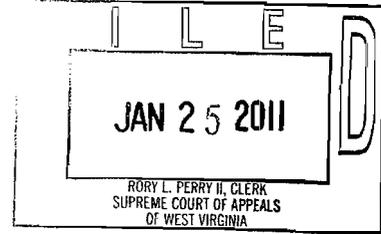


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Nos. 35750 and 35751



**IN THE MATTER OF HUNTER H.**

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**BRIEF OF APPELLEE, DONNA D.,  
HUNTER H.'S GRANDMOTHER AND CUSTODIAN**

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Appeal from the Circuit Court of Ohio County, West Virginia,  
Honorable James P. Mazzone, Judge  
Circuit Court Case No. 07-CJA-50

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### **III. NATURE OF PROCEEDINGS AND RULINGS BY TRIBUNAL BELOW**

The instant appeal arises by virtue of this Court's Order of November 17, 2010, granting the Petition for Appeal filed by the Appellants herein and foster parents below, Jerry and Joyce W. Appellants appeal the August 5, 2010, Order of the Circuit Court wherein the circuit court below ordered that custody of the infant herein, Hunter H., be with his maternal grandmother and Appellee herein, Donna D.

The thrust of the instant appeal is predicated on Appellants' contentions that the trial court: (1) employed the statutory preference for placement of a child with a grandparent embodied in W. Va. Code § 49-3-1 to the exclusion of any analysis of what the "best interest" of Hunter H. is regarding placement; (2) erred by failing to consider all of the evidence presented herein, particularly expert testimony offered by Appellants on the subject of Hunter H.'s "bonding" with them; (3) failed to admit certain evidence relative to contact sheets; (4) erred by improperly advocating for Appellee Donna D. as a *pro se* litigant; and (5) denying Appellants' motion to stay. These contentions are addressed in turn.

### **IV. COUNTERSTATEMENT OF FACTS OF THE CASE**

Appellants' brief cites to virtually no specific portions of the record (save the self-serving ones) and relies, instead, on Rule 4(a), W. Va. App., and "counsel's recitation of [the] facts." *See* Brief of Appellants at fn. 2.<sup>1</sup> Accordingly, gross disparities between

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<sup>1</sup> Rule 4A, W. Va. R. App. P., of course, requires that facts contained within a *Petition* be represented "faithfully" and "accurately" and that counsel include a certification to that effect. While such a certification was included in the original petition herein, it appears not to have been included in the instant appeal brief. As well, following consultation with the circuit court's reporter, no record exists, including an Appellate Transcript Request Form, to substantiate that the relevant portions of the transcript, including the 2010 evidentiary hearings held on April 16,

counsel's skeletal recitation of recollected "facts" and the actual record warrant a more fulsome citation to the record by Appellee Dunsmore than that ordinarily contemplated by Rule 10(d), W. Va. R. App. P. Accordingly, Appellee Dunsmore strives to strike a reasonable balance between accuracy and brevity in the following summation of the record.

The underlying Petition for Relief from Parental Abuse and Neglect was initiated in August, 2007, by the Appellee, Department of Health and Human Resources ("DHHR") on behalf of the infant herein, Hunter H., naming as respondent therein, Amanda L. ("mother"), Rob H. ("father"), Appellee Donna (D.) B. (maternal grandmother and custodian), and Frank B. (maternal grandfather and custodian). *See* August 28, 2007, Petition.

Hunter H. was born in 2006 and resided frequently with Appellee Donna D. from his birth until the filing of the Petition. During this period of time, the birth parents struggled with drug addictions and alcohol problems as well as legal difficulties, including writing bad checks *See* April 23, 200, tr. of testimony of Appellee Donna D., at pp. 177-178, 180-182. Appellee Donna D. sought to help them. *Id.*

Eventually, however, she summoned the police and contacted CPS, because she feared for the safety of her grandson, Hunter H. *Id.* at pp. 184-185, 188.2 When she

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April 23, May 3, and May 7, were ever requested by Appellants save the May 3, 2010, hearing, at any time herein. The absence of this request might well account for why the entire transcript "had not yet been received" by Appellants at the time of filing of their brief.

