

35743

No. 35734 and 35744

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES, APPELLANT'S BRIEF

DEC 2010

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

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NO. 35743 and 34744
BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner Below,

(Underlying Mingo County Circuit Court)
JUVENILE CASE NO. 09-JN-34,35,36,37
Chief Judge Michael Thornsby

v.

TARA P.,
VERNER P.,
DOROTHY P.,
MARCUS A.,
JOSHUA G.,
JIMMY G.,

Respondents Below.

IN THE INTEREST OF THESE MINOR CHILDREN
IN THE RESPONDENTS' CUSTODY

NOAH A.	DOB: 04/15/2000
IAN A.	DOB: 02/21/2003
CARSON P.	DOB: 03/18/2004
MICAH P.	DOB: 09/29/2008

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
APPELLANT'S BRIEF

I. Kind of Proceeding and Nature of Ruling in the Lower Tribunal

The Mingo County District Office of the West Virginia Department of Health and Human Resources (the "Department") filed an abuse and neglect petition in the Mingo County Circuit Court in August 2009 alleging that Tara P. and her father Verner P. had perpetrated domestic violence against one another in front of her young children. The petition also included allegations

of drug abuse by Tara P. such that she had abused and neglected her children.

The petition proceeded through to a final termination of the parental rights of Tara P. to the subject children as memorialized by a Final Dispositional Order dated May 21, 2010. By that same Order, Verner P. and his wife Dorothy P. are recognized as psychological parents of the subject children and are adjudicated as neglectful of the subject children, but are permitted a ninety day post-adjudicatory improvement period with a grant of physical custody to all of the subject children.

One of the subject children, Micah P., has a father, Jimmy G., who only learned after paternity testing later in the case that he is the biological father of the child. There are no abuse and neglect allegations against him. He participated in proceedings below and requested at the final disposition hearing that the Court give him custody of his son. His son had been placed in his temporary physical custody prior to the final disposition hearing. At that hearing, the Department recommended that the child be placed in his care. The Guardian Ad Litem did not object to his motion, citing no concern for his ability to care for the child. However, the Court ultimately denied his motion, explaining that the children should be kept together as a sibling group. Jimmy G. has indicated he will appeal that decision.

That final order also went against the recommendations of both the Department and the Guardian Ad Litem that the children should not be returned to the physical custody of Dorothy P. and Verner P. because there

are concerns, among others, about their ability to protect the children from Tara P., given that they have been repeatedly admonished by the Court not to permit the children to have unsupervised contact with Tara P., but have repeatedly ignored or minimized the importance of that order.

It is from that Final Dispositional Order that this appeal arises.

II. Statement of the Facts of the Case

The Mingo County District Office of the West Virginia Department of Health and Human Resources filed an abuse and neglect petition in the Mingo County Circuit Court in August 2009 alleging that Tara P. and her father Verner P. had perpetrated domestic violence against one another in front of her young children, with all of them living in the home of Verner P. and Dorothy P. The petition also alleged numerous prior referrals for a history of drug abuse by Tara P. dating back to 2004 for which she had an active child protective services case, including one instance where she alleged she had been abusing prescription medications since the 2007 death of her infant child Preston P., who had died of undetermined circumstances, according to the Medical Examiner.

At the Preliminary Hearing held on August 31, 2009, the Mingo County Circuit Court found probable cause to believe that the facts alleged in the petition constituted abuse and neglect by Tara P. of the subject children, Noah A., Ian A., Carson P., and Micah P. The Court also found that the fathers, Joshua G. and Marcus A., had been largely absent from the

children's lives during this entire time in such a manner as to constitute neglect of the children. The Court ordered that the children remain in legal custody of the Department and the physical custody of their maternal grandparents, Dorothy P. and Verner P. until further order. The Court further ordered that Dorothy P. and Verner P. not permit Tara P. to have contact with the children in the home; all such contact was ordered to be supervised outside the home.

At the Adjudicatory Hearing held on September 29, 2009, the Mingo County Circuit Court found by clear and convincing evidence that Tara P., Marcus A., and Joshua G., had all neglected the children. The Court ordered the children to remain in the legal custody of the Department and the physical custody of Dorothy P. and Verner P., so long as Tara P. did not live in the home. The Department was ordered to assume physical custody if Tara P. was found to be in the home while the children were present.

