's best interest and not consider a grandparent preference. That misinterprets the Foster Parents' argument. Based upon the statutes and case law currently in place, although there is a stated "grandparent preference," this Court has said that the best interest analysis is a crucial component in determining whether permanent placement of a child should be with his/her grandparent. No evidence was admitted demonstrating that the DHHR made this analysis part of its recommendation. In fact, one could argue that not only did the DHHR fail to include a best interest analysis in its placement recommendation but it merely relied on the fact that Grandmother eventually obtained an approved home study as its sole reason for placement. Additionally, but for one phrase in one conclusion of law cited by the DHHR (Conclusion of Law #11, p. 22) the Circuit Court's Order is void of any meaningful discussion or application of an analysis of the best interest of the child.

The only expert witness to testify as to what was in Hunter H's best interest was the Foster Parents' expert, Sandra Street, MA, LPC, CCAC-S.[7] No other expert was presented to dispute or rebut her testimony. Ms. Street testified that it would be to Hunter's detriment to be removed from the Foster Parents and that it was in Hunter's best interest to stay with the Foster Parents.[8] Notably, in its Response the DHHR failed to even acknowledge this testimony by Ms. Street. Instead, it chose to focus only on selected portions of Ms. Street's

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[7] Ms. Street was qualified as an expert in the area of mental and behavioral health assessments, counseling, and child development, and as all the same related to the bonding evaluation she conducted.

[8] Exhibit A: pg. 35, lines 18-25; pg. 37, lines 19-22.

testimony in which she concluded that Hunter H. had bonded with the Foster Parents and then it argued that bonding is not the only consideration to be given in making a placement decision. The DHHR also ignored Ms. Street's expert testimony that not every foster child bonds with his/her foster parents. Interestingly, despite taking this position, the DHHR has requested, considered, and/or relied upon bonding evaluations in other cases when determining permanent placement.

In his petition for appeal, the Guardian ad Litem correctly cited to and relied upon this Court's decision in In re: Katelyn T. and Joel T., --- W. Va. ---, 692 S.E.2d 307 (2010) for the proposition that it was clear error when that Circuit Court disregarded the only expert evidence in the case. Similarly, in this case, the Circuit Court failed to consider the only expert testimony presented concerning the best interest of Hunter H. Furthermore, for the DHHR to argue in its Response that Ms. Street did not provide testimony on a dispositive issue in this case, it must then blatantly ignore her testimony as to best interest. (See Response p. 12, lines 1-3)

Since the Court failed to include Ms. Street's expert opinion concerning best interest within its order, it failed to consider the record in its entirety in making an analysis of the best interest of the child.

Finally, the Guardian ad Litem agreed with Ms. Street and testified that it would be in Hunter H's best interest to remain with the Foster Parents. He testified that Hunter H. identifies the Foster Parents and their daughter as his immediate family and the maternal and paternal grandmothers as his grandmothers. He confirmed the testimony of the visitation supervisor that Hunter H's expressed preference was to live with the Foster Parents.

The Guardian further testified as to his concerns with Grandmother, including the reasons that he believed she was not a fit and suitable placement for the child and that the Foster Parents were the best placement option for the child.[9] He was concerned about, among other things, the problems with the visitations expressed by the visitation supervisor; Grandmother's history of selection of men (which caseworker Anna Grafton also expressed in an MDT summary made part of the record); the fact that Grandmother never received more than supervised visits during the course of the case; that Grandmother had previously failed a home study; Ms. Street's opinion that it was in the child's best interest to remain with the Foster Parents; the child's expressed desire to remain with the Foster Parents; that Grandmother continues to have contact with her daughter, Hunter H's biological mother; and that none of the issues which led to the removal of the child from Grandmother's care were either satisfactorily addressed or addressed at all. Those issues led him to conclude that it would be in Hunter H's best interest to remain with the Foster Parents.