<sup>2</sup> Reference to this un-refuted, specific testimony belies the characterization of Appellants in their brief at p. 20 that Appellee Donna D. had Amanda L. and Rob H. living with her and otherwise permitted, if not fostered, an environment of intemperance, drug abuse and violence. Indeed, Appellee Donna D. specifically testified that Amanda L. and Rob H. stayed with her only

found out that her daughter and her daughter's paramour were getting high on crack, she took Hunter H. from them. *Id.* at p. 192. Appellee Donna D. provided many of life's necessities for her grandson, including all the things that he needed as a baby and later as a toddler, including shoes, hats, and coats. *Id.* at p. 197. According to Hunter H.'s great-grandmother, Carolyn H., Appellee Donna D.'s mother, Donna D. enjoys a "wonderful relationship" with Hunter H., and she is "very capable of caring for her grandson by herself." *See* April 16, 2010, tr. of testimony of Carolyn H. at pp. 216-217. At one point in time, Appellee Donna D. filed an involuntary commitment petition against her daughter because her daughter was homeless and drug-addicted. *See* April 23, 2010, tr. of testimony of Appellee Donna D. at pp. 198-199.

Upon the filing of the Petition, Hunter H. was placed with Appellants, Jerry and Joyce W., Appellants, where he resided continuously between August, 2007, until his return to Donna D., in August, 2010. Other than multiple references to the presence of the smell of cigarette smoke in their home and on the person of Hunter H., during supervised visits, no question exists as to whether Appellants are fit to parent Hunter H. *See, e.g.,* April 23, 2010, tr. of testimony of CPS Worker Anna Grafton at pp. 20 and 65.

Initially, the objective of DHHR was to seek reunification between Hunter and his mother. *See* April 16, 2010, tr. of testimony of DHHR Child Protective Service ("CPS") Worker Jason C. Prettyman at p. 104. Despite DHHR's primary objective of family reunification, Appellee Dunsmore nevertheless requested a home study in October,

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intermittently and then only for a night or two at a time. *Id.* at pp. 177, 179. Bizarrely, the guardian ad litem ("GAL") echoes this sentiment, expressly contending (without citing to any specific facts in the record) that marijuana and alcohol use were occurring when Hunter H. was in the home. *See* brief of the guardian ad litem at p. 5.

2007, to be considered as a placement option for Hunter, which home study was performed by DHHR Home Finder Roger Hayes. *See* tr. of April 16, 2010, testimony of DHHR CPS Worker Joe King at p. 29. The home study was denied in December, 2007.

The bases for the denial of Appellee Dunsmore's home study centered upon DHHR's conclusion that issues pertaining to Frank Bell's use of marijuana, his criminal history, his abuse of alcohol and his proclivity for violent outbursts when drinking rendered Appellee Dunsmore's household unsuitable for Hunter's placement; of concern as well was a head injury that Mr. Bell had sustained and the manner in which that injury affected his behavior. *Id.* at pp. 29-30, 35, 51, 82-83, and 119.

Of special note, DHHR's denial of Appellee Dunsmore's home study related *solely* to her husband's eligibility. *See* May 7, 2010, tr. of testimony of DHHR Home Finder Brooke Boston at p. 9. Indeed, the failed home study "had *nothing* to do with [Appellee Dunsmore]." *Id.* (Emphasis added). CPS Worker King testified that "[a]t that time," *i.e.*, when Frank B. was living with Appellee Donna D., it would not have been in Hunter H.'s best interests to be placed with her, the clear implication being that, but for Frank B.'s presence, Donna D.'s residence would have been suitable for Hunter H. and in his best interest. *See* April 16, 2010, tr. of testimony of CPS Worker King at pp. 53-54.

(Emphasis added).<sup>3</sup>

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<sup>3</sup> Appellants in their brief at p. 23-24 refer to testimony offered by CPS Worker King to the effect that Appellee Donna D. "[was] to be randomly drug tested although he could not recall the specific reason why" and that no such testing was ever performed. The clear, yet sinister insinuation by Appellants is that Appellee Dunsmore used drugs, but this representation patently mischaracterizes King's testimony, which, in fact, was in response to a question over a *possible allegation* that Appellee Dunsmore had used marijuana and the source of which was unknown. *See* April 16, 2010, tr. of testimony of CPS Worker King at pp. 64-65 (Q. "Do you remember that she *volunteered* at an MDT to take drug tests?" A. "Yes."). *No facts* were ever offered or produced or received into evidence that would substantiate that Appellee Donna D. ever used