On October 26, 2009, Tara P. and Joshua G. requested and were granted a post-adjudicatory improvement period for ninety days, with the children remaining in the home of Dorothy P. and Verner P. pending further proceedings.

On January 6, 2010, the Department requested that the Circuit Court remove the children from the home of Dorothy P. and Verner P. because they had permitted Tara P. to take one of the children out of their home, in violation of the Court's order. The Circuit Court recalled an earlier instance in which Dorothy P. and Verner P. had permitted the children to have

contact with Tara P., in violation of the Court's order, for which they had been admonished. The Circuit Court concluded that Dorothy P. and Verner P. had failed to protect the children and ordered the children removed from their home. The Circuit Court further found that the children could not be returned to the care of Tara P., due to the unsuitable nature of her home, nor the home of Joshua G., due to his failure to fully participate in services. The Court ordered a disposition hearing to occur near the end of January.

On January 27, 2010, Marcus A. voluntarily relinquished his rights to the children, Noah A., Ian A., and Carson P. Joshua G. requested paternity testing to determine if he was the biological father of Micah P. The Court ordered that paternity testing take place and continued the disposition hearing with respect to Tara P. and Joshua G. to February 22, 2010.

On February 22, 2010, the Court found that paternity testing had excluded Joshua G. as the father of the child Micah P. The mother informed the Court that if Joshua G was not the father of the child, then Jimmy G. could be the biological father. The Court ordered the petition amended to include Jimmy G. and ordered paternity testing to be conducted as well. When Dorothy P. and Verner P. requested that the children be returned to their physical custody, the Department objected to the return of custody citing a concern for the safety of the children in the home of Dorothy P. and Verner P. with regard to their prior conduct of domestic violence and their continuing failure to protect the children from Tara P. The Court ordered that a separate evidentiary hearing be held with regard to the grandparent

request for custody, and with regard to Tara P.'s request for final disposition.

At the evidentiary hearing on February 25, 2010, the Court took notice of many facts and heard testimony of the witnesses. First, the Medical Examiner appeared to testify regarding the death of Preston R. in the home of Dorothy P. and Verner P. The Medical Examiner explained that Tara P.'s description of how the nearly eight month old child had died by being wedged between the bed and the wall while co-sleeping with her was not supported by the location of bruising found on the child nor by the presence of anal stretching, which Tara P. and Verner P. insisted must have been caused by use of an anal thermometer, and which the Medical Examiner did not find a compelling explanation of the injury. The Medical Examiner indicated that the anal injury was fresh and fairly recent. The Medical examiner also said the findings were consistent with asphyxiation, but because of the concerns regarding the location of the bruising and the anal stretching, the cause of death was listed as undetermined.

Melissa Muenich, West Virginia Department of Health and Human Services Homefinder, testified regarding the home of Dorothy P. and Verner P. Melissa Muenich testified that Dorothy P. and Verner P. had repeatedly cancelled appointments for her to come and perform aspects of the home study, which was yet to be completed. Melissa Muenich testified that Verner P.'s background check revealed a 2005 conviction for Battery and a 2009 conviction for Domestic Battery. Melissa Muenich testified that

she was scheduled yet again to visit the home of Dorothy P. and Verner P. on February 26, 2010.

Ronald May, Family Options Worker, testified that he saw Tara P. and Verner P. arguing in the home of Verner P. during one of his scheduled visits to offer parenting classes to Dorothy P. and Verner P., and that he thought Tara P. was not supposed to be in the home, though the children were not there.

Marcus A. testified that Tara P. had overdosed on drugs before, and that he and Verner P. had gotten into a physical altercation in Nitro, West Virginia.

Vickie Fields, Child Protective Services Worker, testified that the three oldest children, aged 10, 6, and 5 frequently soiled their underwear. Vickie F. testified that one child had disclosed to the foster parents that someone had "messed with him", resulting in an appointment with a Dr. Phillips, to whom the children did not disclose anything. Vickie F. testified that the psychological ordered to be performed on Dorothy P. and Verner P. had not been completed yet, due to Verner P. going to cancer treatments. Vickie Fields testified that she did not believe that Dorothy P. and Verner P. could protect the children from Tara P., given their history.

During the proceeding, Joshua G., having been determined not to be the biological father of Micah P., and wishing to relinquish his parental rights, requested to be dismissed from the case. His request was granted.