Although Paragraph 3 of the Circuit Court's conclusions of law cites to West Virginia Code §49-3-1(a)(3), the Court's order is void of any meaningful discussion or application of an analysis of the best interest of the child. In fact, the only times the phrase "best interest" is used is in the Court's citations to the statutes and case law and its conclusory statement ". . . that it is in Hunter H's best interest that he be immediately and permanently placed with his maternal grandmother. . . ." Instead, the Court focused on the fact that Grandmother is Hunter H's maternal grandmother and there is a preference for placement with her. That focus was inappropriate, and because the findings of fact--discussed below--do not support

[9] The Guardian had previously filed objections with the Court regarding permanent placement with Grandmother.

any conclusion that placement with Grandmother was in Hunter H's best interests, the Court incorrectly applied statutory and case law.

B. The Circuit Court issued findings of fact that were clearly erroneous and implausible in light of the entire evidence presented.

More than any other portion of its Order, the Findings of Fact demonstrate that the Circuit Court did not consider Hunter H's best interests and was instead focused on the grandparent preference. In some areas, it failed to consider all of the evidence, while in others, it incorrectly stated the evidence presented. And worse, in certain areas, it chose to extract from the testimony only select portions that appeared to support its conclusion for removal of the child.

As stated above, the only expert witness to testify as to what was in Hunter H's best interest was the Foster Parents' expert, Sandra Street, MA, LPC, CCAC-S.; no other experts were presented to dispute or rebut her testimony. Ms. Street testified, in detail, regarding a child's development at age 17 months, when Hunter H. was removed from his biological family. She emphasized that this is time when a child is learning to trust the adults in his life--particularly a consistent adult--and that being removed at age 17 months is at the height of a child's separation anxiety.[10] When a child is removed at this time in his life, one may see regression, acting out, despair, or signs of being withdrawn.[11] The importance of a constant caregiver cannot be stressed enough.[12] There are environmental conditions that have to be present for a child to be resilient after a removal at this stage of development.[13]

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[10] Transcript of testimony, pg. 8, lines 22-25, pg. 9, lines 1-10, pg. 29, lines 7-9.
[11] Id. at pg. 10, lines 7-13.
[12] Id. at pg. 10, lines 13-14.
[13] Id. at pg. 11, lines 1-4.

Ms. Street testified that Hunter H. bonded very well with the Foster Parents and they provided some environmental factors that encouraged resiliency in the child, particularly with setting limits.[14] His speech improved after being placed with the Foster Parents.[15] Hunter's behaviors showed her he recognized the Foster Parents as his consistent caregivers, he expressed compassion for others and he specifically identified the Foster Parents and their children as his family.[16] She testified that he was able to become bonded with and attached to the Foster Parents largely because of the environment they provided and their own personal characteristics.[17] Indeed, a lot of whether or not a child is resilient has to do with the behaviors and the personality of the parent or adoptive parent.[18]

Ms. Street also testified that Hunter H. told her he did not want to go to the visits with Grandmother.[19] When she tried to focus on something positive about the visits, he told her only that he liked the toys he got at the visits.[20] He did not appear to be excited about the visits.[21] Ms. Street testified that is was significant to her that Hunter H. did not say he liked that he talked with his Grandmother or that she told or read him stories or played with her.[22] Hunter H. also told her that he did not want his Grandmother to take him away from the Foster Parents.[23]

Ms. Street testified that the Foster Parents have provided Hunter with a consistent, stable environment in which he has limits and reinforcement.[24] He has made an adjustment with them and he has been able to bond and be part of the family, which is

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14 Id. at pg. 11, lines 1-6, pg. 13, lines 7-11.
15 Id. at pg. 30, lines 11-20.
16 Id. at pg. 31, lines 10-25, pg. 32, lines 1-2, 20-22.
17 Id. at pg. 15, lines 21-25, pg. 16, lines 1-3.
18 Id. at pg. 16, lines 3-7.
19 Id. at pg. 20, lines 17-19, pg. 40, line 23.
20 Id. at pg. 20, lines 20-22.
21 Id. at pg. 40, lines 8-9.
22 Id. at pg. 20, lines 22-25, pg. 21, lines 1-2.
23 Id. at pg. 47, lines 8-10.
24 Id. at pg. 11, lines 1-10.

extremely important at his age.[25] She testified that it would be to Hunter's detriment to be removed from the Foster Parents and that it was in Hunter's best interest to stay with the Foster Parents.[26] Notably, the DHHR chose to ignore all of this testimony in its Response to this Court, instead attempting to argue that Ms. Street's testimony simply centered on the fact that Hunter H. had bonded with the Foster Parents.