As a consequence of the failed home study, and in light of the fact that re-unification of Hunter H. with his mother, Amanda L., remained DHHR's principal objective, Appellee Donna D. and her then-husband, Frank B., were dismissed as respondents from the Petition in May, 2008. *See* April 16, 2010, tr. of testimony of DHHR CPS Worker Prettyman at p. 137. No improvement period criteria were imposed on Appellee Donna D., as it would have made no sense to do so in light of DHHR's re-unification objective. *Id.* at pp. 163, 170.

Re-unification, at least to the extent of Amanda L., remained DHHR's objective until at least, December, 2008, because of her seeming progress in overcoming her drug addictions. *Id.* at pp. 114-115. Despite DHHR's stated objective of re-unification, Appellee Donna D., announced her intention to live separately from her husband, Frank B., and requested a second home study in August, 2008.

In conjunction with the requested home study, Appellee, Donna D., submitted to a psychological evaluation by Dr. William Freemouw, a psychologist, for purpose of evaluating her fitness to parent Hunter H. *Id.* at pp. 124-125. Dr. Freemouw concluded that Appellee Donna D. had "no strategy" for disciplining Hunter H., and that she had a "lie" score of 13 (over the maximum score of 7), which precluded his capacity to interpret the same given her proclivity to minimize problems. *See* April 16, 2010, tr. of testimony of CPS Worker King at pp. 37-38.4 However, he also concluded that Appellee Donna D.

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drugs or that her offer was anything more than a gratuitous, sincere offer to allay any concerns over whether her habits were in any manner similar to those of her then-husband, Frank B. The contention of Appellants in the brief at p. 25 to the effect that the so-called "contact sheets" which were not produced by DHHR "would have included information specifically regarding why drug testing of Grandmother was requested (although never done) . . . ." This contention constitutes nothing short of rank speculation.

4 Appellants find the circuit court's omission of this fact in its findings and conclusions

“appears to be a loving grandmother who is committed to [Hunter H.] and her other grandchildren.” *Id.*

Especially noteworthy in Dr. Freemouw’s report is his recommendation that Appellee Donna D. take parent training courses, *id.*, at p. 37, the clear implication being that doing so would be a worthwhile undertaking, and, should she successfully do so, she would have attained the fitness necessary to parent Hunter H. The circuit court apparently grasped the significance of the recommendation as well, and noted, further, that Dr. Freemouw concluded that Appellee Donna D. “was *not* a risk to commit neglectful behavior.” *See* August 5, 2010, Order at p. 7, ¶ 23. (Emphasis in the original). These facts are also not referenced in Appellants’ brief.

Appellee Donna D., enrolled in and completed PRIDE<sup>5</sup> training classes offered through DHHR. *See* May 7, 2010, tr. of testimony of Home Finder Boston at p. 13. The thirty (30) hour PRIDE training course in, addition to including a parenting class component, is “more intensive” and “far superior than any regular parenting class;” the course is taught by Rebecca Bledsoe, a masters level social worker who has done PRIDE training for years. *See* April 16, 2010, tr. of testimony of CPS Worker Prettyman at p. 127; May 7, 2010, tr. of testimony of Home Finder Boston at pp. 12-13.

Although it is not disputed by any party to this matter that a home study had been requested on behalf of Appellee Donna D. in August, 2008, the same was not

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noteworthy and imply some ominous or malicious significance to the so-called “lie score.” *See* Brief of Appellants at pp. 21-22. Yet in so doing, they omit reference to Mr. King’s testimony that Dr. Freemouw found that the elevated “lie score” was reflective, simply, of Appellee Donna D.’s tendency to “deny or avoid common problems.” *See, too*, April 16, 2010, tr. of testimony of CPS Worker Prettyman at p. 125.