At the conclusion of the evidentiary hearing, the Court found that Dorothy P. and Verner P. had repeatedly permitted Tara P. to be in their home, and around the children, in violation of the Court's order, even after being admonished by the Court. The Court explained that the hearing had been ordered in part to address allegations that one of the children had disclosed sexual abuse. *See Final Dispositional Order*, wherein the Circuit Court also takes notice of the entire record of the case. After the March 15 hearing, the Circuit Court did not issue any orders until the written Final Dispositional Order of May 21, 2010. The Court explained that the evidence presented was not concrete enough to make any findings of sexual abuse.

The Court ordered that, in light of the allegations of sexual abuse, and because of continued violation of the Court's orders by Dorothy P. and Verner P. with regard to the children visiting with Tara P., that custody remain with the Department of Health and Human Resources.

On March 15, 2010, the Court conducted a disposition hearing wherein the parental rights of Tara P. were terminated as to all of the children. The Court heard the testimony of Vickie Fields, Child Protective Services Worker, who recounted the inability of Tara P. to follow the conditions of the improvement period. After receiving the testimony of Vickie Fields, the Court found that Tara P. had participated in domestic violence, substance abuse, and other risk behaviors that endangered her children. The Court found that Tara P. failed to follow the Court's orders regarding contact with the children, had not substantially corrected the

behaviors that led to the filing of the petition, continued to subject the children to abuse, and had failed to follow through with reasonable case plan requirements designed to return the children to her care. The Court concluded that there was no reasonable likelihood that the conditions leading to the abuse and neglect would be substantially corrected and, thereupon, terminated the parental rights of Tara P. to the children. The Court further concluded that Tara P. should not have post-termination visitation with the children.

Also during the March 15, 2010, disposition hearing, the Court considered the request by Dorothy P. and Verner P. for a return of custody of the children. Vickie Fields testified that Dorothy P. and Verner P. were not an appropriate placement for the children. Vickie Fields explained that she did not feel that Dorothy P. and Verner P. would comply with the Court's Orders based upon their history of violating the Court's prior visitation orders.

The Court concluded that Dorothy P. and Verner P. are the psychological parents of the children, but that they had neglected the children by engaging in domestic violence, failing to protect the children, and participating in risk behaviors that endangered the children. The Court ordered that in light of their strong bond with the children, and their participation in services, that Dorothy P. and Verner P. be given one last opportunity to resolve their issues. The Court found that there was a reasonable likelihood that the conditions of abuse and neglect in the home of

Dorothy P. and Verner P. could be corrected in the near future and placed them on a ninety-day improvement period, with custody of the children to return to Dorothy P. and Verner P. after four weekend visits in their home by the children without incident. The Court ordered the following additional conditions: Dorothy P. and Verner P. were ordered to complete their psychological on April 2, 2010, continue participating in all ordered services, keep the children safe during visitations, prohibit contact of the children with Tara P., and not be involved in acts of domestic violence or be around inappropriate individuals.

Finally, during the March 15, 2010, disposition hearing, the Court considered the request of Jimmy G. for custody of Micah P. The Court's order from this hearing refers to no allegations of abuse or neglect against Jimmy G. The Court found that Jimmy G. is the biological father of Micah P. The Court's order further found that Jimmy G. has been cooperative with services and that while Micah P. had been placed in his temporary care the child was well-adjusted. However, the Court ordered that the children should not be separated, citing their bond. Jimmy G. was given visitation with Micah P. However, Jimmy G. was not given custody of his daughter.

After the hearing on March 15, 2010, and before the Court announced or issued any orders with regard to the final disposition, the Guardian Ad Litem filed an Argument and Recommendation of the Guardian Ad Litem for the Children Following the Dispositional Hearing. The Guardian

Ad Litem concurred in the ultimate finding by the Court that the parental rights of Tara P. be terminated and that she be denied post-termination visitation. The Guardian Ad Litem explained that she had concern about placing the children with Dorothy P. and Verner P. given their history of lack of cooperation with the Department and because of their history of permitting contact between the children and Tara P., despite being admonished otherwise. The Guardian Ad Litem had concern that Dorothy P. and Verner P. never have sought an explanation for the children's unexplained encopresis at any time while the children have been in their home. Finally, the Guardian Ad Litem suggested the following:

"My third and most troubling concern regarding the mother and the grandparents in this matter is in regards to the unexplained death of the sibling of these children. The sibling of the children herein, Preston P., died under suspicious circumstances. He had significant, unexplained injuries to his rectum and to his face and head as evidenced by testimony from the deputy medical examiner. The only adults in the home at the time of his death were the mother and the grandfather. These adults have never been able to give a plausible explanation for the child's death, and the medical examiner testified that the explanation given is not consistent with the child's injuries. In addition to all of the reasons heretofore stated, for this reason, I have grave concerns that any child placed in the physical custody of Tara P. or Verner P. would be in danger." *See Guardian Ad Litem's Argument and Recommendation, pg. 3.*

The Guardian Ad Litem also suggested that while she thought it in the best interests of the children to remain together, there was no reason to object to Jimmy G.'s request for custody of his son Micah P., given that he appeared to be an appropriate caretaker.

Another hearing was held on May 24, 2010, following entry of the Final Disposition Order on May 21, 2010, to advise the parties of their appeal rights. Jimmy G. indicated his wish and intent to appeal the Court's Final Dispositional Order. Jimmy G. requested a stay of the Court's Final Dispositional Order pending the outcome of his appeal. That motion was denied. A judicial review is scheduled for August 23, 2010.

By the time of the last hearing, the Court had also received the completed home study on Dorothy P. and Verner P. explaining why their home would not be approved as an appropriate home for the subject children. *See Home Study of Dorothy and Verner P.* The home study recounts lack of cooperation on the part of Dorothy P. and Verner P. in completing the study. They never returned the form titled "Application", despite being asked to repeatedly. They never provided their medical reports regarding their physical health indicating their current condition and any prescribed medications, despite repeated requests. Verner P. never signed a consent for the homefinder to obtain his mental health treatment records at the Veteran's Administration, despite the request. The home study recounts that Verner P. also has prior convictions for both Battery and Domestic Battery, among other concerns. During the home study, Dorothy P. and Verner P. recounted to the homefinder how Verner P. has an anger control problem related to his diagnosis of Post Traumatic Stress Disorder:

"Ms. P told me that when he is not on his medicine "you better watch out". He started to explain this, but Mrs. P stopped him saying that he would scare me. He

reported that when DHHR removed the grandchildren from him that he flushed all of his medication because he wanted the people involved to know his anger." See *Home Study of Dorothy and Verner P.*, pg. 3.

Additionally, the Court has received psychological evaluations for Dorothy P. and Verner P. See Petitioner's Exhibit 5, Psychological of Dorothy P. and 6, Psychological of Verner P. Although the psychologist that conducted the psychological evaluation regarding Dorothy P. and Verner P. noted that their prognosis was fair, she ultimately concluded that the children should not reside in the home of Dorothy P. and Verner P.

With regard to Dorothy P., the psychologist noted the following diagnostic criteria: Dysthymic disorder, Generalized Anxiety Disorder, Neglect of Child, Partner Relational Problems, Dependent Personality Disorder, reported diabetes, heart complications, acid reflux and kidney problems, and problems with primary support system and related social environment. See *Psychological Evaluation of Dorothy P.*, pg. 12.

The psychologist explained that Dorothy P., aged 62:

"is overwhelmed with depression, anxiety and dependency issues and this complicates her ability to effectively make decisions for her family, provide a safe environment for the grandchildren and be emotionally available for the children. She reported being a victim of abuse in the past. She reported allowing domestic violence between her husband and her daughter to occur in front of the children with no significant interventions. She reported that her medical conditions interfere with her ability to

intervene during these violent episodes." *See Psychological Evaluation of Verner P.*

The psychologist also expressed concern about disciplinary practice in the home of Dorothy P. and Verner P. noting that both Dorothy P. and Verner P. "shared information suggesting Mr. P. to have physically abused the grandchildren during the course of discipline. Mr. P. admitted to leaving marks on the children after whipping them with belts. Mrs. P. reported the whelps would last for a few days. *See Psychological Evaluation of Dorothy P., pg 3.*

With regard to Verner P., aged 63, the psychologist noted the following diagnostic criteria: Major Depressive Disorder Recurrent and Moderate, Post Traumatic Stress Disorder, Impulse Control Disorder NOS, Neglect of Child, Antisocial Personality Features, reported diabetes, high blood pressure, cancer and tremors, and problems with primary support system and related social environment. *See Psychological Evaluation of Verner P., pg. 10.*