Despite being provided with this expert testimony, and despite the fact that no other expert testimony was presented to rebut it, the Circuit Court spent a mere eleven of its one hundred seven paragraphs outlining its interpretation of her testimony (¶¶68-78), only six paragraphs of which focused on the substance of her testimony (¶¶70-75). Five of those six paragraphs either mischaracterize her testimony, take it out of context, or fail to consider the entirety of her opinion.

For example, with regard to bonding, Ms. Street testified that one is hopeful that bonding will occur but that it does not always happen and that there must be certain conditions for bonding to occur.[27] Her opinion regarding bonding was based on this child identifying with these foster parents as his immediate family and that he is a member of that family,[28] that his speech improved when placed with them,[29] that the Foster Parents provided him with a consistent, stable environment in which he has limits and reinforcements,[30] that the Foster Parents helped him through the crisis of the removal,[31] and that it is overall in his best interest to remain with the Foster Parents.[32]

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25 Id. at pg. 14, lines 24-25, pg. 15, lines 1-7.
26 Id. at pg. 35, lines 18-25, pg. 37, lines 19-22.
27 Id. at pg. 24, line 11, pg. 25, lines 12-14.
28 Id. at pg. 31, lines 23-25, pg. 32, lines 1-2, 13-15, 20-22.
29 Id. at pg. 30, lines 19-20, pg. 41, lines 15-22.
30 Id. at pg. 27, lines 8-10.
31 Id. at pg. 35, lines 3-7, pg. 16, lines 15-16.
32 Id. at pg. 37, lines 19-22.

Instead of addressing the reasons Ms. Street found Hunter H's bonding with the Foster Parents to be significant, the Court discussed in conclusory fashion that Ms. Street simply testified that Hunter H. did bond with the Foster Parents, that he is expected to bond, and that it is the job of a foster family to bond with a foster child. As a result, the Court significantly diminished the substance of the expert's testimony. Indeed, the Court clearly either incorrectly interpreted the substance of her opinions, failed to acknowledge or give weight to the substance, or worse, completely ignored it. The fact that her opinion was the only expert opinion on what would be detrimental to Hunter H. and what would be in his best interest demanded that the Court at least address the substance of that testimony and state exactly why the Court disagreed. In doing so, the Court issued findings of fact that were clearly erroneous and not plausible in light of totality of the testimony presented by this expert.

Although the issue of the expert testimony was the most significant error made by the Circuit Court, there are several pieces of evidence that were of great importance in making a best interest analysis and would impact upon an ultimate determination of permanent placement that were completely omitted by the Court. For example, none of the DHHR workers testified that it is in Hunter H's best interest to be placed with Grandmother instead of remaining with the Foster Parents, but the Court did not mention this fact. Likewise, though it did mention that the Guardian recommended that Hunter H. remain with the Foster Parents, there is no mention that he testified that it was in Hunter H's best interest to remain with the Foster Parents as opposed to with Grandmother.

There is no mention of each of the concerns raised by visitation supervisor Aric McCreary in his testimony about the supervised visits with Grandmother, or that he expressed these concerns to the DHHR. There is no mention that DHHR worker Anna

Grafton testified that she was aware of the problems with the visits but failed to address those problems with Mr. McCreary.

There is no mention that DHHR worker Jason Prettyman testified that the only reason Grandmother and her husband were dismissed from the Petition was because they were not being considered for placement. There is no mention that Mr. Prettyman had requested a home study for Grandmother in August 2008, while she was still living with and married to her husband, and that that home study was never conducted by the DHHR.