<sup>5</sup> “PRIDE” is an acronym for Parent Resources for Information, Development, and Education. *See*, May 7, 2010, tr. of testimony of DHHR Home Finder Boston at p. 11.

referred by DHHR to a home finder until May, 2009. By that time, Appellee Donna D. had physically separated from Frank B. (March, 2009), had filed for divorce from him (June, 2009), and was granted a divorce from him (July 2009). Her requested home study was approved on July 28, 2009. *Id.* at p. 15-16.6

## V. STANDARD OF REVIEW

In prescribing the standard of review for abuse and neglect petitions, this Court has held that

conclusions of law reached by a circuit court are subject to *de novo* review, when . . . 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.

Syl. Pt. 1 (in part), *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996). (Emphasis added).

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6 Appellants contend repeatedly throughout their brief that the August, 2008 home study requested by CPS Worker Prettyman on Appellee Donna D.'s behalf, was never completed. See Brief of Appellants at pp. 4 and 20. While in the strictest sense true, as it was not until CPS Worker Grafton referred the matter for a home study to Home Finder Brooke Boston in May, 2009, that the study was undertaken and completed, Appellants, through omission, imply that a home study approving Appellee Dunsmore was never completed. See April 26, 2010, tr. of testimony of CPS Worker Grafton at p. 15.

**VI. POINTS AND AUTHORITIES OF LAW AND ARGUMENT  
IN SUPPORT OF AFFIRMING THE CIRCUIT COURT'S  
ORDER RETURNING HUNTER H. TO HIS GRANDMOTHER**

**Summary of Argument**

Contrary to the representations of the Appellants, the trial court below employed the best interests of Hunter H. as its polestar in deciding to place him with his grandmother as evidenced by the Ohio County Circuit Court's express conclusion at P. 22 (¶ 11) of its August 5, 2010, Order. As well, the court's conclusion was more than more amply supported by facts establishing that Hunter H.'s best interests were served by placement with Appellee Donna D. and that Donna D. is more than capable of fulfilling Hunter H.'s parenting needs.

**A. The Circuit Court of Ohio County, sitting as the trier of fact, expressly found that the best interests of Hunter H. were served by his return to his grandmother.**

Both Appellants and the GAL misapprehend the circuit court's August 5, 2010, Order to the extent that they each contend that the court below applied the "grandparent preference" statute to the exclusion of any consideration of where Hunter H.'s best interest lied. That statute provides, in relevant part, that

[f]or purposes of any placement of a child for adoption by [DHHR], [DHHR] 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, [DHHR] shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. *If [DHHR] determines, based on 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.*

W. Va. Code § 49-3-1(a)(3). (Emphasis added).

Appellants correctly cite and apply, as did the circuit court below, *Napoleon S. v. Walker*, 217 W.Va. 254, 617 S.E.2d 801 (2005), wherein this Court held that

[W. Va.] 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 by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is *presumptively* in the best interests of the child, and *the preference for grandparent placement may be overcome only where the record reviewed in its entirety establishes that such placement is not in the best interests of the child.*

*Id.* at Syl. Pt. 4. (Emphasis added).

Thus, as the “presumptive preference” for Hunter H.’s placement must be with Appellee Donna D., if and only if his best interests are not served may the preference to place him with her be overcome. Appellants reliance on this Court’s recent decision in *In re Elizabeth F.*, 225 W. Va. 780, 696 S.E.2d 296 (2010) (*per curiam*), for the proposition that a “best interest” calculation overlays any placement decision, including the grandparent preference, properly states this Court’s rule, but it does nothing otherwise to undermine the validity of the circuit court’s decision to place Hunter H. if the court found that his best interest were served.

Indeed, this Court reversed the trial court in *Elizabeth F.*, because the lower court concluded that there existed an “absolute preference” for placement with grandparents despite express reservations by the trial judge that the infants’ best interests were *not* served by their placement with their grandparents. 225 W. Va. at \_\_\_\_, 696 S.E.2d at 303. Stated otherwise, the trial court in *Elizabeth F.* explicitly found that the best interests of the infants therein were not served by placing them with the grandparents, but it misconstrued the grandparent preference statute as obligating it to make such a placement.

In the matter *sub judice*, the circuit court made an express finding in its August 5, 2010, Order at p. 22, ¶ 11, that Hunter H.'s best interest were served by his placement with Appellee Donna D., and noted that this finding was arrived at "after careful consideration of this matter, applicable West Virginia law, and [the] extensive testimony presented[.]" *Id.* The law considered by the court **expressly** included *Napoleon S.* and *Elizabeth F.*, and an recognition of the effect of a best interest analysis on W. Va. Code § 49-3-1(a)(3). *See* August 5, 2010, Order at p. 20 (¶ 3).