The psychologist concluded that Verner P. reported:

"significant impairment with psychological and medical functioning which would interfere with his ability to parent his grandchildren. Personality maladjustment and significant anger problems are primary concerns and place his grandchildren at risk for abuse and neglect. He minimizes concerns that DHHR and the court voiced in the past. He shows no remorse or desire to alter his behaviors or decision making skills." *See Psychological Evaluation of Verner P., pg. 10.*

In fact, the psychologist noted during her interview of Verner P. that he reported a history of anger problems, including descriptions of physical altercations with a teacher, bosses, family members, and some of his daughter's boyfriends. The psychologist indicated that Verner P. also reported an incident where he became angry at another vehicle and drove aggressively toward the vehicle while one of the children was in the car with him. The psychologist noted that Verner P. expressed no concern over his behaviors. Verner P. also reported to the psychologist that his daughter was a "good mommy" and that he admitted to letting her into his home, though he said the court informed him not to allow that to occur, which directive "while smirking and rolling his eyes" he reported he would follow. See *Psychological Evaluation of Verner P.*

In a report dated June 7, 2010, directed to the attention of the Guardian Ad Litem for the children, the psychologist notes that the children reported that they saw their mother over Memorial Day weekend. During the session, one of the children also explained to the psychologist that after he is adopted by Verner P. he will be allowed to see his mother. See *Psychologist's Report of June 7, 2010.*

III. Assignments of Error

The Circuit Court erred when it denied the joint motion of the Department of Health and Human Resources and Jimmy G. to place one year old Micah P. in his custody at the Final Disposition hearing where Jimmy G.

was determined to be the biological father of Micah P., his biological daughter; where there were no allegations of abuse or neglect against Jimmy G.; where his home was determined to be an appropriate home; where he was denied custody because the Court concluded that the maternal grandparents were psychological parents to the children, and where the children had a psychological bond with each other such that the Court concluded it was not in the best interest of the sibling group to be separated.

The Circuit Court erred when it granted physical custody of the subject children to Dorothy P. and Verner P. pursuant to a post-adjudicatory improvement period where Dorothy P. and Verner P. have demonstrated no capability to substantially correct the conditions of neglect in the near future that initially led to the removal of the children from their home.

Points and Authorities Relied Upon

In re: Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996).

In the Matter of Ronald Lee Willis, 157 W.Va. 225, 207 S.E.2d 129 (1973).

In Re: Samantha S. and Hope S., 667 S.E.2d 573 (2008)

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

West Virginia Code § 49-6-5(b)

IV. Standard of Review

This Supreme Court has set forth the standard of review in abuse and neglect cases, previously stating that:

"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." In re: Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).

V. Discussion of Law

- A. The Circuit Court erred when it denied the joint motion of the Department of Health and Human Resources and Jimmy G. to place one year old Micah P. in his custody at the Final Disposition Hearing where Jimmy G. was determined to be the biological father of Micah P.; where there were no allegations of abuse or neglect against Jimmy G.; where his home was determined to be an appropriate home; where he was denied custody because the Court concluded that the maternal grandparents were psychological parents to the children, and where the children had a psychological bond with each other such that the Court concluded it was not in the best interest of the sibling group to be separated.**

The biological father of Micah P., Jimmy G., has been deprived of the opportunity to exercise his parental rights to Micah P. even though there are no allegations against of abuse and neglect against him. This Court has held that, "In the law concerning custody of minor children, no rule is more firmly

established than the right of a natural parent to the custody of his or her infant child, which is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the W. Va and U.S. Constitutions." Syl. Pt. 1, In the Matter of Ronald Lee Willis, 157 W. Va. 225, 207 S.E.2d 129 (1973).