There is no mention of the testimony of DHHR worker Joe King that Grandmother's daughter and Hunter H's biological mother, Amanda Lemasters, had drug and alcohol issues and lived with Grandmother and her husband prior to the petition being filed. He testified that Ms. Lemasters was addicted to crack cocaine, that Grandmother raised Ms. Lemasters and she grew up in her house, and that Ms. Lemaster's use of drugs should have been reported. He also testified that he recalled Grandmother's husband having a criminal history and that there were allegations that he smoked marijuana in the home he shared with Grandmother. There was no mention of Mr. King's testimony that Grandmother provided baseless allegations against Hunter H's paternal grandmother during the course of case, including that she was a drunk and provided fake identification to Hunter H's parents so they could evade the police.

There was also no mention of DHHR worker Jason Prettymen's testimony that there was alcohol and marijuana use by Grandmother's husband and that Grandmother's daughter, Amanda Lemasters, was an addict. There is no mention of DHHR caseworker Anna Grafton's testimony that she expressed concerns about Grandmother's inappropriate choice in men at the August 31, 2009 MDT, which came <u>after</u> the DHHR's recommendation to place Hunter H. with Grandmother. These were significant issues that at least placed

into question whether Grandmother was suitable and placement with Grandmother was appropriate. That the Circuit Court did not address why it did not find them to be detrimental to that placement only demonstrates that the Court was not focused on the best interest standard but instead on Grandmother's preference.

On other occasions, the findings of fact do not accurately reflect the testimony that was presented. For example, Finding #21 states that Grandmother separated and ultimately divorced her husband after her first home study was denied, implying that the separation was somehow a response to the home study. What the Court fails to mention is that Grandmother's first home study was denied in December 2007, that she did not separate from her husband until March 2009, and that did not divorce him until July 2009. It is quite clear that Grandmother did not separate from or divorce Mr. Bell in response to the home study.

The Order also does not mention that DHHR worker Jason Prettyman testified that the DHHR would not place Hunter H. with her while her husband was in the home and that he was a major hurdle in getting her approved. And the Court included findings that Grandmother was dismissed from the Petition without any findings of abuse or neglect, but does not include testimony that she and her husband were only dismissed because they were not being considered as a placement option for Hunter H.

By way of further example, Finding #23 states only a portion of the conclusion from Grandmother's Parental Fitness Evaluation. It does not include the fact that Grandmother had no strategy for discipline, that she had a lie score of thirteen, which is nearly twice the maximum score of seven, and that Grandmother needed parent training classes to help her learn more appropriate ways to discipline young children other than "I yell at them or

smack them." The Court failed to discuss it even though DHHR worker Joe King testified that it all raised concerns with him.

Also absent was that Grandmother never participated in parent training classes. The testimony from the DHHR was that the only class attended was a three-hour session on general parenting that Grandmother was required to attend as part of the PRIDE (foster/adoptive parent) training classes. Along these lines, Finding #40 states that Anna Grafton of the DHHR testified that Grandmother's lie score was within average limits. However, on cross-examination she was shown the report and acknowledged that the lie score was above the maximum score.

Findings #42 and #43 pertain to statements allegedly made by Foster Parents' counsel to one of the DHHR caseworkers. Both findings fail to state that, on the record, counsel denied making these statements. These findings also fail to include the same caseworker's unsolicited statement that despite there being "over 100 years worth" of attorney experience in the courtroom, Grandmother "stands before us now pro se," demonstrating a bias towards Grandmother because she was not represented at that hearing.

Finding #51 states that Brooke Boston, DHHR home finder, contacted all five of Grandmother's references when conducting her home study. It goes on to state that the references confirmed that Grandmother and her husband no longer had contact with each other. However, Ms. Boston testified that the references provided did not have a personal relationship with Grandmother's husband. As a result, any knowledge they had of him or that he was no longer in the household would have been based upon information provided to them by Grandmother, not based on their own personal knowledge.

Finding #56 mentions that two incidents were self-reported to the psychologist by Grandmother but fails to state that the incidents were a DUI in 1989 after which she lost her license for six months and a 2000 domestic violence arrest. The Court did find it important to address in Finding #77 that Foster Mother had a DWI charge/conviction but not that it occurred in 1978.