The argument urged on this Court by Appellants, frankly, seeks to prioritize form over substance. Appellants essentially urge this Court to reverse the Ohio County Circuit Court, because it ordered Hunter H.'s placement in the absence of any witness uttering the words "*best interest of the child*" as if the omission of such an incantation magically transforms the extensive facts already lodged in a well-developed record. *See* Appellants' brief at p. 15. As noted above, the circuit court sits as the trier of fact in any abuse and neglect proceeding, and it would be expected that a circuit court judge, having cited the law directly applicable to the analysis it undertakes, made a factual finding as to what the child's best interests are even if no witness uttered those words.

Over the span of four separate days, the trial court below heard over sixteen (16) hours of testimony from sixteen (16) witnesses, including Appellants, Appellee Donna D., Appellants' expert, CPS workers, a social worker, home finders, and character witnesses. The factual testimony included evidence that Appellee Donna D. has been gainfully employed for twelve years, *see* April 16, 2010, tr. of testimony of Candy Hartley at pp. 228-229, enrolled in and successfully completed intensive PRIDE training and its parenting component, divorced her husband in order to cure any impediment to completing a home

study, successfully completed a home study, and has a loving and wonderful relationship with Hunter H.<sup>7</sup>

To contend as Appellants do, in light of the avalanche of evidence received and evaluated by the circuit court, that it neglected to consider Hunter H.'s best interests in making a placement decision requires a willingness to suspend disbelief. Moreover, even if this Court would have "decided the case differently, . . . 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." Syl. Pt. 1, *Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177. Here, the circuit court's findings and conclusions are more than plausible in light of the record viewed in its entirety and not merely selectively as urged by Appellants.

**B. The Circuit Court's findings of fact were entirely substantiated by a thorough and well-developed record below.**

Appellants suggest that the circuit court erred because it effectively discounted the conclusions of the only expert witness to testify in the matter below, Sandra Street, a "bonding expert," and devoted only eleven paragraphs in its factual findings to her

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<sup>7</sup> Appellants complain that the circuit court improperly implied in its factual findings that Appellee Donna D.'s separation and divorce from her husband were undertaken in response to a home study when it omitted reference to the fact that the separation did not occur until March, 2009, and the divorce (filed June, 2009) did not occur until July, 2009. See Brief of Appellants at p. 21. However, Appellants fail, themselves, to note that the utility of any home study on Donna D. at that time would have been fruitless, as re-unification between Hunter and his mother, Amanda L., remained DHHR's objective until at least December, 2008, Donna D. had requested the study in August, 2008, but the same was not referred to a Home Finder until May, 2009, and that DHHR's CPS personnel were in a transition period around March, 2009. See, respectively, April 16, 2010, tr. of testimony of CPS Worker Prettyman at pp. 114-115; May 7, 2010, tr. of testimony of Home Finder Boston at p. 8; and April 23, tr. of testimony of CPS Worker Grafton at pp. 10-11. In other words, Donna D. had no immediate reason to divorce Frank B., but once DHHR's placement priority shifted and she had a legitimate opportunity to obtain custody of her grandchild, Hunter H., Frank B. was rather quickly "kicked to the curb."

testimony. *See* Appellants' brief at pp. 16, 18. Appellants complain, further, that the circuit court failed to give appropriate deference to their expert, distorted and mischaracterized her testimony, and otherwise belittled her conclusions. *Id.* at pp. 18-19. However, in advancing this argument, a review of the record reveals that Appellants misapprehend the critical distinction between ignoring testimony and weighing it.