Consistent with this fundamental right, Jimmy G. has done nothing to justify depriving him of the opportunity to parent Micah P., who is one year old. At the point in the this case when Jimmy G. was notified by the court that Tara P. had identified him as the potential father of Micah P., and the Court ordered that he submit to paternity testing, he did so. When the paternity testing established that he was the biological father of Micah P., he became a certified foster home to demonstrate his fitness to assume custody of Micah P. after Micah P. was removed from the care of Dorothy P. and Verner P. When the Court was considering permanent placement for the children after terminating the parental rights of Tara P., Jimmy G. requested that Micah P. be placed in his home permanently. The Department joined in his request, having no concerns about his parental fitness. The Guardian Ad Litem, though concerned that the sibling group would not remain together if the child Micah P. were placed in the home of Jimmy G., also considered his home appropriate and did not see a need to object to his home as a placement. Micah P. is one year old. His other siblings are aged 6, 7, and 10, respectively. Given the fact of his age difference from his siblings, the reports that he had adjusted well to living in

the home of Jimmy G. previously, and the availability of his biological father to parent him, it is clearly erroneous for the Circuit Court not to order sibling separation with a provision for sibling visitation in this case. To do otherwise violates the father's fundamental right to custody of his infant child, and deprives Micah P. of the opportunity to develop a normal relationship with his father. Nevertheless, the Court ordered that it would be in the best interest of Micah P. to remain together with his siblings in the home of their court-recognized psychological parents, Dorothy P. and Verner P.

Regardless of the maternal grandparents' status as psychological parents to the other children, this Court has repeatedly held that when it comes to matters involving the custody of children who have been victims of abuse and neglect, the best interests of the child are the "polar star" by which courts must determine the child's future. See In Re: Samantha S. and Hope S., 667 S.E.2d 573 (2008); In Re: Katie S., 198 W. Va. 79, 479 S.E.2d 589 (1996). It is in the best interest of Micah P. to be united with his father, after a period of transition, and with provision being made for appropriate visitation with his siblings, particularly since the Department and the Guardian Ad Litem also have concerns with the ability of the grandparents to maintain the safety of the children in their home.

In fact, there is clear and convincing evidence that Dorothy P. and Verner P., who have been adjudicated as having neglected the children, and who are on a post-adjudicatory improvement period, cannot correct the

conditions of neglect in the near future that led to the neglect of the children while in their care.

- B. The Circuit Court erred when it granted physical custody of the subject children to Dorothy P. and Verner P. pursuant to a post-adjudicatory improvement period where they have demonstrated no reasonable likelihood that they can substantially correct the conditions of neglect in the near future.**

There is no dispute that the children have a bond with Dorothy P. and Verner P. There is also no dispute that Dorothy P. and Verner P. have repeatedly ignored court orders for them at various times to limit or prohibit contact between the children and Tara P., whose rights have now been terminated, and who is not allowed post-termination visitation. Therein lies the problem. Dorothy P. and Verner P. have been adjudicated to have neglected the children by exposing them to domestic violence, by failing to protect them from Tara P., and by participating in risk behaviors that endanger the children, and consequently, they were placed on a post-adjudicatory improvement period. However, despite admonishments and support services they continue to behave in exactly the same way. They have never demonstrated the reasonable likelihood that they could substantially correct the conditions of neglect abiding in their home anytime in the near future.

Statute provides that a court may terminate parental rights where the parent demonstrates no reasonable likelihood that they can substantially correct the conditions of neglect in the near future. West Virginia Code

§ 49-6-5(b). The Department objected to the return of the children to the custody of Dorothy P. and Verner P. for a post-adjudicatory improvement period. The Department has repeatedly suggested concerns about the ability of Dorothy P. and Verner P. to appreciate the seriousness of their daughter's drug problem and how it impacts the children. Dorothy P. and Verner P. also continually minimize the children's previous exposure to domestic violence. Verner P.'s physical altercation with his daughter Tara P. in front of the children was, in fact, one of the initial allegations that led to the filing of a petition.

Verner P.'s aggressive behavior is also very common. Dorothy P. and Verner P. admit to a long history of domestic violence in their home. Dorothy P. and Verner P. also admit to Verner P. whipping the children with a belt so hard that it often leaves welts for a few days. Verner P. suffers from Post Traumatic Stress Disorder, for which he receives prescribed medications, but has said he does not always take them. When he does not take his prescribed medications, Verner P. has said that "you better watch out". Verner P. even admitted to intentionally not taking his prescribed medications when the Department took custody of the children because he wanted the people involved to know his anger. Verner P. has a demonstrated anger problem and has no problem talking about it. Verner P. has freely shared information of a lifetime of verbal and physical aggression against others, including fights with a teacher, bosses, and most importantly, family members. The psychologist that examined him for this

case concluded that, "His response to family problems or social issues is violence first." This is demonstrated by his criminal record. He has prior convictions for both Battery and Domestic Battery. While the psychologist indicated that the prognosis for him was fair, she also suggested that his lack of remorse or desire to alter his behavior related to his anger problem place him at risk to abuse and neglect the children.