In making these errors, the Circuit Court issued findings of fact that were clearly erroneous. While counsel acknowledges that the Court cannot include every piece of evidence submitted into its Order, the concern is that it was content with pulling out what evidence supported its conclusion, while ignoring other evidence or failing to include findings of fact that were relevant to the best interest analysis. When viewed in its entirety, the Court's findings of fact do not accurately reflect the evidence. As a result, and if the Court had appropriately considered the best interest analysis, the Court necessarily would have found that permanent placement of Hunter H. should be with the Foster Parents. It was error for it to conclude otherwise.

C. The Circuit Court erred in failing to admit into evidence DHHR contact sheets and a Pre-Petition letter from a DHHR caseworker to the Prosecuting Attorney's office on the basis of attorney-client privilege.

The Court's refusal to consider various documents in the DHHR file was also error. There is no factual dispute that Grandmother and her husband, Frank Bell, were custodians of Hunter H. when the Petition was filed, and he was removed from their care. During the course of the hearing, DHHR caseworker Joe King testified that following the filing of the Petition, both Grandmother and Mr. Bell were to be randomly drug tested although he could not recall the specific reasons why. However, both Joe King and Jason Prettyman (a subsequent caseworker) testified that no tests were ever given to Grandmother and no

explanation was provided for the failure to test. A request was made on the record for copies of the DHHR contact sheets[33] which would have indicated the reasons for drug testing. Anna Grafton (a subsequent caseworker) testified that they would also substantiate whether any prior referrals on the home of Grandmother and Mr. Bell had been made. The request to produce these contact sheets was denied by the Court. In its Response, the DHHR argues that since the contact sheets were not disclosed by the GAL as an exhibit prior to the hearing they were properly excluded from use as evidence a the hearing. However, since the Foster Parents were admittedly never provided with a copy of these contacts sheets, they had no opportunity to list them as a possible exhibit.

During the testimony of caseworker Jason Prettyman, the Guardian ad Litem inquired as to whether he had seen the Pre-Petition letter dated August 24, 2007, that was sent from the DHHR to the Prosecuting Attorney's Office. The Guardian advised the Court that during his investigation he was given access to and read this letter, but it was not photocopied. He represented to the Court that it contained information relevant to the filing of the Petition, the removal of the child, and whether any prior allegations had been made against Grandmother and Mr. Bell. Despite the Guardian's prior review of the letter, the Court determined that it contained attorney/client privileged information and would not be released.[34]

The DHHR argues that because Mr. Prettyman testified that a pre-petition letter "basically" contains the same information as a petition it should not be disclosed. If that is the case, then there would be no reason for the DHHR to object to its disclosure since it

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[33] Although counsel for DHHR previously produced various documents, contact sheets were not included.

[34] The DHHR notes in its response that there is no evidence in the transcript that the GAL ever saw the Pre-Petition letter. It is unclear why this discussion was not part of the transcript; however, undersigned counsel does have a clear recollection of that discussion being held with counsel and the Court.

would not be providing any more information that what was contained within the petition that was filed.

The Foster Parents cannot agree with the DHHR's representations in its Response that "IF the letter had contained any allegations against Donna that were not included in the petition, those allegations would have been unfounded. IF any such allegations existed and IF they had any foundation, they would have been included in the petition." (See Response p. 17, lines 12-15) If, in fact, the pre-petition letter had contained allegations against Grandmother, those allegations and any investigation the DHHR made into them would be relevant to a best interest analysis and certainly relevant to a determination as to whether Grandmother was a suitable placement option for the child.