Far from "ignoring" Ms. Street's advise, as suggested by Appellants at p. 19 of their brief, the circuit court devoted approximately ten (10) paragraphs in its factual findings to her evidence. *See* August 5, 2010, Order at pp. 14-15 (¶¶ 68-77). Significantly, the court below included her most significant findings, including that Hunter H. had bonded with Appellants, *id.* at p. 14 (¶ 70), that his removal from Appellants' home might be a "crisis" from which he would not "recover," *id.* at p. 15 (¶ 72). The circuit court evidently weighed her evidence and accorded it the weight that it deemed appropriate. After all, this calculation is specifically the objective with which the trial court is charged in such proceedings. As this Court has noted,

in the context of abuse and neglect proceedings, the circuit court is the entity charged with weighing the credibility of witnesses and rendering findings of fact. Syl. pt. 1, in part, *In re Travis W.*, 206 W. Va. 478, 525 S.E.2d 669 ("[W]hen 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" (internal citations and quotations omitted)). This Court, therefore, cannot set aside a circuit court's factual determinations unless such findings are clearly erroneous. *Id.*

*In re Emily B.*, 208 W.Va. 325, 339, 540 S.E.2d 542, 556 (2000).

Ms. Street's opinions following the six (6) hours she spent with the Appellants and Hunter H. *in toto*, were based, in large measure, on her conclusion that Hunter should not

be returned to the environment in which he existed at the time of his removal by DHHR. *See* May 3, 2010, tr. of testimony of Ms. Street at p. 27; August 5, 2010, Order at p. 15 (¶ 75). As well, the source of her information concerning Appellants were Appellants, themselves, who hired her for seven hundred dollars to conduct her evaluation. *See* May 3, 2010, tr. of testimony of Ms. Street at p. 19; August 5, 2010, Order at p. 15 (¶ 78).

As well, the reliance of both Appellants and the GAL on this Court's decision in *In re Katelyn T.*, 225 W. Va. 264, 692 S.E.2d 307 (2010) (*per curiam*), for the proposition that unrebutted expert testimony in an abuse and neglect matter effectively binds a circuit judge to follow such expert's advise entirely misconstrues *Katelyn T.*'s holding. *See* Appellant's brief at p. 14; GAL's brief at pp. 9-10. The facts in *Katelyn T.* differ radically from the ones in the instant matter; there, two experts testified that the children who were the subject of the petition had been sexually abused, the central issue in the case. 225 W. Va. at \_\_\_\_, 692 S.E.2d at pp. 311-312. The circuit judge quibbled with the interview techniques employed by one of the experts and used the same as a basis upon which to deny the petition.

Here, Ms. Street testified that Hunter had bonded with Appellants, an expected result as noted in the circuit court's August 5, 2010 Order. No evidence exists to the effect that Ms. Street was ever apprised of any change in Appellee Donna D.'s life circumstances, including her separation and divorce from her husband, Frank B., the sole reason she failed her first home study. And no evidence exists to substantiate that she conducted a holistic assessment of all placement options that were available to Hunter. Contrariwise, the circuit court was armed with all facts from all witnesses and enjoyed the vantage point of all perspectives.

To accept the argument advanced by Appellants under *Katelyn T.* to the effect that the circuit court, as the finder of fact, was obliged to be automatically bound by the counsel of Sandra Street as the sole expert witness to testify herein would effectively denude the trial court of its fact-finding role in an abuse and neglect petition. Moreover, to adopt a rule functionally suggested by Appellants that anytime a child of tender years is removed from a birth family pursuant to an abuse and neglect petition for an extended period of time and thereafter meaningfully bonds with a foster family, the birth family will be precluded from having the child rejoin them after the abuse/neglect conditions have been rectified if the foster family wishes to keep the child. Surely this Court cannot countenance such a result.

**C. The Circuit Court properly precluded admission of DHHR “contact sheets.”**

Appellants and the GAL next complain that the circuit court improperly denied them access to or otherwise admit into evidence any DHHR “contact sheets” involving Appellee Donna D, because, Appellants contend, the contact sheets would have indicated why Appellee Donna D. would need to be drug tested. This enormous red herring was addressed in greater detail above, but, at the risk of belaboring the point, it warrants comment that *no evidence exists whatsoever that Appellee Donna D. was ever using drugs.*

As noted by DHHR in its response to the petition filed herein at p. 14, production of non-existent contact sheets concerning referrals on Appellee Donna D. would have been pointless on the question of her fitness to parent Hunter H. As the testimony of

CPS Worker Grafton indicated, a contact sheet would be generated only if there had been a prior referral, *see* April 23, 2010, tr. at p. 81-83, and the explicit testimony of Home Finder Boston that no abuse or neglect referral was ever made against Appellee Donna D. *See* May 7, 2010, tr. at p. 21. Inasmuch as no prior referrals were made against Appellee Donna D., production of the contact sheets would have been utterly useless in assessing the propriety of any placement of Hunter H. with her.