Dorothy P. will not protect the children from further abuse and neglect, either. Dorothy P. has multiple physical and mental health issues that impact her ability to care for the children. The psychologist that examined her concluded that Dorothy P. "is overwhelmed with depression, anxiety and dependency issues and this complicates her ability to effectively make decisions for her family, provide a safe environment for the grandchildren and be emotionally available for the children." Additionally, Dorothy P. told the psychologist that she had allowed domestic violence to occur in front of the children between her husband and daughter without intervention. In fact, Dorothy P. suggested to the psychologist that her medical condition interfered with her ability to intervene in such violent episodes. In addition to her mental ailments, Dorothy P. suffers from physical ailments including diabetes, heart complications, and kidney problems. Dorothy P. cannot protect the children from Tara P. or Verner P., should the need arise.

Ultimately, the Department, the Guardian Ad Litem, and the examining psychologist in this case recommended against placing the children in the

home of Dorothy P. and Verner P. for good reason. As recently as June 7, 2010, the children disclosed in therapy that they had seen Tara P. during a weekend visit. One of the children even explained to the therapist how he will be allowed to see Tara P. after he is adopted by Verner P. It is clear that Dorothy P. and Verner P. have never demonstrated a reasonable likelihood that they could substantially correct the conditions of neglect in their home in the near future, and still don't. To have thought otherwise has always been clearly erroneous.

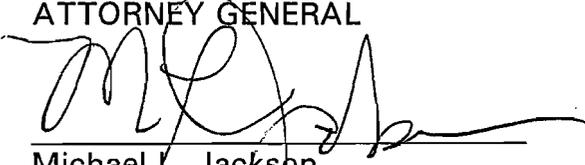
VI. Conclusion

Wherefore, Petitioners pray that this court reverses the Final Order of the Circuit Court of Mingo County and grant the Department's motion that Micah P. be placed in the custody of his biological father, with an appropriate order of sibling visitation, and that Micah's siblings be removed from the custody of Dorothy P. and Verner P. and placed into a suitable placement.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES
By Counsel

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No. 35743 and 35744
BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner Below,

(Underlying Mingo County Circuit Court)
JUVENILE CASE NO. 09-JN-34,35,36,37

v.

TARA P.,
VERNER P.,
DOROTHY P.,
MARCUS A.,
JOSHUA G.,
JIMMY G.,

Respondents Below.

IN THE INTEREST OF THESE MINOR CHILDREN
IN THE RESPONDENTS' CUSTODY

NOAH A.	DOB: 04/15/2000
IAN A.	DOB: 02/21/2003
CARSON P.	DOB: 03/18/2004
MICAH P.	DOB: 09/29/2008

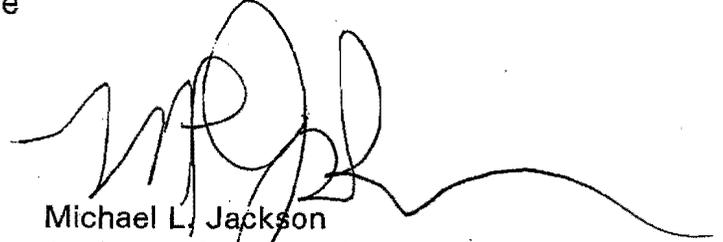
CERTIFICATE OF SERVICE

I, Michael L. Jackson, Assistant Attorney General, and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that on this 17th day of December, 2010, I served a copy of the foregoing "WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, APPELLANT'S BRIEF", upon the following individual(s) by United States Mail, postage prepaid, and addressed as follows:

Diana Carter Wiedel, Esquire
84 East Third Avenue, Suite 24
Williamson, WV 25661

Lauren Thompson, Esquire
35 West Third Avenue, Suite 106
Williamson, WV 25661

Charles S. West, Esquire
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Williamson, WV 25661

A handwritten signature in black ink, appearing to read 'MLJ', with a long horizontal flourish extending to the right.

Michael L. Jackson
Assistant Attorney General
WV STATE BAR ID #9507