These rulings by the Court were clearly in error. With regard to the contact sheets, the Court was advised that such documentation has been produced in other cases. Additionally, no claim of attorney/client privilege was asserted by the State to prevent their release. The contact sheets would have included information specifically regarding the reasons why drug testing of Grandmother was requested (although never done) and whether Grandmother had any prior referrals--both of which were relevant to the ultimate inquiry of where Hunter H. should be permanently placed. Regarding the Pre-Petition letter, case law is clear that even where attorney/client privilege is asserted, the privilege is waived when a third party has been given access to and read the claimed privileged information. State ex rel. McCormick v. Zakaib, 189 W.Va. 258, 261, 430 S.E.2d 316, 319 (1993); see also, Marano v. Holland, Syl. Pt. 12, 179 W.Va. 156, 366 S.E.2d 117 (1988). If the pre-petition letter contains the same information as the petition, as the DHHR represents in its Response, then there was no reason to object to its admission.

In this case, the Court erred in denying the requests for the DHHR contact sheets and Pre-Petition letter. The attorney/client privilege was not asserted with regard to the contact sheets and since the Guardian had reviewed the Pre-Petition letter, there was no legal basis for failing to produce it. These documents would have provided relevant information on the ultimate issue of permanent placement of the child and whether it was in his best interest to consider Grandmother for permanent placement. As such, it was error for the Circuit Court to refuse to order their disclosure.

D. The Court erred when it inappropriately favored Grandmother as indicated in a two-page section entitled "Conclusion" at the end of its Order which contained various thoughts and opinions that were not based upon the evidence presented.

At the end of its Order, the Court included a two-page section entitled "Conclusion," which demonstrates that it inappropriately favored Grandmother. As stated, the basis for making such commentary was that the Court believed that:

> "As often happens in litigation, many critical and salient facts are given only cursory consideration during a hearing. The Court believes this case to be no different and, in particular, as it pertains to Ms. D., the maternal grandmother of Hunter H. While this may have occurred due to Ms. D's status as a *pro se* litigant and her not having an attorney to emphasize such points or because of the nature of the litigation, the Court believes that it is important to note some of these facts."

The Circuit Court goes on to make numerous statements in support of Grandmother, some of which were not supported by any evidence presented or were contradicted by the evidence presented.[35]

For example, the comment that Grandmother had been "dismissed from these proceedings <u>with the consent</u> of all parties and the Guardian ad Litem" takes that portion of

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[35] It should be noted that the Court also included the same type of commentary in its order denying the Foster Parents Motion to Stay by including, among other statements, that Grandmother is a ". . . loving grandmother who is committed to her grandson, Hunter H., *and to her other grandchildren.*" [Emphasis added.]

the underlying proceedings out of context. The record is clear that the present Guardian ad Litem was not the same Guardian appointed to the case at the time Grandmother and Mr. Bell were dismissed. But more importantly, DHHR caseworker Jason Prettyman testified that Grandmother and Mr. Bell were dismissed from the case simply because they were not being considered for placement. The dismissal had nothing to do with anything Grandmother or Mr. Bell did or did not do.

The Foster Parents strongly disagree with the DHHR when it stated in its Response that the reason for Grandmother's dismissal is immaterial. It is absolutely material to this case. The child at issue was removed from Grandmother's care even after a West Virginia Safety First/Protection Plan had been put into place. Mr. King of the DHHR testified that Grandmother was named as a respondent because she was a custodian and the child was at risk. Mr. King also testified that the Grandmother's daughter, Hunter H's biological mother, had drug and alcohol issues (including being addicted to crack cocaine) and lived with Grandmother prior to the Petition being filed. There were allegations that Grandmother exposed the child to her violent husband who consumed alcohol and smoked marijuana in the home he shared with Grandmother. The DHHR made the request to have Grandmother drug tested. Thus, the fact that Grandmother was dismissed from the case because she was not being considered for placement is quite relevant.

The comments that she "has had a successful home study" and "corrected the situation by legally separating and ultimately divorcing from Mr. Bell, in order to obtain permanent custody of Hunter" are problematic at best. Despite that DHHR had informed Grandmother on more than one occasion of all their concerns about Mr. Bell (including his criminal history, use of illegal substances, excessive drinking, and violence), she stayed married to him for almost two years while the case was pending before leaving and

divorcing Mr. Bell. To then further comment that "such conduct speaks to her dedication to her grandson and exceeds changes that other respondents, who have been reunified with their children, have made though improvement periods" ignores completely the nearly two-year span in which her dedication to her grandson did not compel her to separate.