Appellee Donna D. otherwise references and incorporates the balance of the arguments advanced by DHHR in its response to the original petition filed herein at pp. 14-19 to refute the point that any error was committed concerning the contact sheets.

**D. The Circuit Court engaged in no improper conduct by including a summation of its reasons, fully substantiated by the record, for its decision to award custody to Appellee Donna D.**

Next, Appellants chide the circuit court for purportedly “favor[ing]” Appellee Donna D. in the conclusion section of its August 5, 2010, Order. This assertion is specious at best. While it may come as a news flash to Appellants, in America’s system of litigation, there are ordinarily winners and losers, although the “difference in [custody] cases is that it is immoral and destructive to treat children as prizes to be awarded to a winner and denied to a loser.” *Mosley v. Figliuzzi*, fn. 12, 113 Nev. 51 at fn. 12, 930 P.2d 1110 at fn. 12 (Nev.1997). In drafting its conclusion, the circuit court merely summarized its heartfelt reasons, substantiated in every respect by references to the record, for its decision. Appellants pounce on this summation as some form of evidence that the circuit court abandoned its role as a neutral arbiter of the evidence and improperly donned the mantle of advocate.

The circuit court below acted with its customary and conscientious thoroughness in summarizing its ruling. The court took particular care to note that Appellee Donna D. was at the time appearing as a *pro se* litigant and that it had acted to address facts adduced in the record that were significant but perhaps overlooked by an unsophisticated, self-represented litigant. See August 5, 2010, Order at p. 23.

But it was, after all, Hunter H.'s interests that drove the circuit court's decision-making, a fact of which it took note in the final sentence of the Order. *Id.* at p. 24. In this regard, the Ohio County Circuit Court heeded the admonition of this Court "to be ever vigilant when issuing rulings to protect the best interests of children to ensure that the rights of those children's [grand]parents are not unnecessarily trammled in the process of administering justice." *In re Visitation and Custody of Senturi N.S.V.*, 221 W.Va. 159, 169, 652 S.E.2d 490, 500 (2007).<sup>8</sup>

**E. The Circuit Court committed no error by refusing Appellants' Motion to Stay.**

Appellee Donna D. incorporates by reference and adopts the arguments of DHHR in its original response to Appellants' Petition concerning any alleged error by the circuit court in denying a motion to stay enforcement of its Order.

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<sup>8</sup> Upon reviewing all of the evidence below, this Court, even if it would have decided the matter differently, certainly cannot be "left with the definite and firm conviction that a mistake has been committed." Syl. Pt. 1 (in part), *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177.

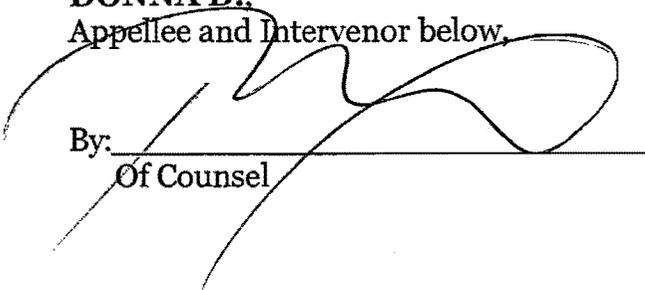
**VII. CONCLUSION AND RELIEF REQUESTED**

The circuit court below properly ordered Hunter H. placed with Appellee Donna D. based a well-developed factual record establishing that it is in his best interest to do so. Accordingly, the trial court below neither committed error nor abused its discretion. For these reasons, and any others which may be apparent to this Court, your Appellee, Donna D., Hunter H.'s grandmother, respectfully requests that this Court **affirm** the August 5, 2010, Order of the Circuit Court.

Respectfully submitted,

**DONNA D.**,  
Appellee and Intervenor below.

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**CERTIFICATE OF SERVICE**

Service of the foregoing **BRIEF OF APPELLEE** was had upon the following by mailing to them a true and correct copy thereof via First Class United States Mail, postage prepaid, this 24<sup>th</sup> day of January, 2011.

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