The Court's comment that she "developed a strong bond with Hunter" was not supported by the evidence, which showed only that she had a bond and never received more than supervised visits from the DHHR during the entire course of the case. The comment that she "has had ongoing and uneventful visitation with Hunter" was directly contradicted by the visitation supervisor, Aric McCreary, who testified as to the specific problems with the visitation that he brought to the attention of the DHHR. Indeed, DHHR caseworker, Anna Grafton, testified that she was made aware of the problems but did not follow-up and never addressed them. Contrary to the DHHR's argument in its Response, Mr. McCreary had more than one (1) issue with the visits. Furthermore, DHHR's framing of the issue of Grandmother bringing too many toys trivializes the issue and the point that was made by Mr. McCreary during his testimony. He was concerned whether the child was coming to the visits to spend time with his Grandmother or to get new toys.

The Court goes on to emphasize that she is Hunter's maternal grandmother "and the law in West Virginia clearly gives preference to grandparent placement." Such comments indicate that the Court failed to include a best interest of the child analysis, as required by law, and instead focused on the fact that she has biological ties to the child.

With all due respect to the Court below, the wording, the length of the commentary, and the inclusion of it into its Order can lead one to the conclusion that at some point the Court became an advocate for Grandmother instead of an unbiased trier of fact. One could

surmise that the Court was sympathetic towards Grandmother because she was *pro se*.[36] However, Grandmother had been represented by privately retained counsel early in the proceedings. That counsel filed a Motion to Withdraw, which was granted. Grandmother was given additional time by the Circuit Court to retain new counsel, but she chose not to do so. Such a knowing and intelligent choice is hardly a reason for a Court to be sympathetic towards or to advocate for that individual. Regardless of its reasons, the "Conclusion" only demonstrates the extent to which the Circuit Court's findings of fact and conclusions of law were erroneous.

E. The Court erred when it failed to grant Foster Parents' Motion to Stay and failed to provide for a transition period for the child.

Finally, the Circuit Court erred in refusing to stay its Order during the pendency of this Appeal, a decision that further confused what were Hunter H's best interests. There is no factual dispute that on August 24, 2007, Hunter H. was placed with the Foster Parents at the age of seventeen months and resided with them continuously during the course of the case until the Court ordered his removal, which occurred on August 13, 2010. There is no factual dispute that Hunter H. resided with the Foster Parents longer than with any member of his biological family. Thus, after the Court ordered Hunter H. to be removed from the Foster Parents' home immediately, with only one closing visit, Foster Parents filed a Motion to Stay that Order. After receiving responses from the State (who objected) and the Guardian (who did not object), the Court denied the Motion.

The Circuit Court based its denial partially on the fact that Petitioners had not filed a Notice of Intent to Appeal at the time that the Motion to Stay was filed. However, there is

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[36] Such sympathy was also evident during the testimony of DHHR caseworker Anna Grafton, who stated that despite there being "100 years worth" of attorney experience in the courtroom, Grandmother "stands before us now pro se."

no such prerequisite to do so within the statutes. Additionally, given that the Court ordered that the child be immediately removed and placed with Grandmother, the Foster Parents' priority was to file the Motion to Stay with the Court as quickly as possible. Thus, the Motion should not have been denied on this basis.

The Court failed to consider the expedited process for appeal for abuse and neglect cases, as no mention was made in its denial. The Court also reiterated its opinion set forth in the order for permanent placement that "any attempt to appeal the Court's August 5, 2010 Order will be unsuccessful." It also considered "evidence" of visitations with Grandmother that allegedly occurred after the conclusion of these proceedings, which the Foster Parents are not aware of and are not privy to. None of these are appropriate reasons to deny the Motion.

Also in support of its denial, the Circuit Court incorrectly stated that the DHHR concluded that it was in the child's best interest to be placed with Grandmother. However, the record below is void of any caseworker testifying that this child's best interest was a reason for the DHHR's opinion to remove him from the Foster Parents and place him with Grandmother. The record is clear that each worker was asked to provide all of the reasons to support the DHHR opinion for removal and none of the workers stated that it was in his best interest to do so. Thus, the Court erred in based its denial, even in part, for this reason.

In its holding, the Court again incorrectly interpreted the testimony of the Foster Parents' expert. The Court found that the expert's sole, if not primary reason, for rendering her opinion that Hunter H. should not be removed was due to the bonding that occurred between Hunter H. and the Foster Parents. It then took that to "its logical conclusion" that no child should ever be reunited with a parent, grandparent or custodian, inasmuch as some degree of bonding always takes place between a child and foster parents.

First, no testimony was presented to support the statement that bonding between a child and foster parents always occurs. In fact, the expert testified that it does not always happen and that there must be certain conditions for bonding to occur.[37] Second, as set forth in detail above, the expert's opinion was based on this child identifying with these foster parents as his immediate family and that he is a member of that family,[38] that his speech improved when placed with them,[39] that the Foster Parents provided him with a consistent, stable environment in which he has limits and reinforcements,[40] that the Foster Parents helped him through the crisis of the removal,[41] and that it is overall in his best interest to remain with the Foster Parents.[42] By concluding that the expert's opinion was focused primarily or solely upon bonding that occurred, the Court incorrectly interpreted the expert's testimony and used that interpretation to deny the Motion to Stay.

As yet another basis for denial, the Court also noted that Grandmother "faithfully participated in extensive visitation" with Hunter H. In doing so, the Court failed to consider that the visits were always supervised and that problems occurred during the course of the visits which were made known to the DHHR but admittedly not addressed.

Finally, the Court emphasized that this was the child's maternal grandmother and so she has statutory preference for placement. However, denial of the Motion to Stay on this ground is misplaced as the request was for a stay of the order and not a re-argument of the statutes or case law regarding grandparents and permanent placement.

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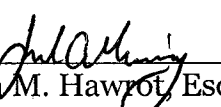
37 Transcript of testimony, pg. 24, line 11, pg. 25, lines 12-14, pg. 39, lines 1-5.
38 Id. at pg. 31, lines 23-25, pg. 32, lines 1-2, 13-15, 20-22.
39 Id. at pg. 30, lines 19-20, pg. 41, lines 15-22.
40 Id. at pg. 27, lines 8-10.
41 Id. at pg. 35, lines 3-7, pg. 16, lines 15-16.
42 Id. at pg. 37, lines 19-22.

While it is acknowledged that the Court directed a "closure visit" to occur, given the age of the child (four years old), length of time this child resided with the Foster Parents (eleven days short of three years) and the fact that Grandmother never had anything more than supervised visits, it was error for the Circuit Court to order an immediate transfer. At the very least the Court should have included provisions for a transitional period to occur. In its Response, the DHHR argues that the failure to provide a transition period is now moot that that the child has not exhibited any signs of distress of crisis. (See Response p. 23, lines 15-16). Any information related to the child or his behavior subsequent to the transfer is not appropriately before this Court for consideration and it is inappropriate for the DHHR to include such information in its Response. Such information from the DHHR would be no more relevant than information that could be provided by the Foster Parents about changes in the child since the transfer. Based upon the above, the Circuit Court erred in denying the Foster Parents' Motion to Stay.

CONCLUSION

In the end, the Circuit Court's analysis appears to be little more than a decision that the evidence would not prevent Hunter H's placement with Grandmother, when it should have been focused on and included an analysis of what was in Hunter H's best interests. Since the Court ignored some testimony, misinterpreted other testimony, and extracted only what supported its holdings, the Court erred, and its decision to place Hunter H. with Grandmother should be reversed.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December 2010, I served the foregoing ***Brief of Appellants***, along with a copy of all exhibits, upon all counsel of record, by depositing true copies thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

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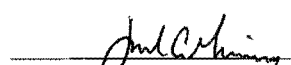

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