

DOCKET NO. 35633

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE THE CHILD OF:

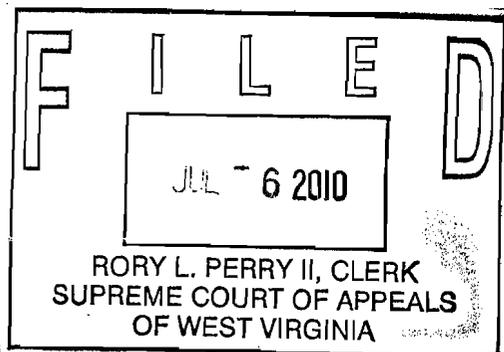
**DAWN PALMER (NOW LACY),
Petitioner (Appellee here),**

v.

**On Appeal from the January 26, 2010
Order of the Circuit Court of Kanawha
County Case No. 09-D-48
(Judge Jennifer F. Bailey)**

**MICKEY JUSTICE,
Respondent (Appellant here).**

**APPELLANT BRIEF BY MICKEY JUSTICE OF THE JANUARY 26,
2010 ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY**



Respectfully Submitted By:

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TABLE OF AUTHORITIES

Case Law

1. *Carr v. Hancock*, 216 W.Va. 474; 607 S.E.2d 803 (2004).
2. *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).
3. *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 286 U.S. 510 (1925).
4. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).
5. *In Re: The Matter of Ronald Lee Willis*, 157 W.Va. 225; 207 S.E.2d 129 (1973).
6. *Turley v. Keesee*, 218 W.Va. 231 (2005).
7. *State ex rel. Roy Allen S. v. Stone*, 196 W.Va. 624, 474 S.E.2d 554 (1996).
8. *Faulkner v. Jones*, 10 F.3d.226 (4th Circuit, 1993).
9. *Shelly v. Kraemer*, 334 U.S. 1; S.Ct. 83; 92 L.Ed. 1161 (1948).
10. *Stephen L.H. v. Sherry L.H.*, 195 W.Va. 384; 465 S.E.2d 841 (1995).
11. *Banker v. Banker*, 196 W.Va. 535; 474 S.E.2d 465 (1996).
12. *Connally v. General Constr. Co.*, 269 U.S. 385, 466 S.Ct. 126; 70 L.Ed. 322 (1926).
13. *State ex rel. Askin v. Dostert*, 170 W. Va. 562 (1982).

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**DAWN RENEE LACY (NOW LACY),
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**APPELLANT BRIEF BY MICKEY JUSTICE OF THE JANUARY 26,
2010 ORDER OF THE CIRCUIT COURT OF KANAWHA COUNTY**

I.

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

Appellant, Mickey Justice, is challenging the January 26, 2010 order of the Circuit Court of Kanawha County, West Virginia which affirmed the Family Court Final Order from November 9, 2009 denying his Petition for Modification.

NATURE OF THE CASE AND STATEMENT OF THE FACTS

The Appellee and the Appellant are parents of a minor child, _____, born on _____, 2009. The parties were in a one-year relationship and were never married. The infant child of the parties, _____, is a child with special needs as a result of a premature birth, and the child suffers from neurological difficulties and sensory problems. The child at the time of this proceeding was attending the Children's Therapy Clinic in Cross Lanes, West Virginia, the Physical Therapy Center in Charleston, West

Virginia, and was enrolled as a special needs pupil at Anne Bailey Elementary School in Saint Albans, West Virginia. The Appellee does not work as a result of having two special needs children in her home. Until recently the Appellant had a very demanding job with Wyndham Hotel Group as a quality assurance inspector. His duties took him out of town often to inspect hotels. Since May of 2006, the Appellant has been exercising parenting time with the minor child every week on Saturday or Sunday for four hours each visit at the Appellee's home. The Appellant initially agreed to this believing that the goal was to get the child comfortable with the Appellee and get the Appellant comfortable with the child's needs so that eventually the child would be able to have unsupervised parenting time at the Appellant's home.

According to an Order entered on October 1, 2007, for the Appellant to get more parenting time he was ordered to participate in as many Birth to Three therapy sessions as possible with the minor child without specifying an exact number of sessions that he had to attend. The Court also ordered that following three months of the Appellant's participation in the therapy sessions, Robin Halstead, the coordinator for Birth to Three, would invoke the services of a licensed social worker to inspect the Appellant's home to assure it was suitable for the minor child. After this inspection was completed, the therapy sessions were supposed to be divided between the Appellant's home and the Appellee's home. The parties were to agree on the recommendations of Robin Halstead with the respect to the special needs of the child.

In February of 2009, the Appellant petitioned the Court for a modification of the parenting plan. The Appellant stated that he had attended as many therapy sessions as possible based on his work schedule in those three months, as requested by the last

court order. A social worker inspected his home, and the Appellant made some minor adjustments to make sure the home was safe for the minor child.

The Court found in an order entered on February 23, 2009 that the Appellant was in need of additional therapy/counseling sessions with a professional provider in order to properly educate the Appellant in the appropriate care for the child. The Appellant was granted leave to file a subsequent Petition to Modify requesting expanded visitation with the child after the Appellant successfully completed the appropriate number of therapy/counseling sessions. According to the court order, the Appellant was required to document his attendance and successful completion of the therapy/ counsel session by providing the Court with written documentation from the professional service providers. The Court again did not specify the number of appointments he had to attend.

The Appellant filed a Petition for Modification on September 1, 2009 requesting more time with the minor child. ***Specifically, he was requesting one overnight visit every other weekend at his home.*** The Appellant attached a letter from Amie Cook-Smith, Teacher of the Visually Impaired and Parent Advisor, stating that the Appellant had attended a total of three INSITE Home Visits provided by a Parent Advisor from the West Virginia School for the Blind during the months of March and April. The Appellant attached a letter from Valicia Leary, Executive Director of Children's Therapy Clinic, stating that the Appellant attended therapy sessions on April 2, 2009 and April 9, 2009 for _____ at Children's Therapy Clinic. The Appellant attached a letter from Kellie J. Blanchard, MSPT from Professional Therapy Services, Inc., stating that the Appellant attended physical therapy sessions on March 30, 2009, April 6, 2009, and April 27, 2009. All of these therapy sessions were also attended by

the Appellee. The Appellant also attached a letter stating that he wanted to attend more appointments, but the Appellee had cancelled several of the minor child's therapy sessions with the various groups. The Appellant provided the dates of the cancellations.

According to an order entered on September 1, 2009, the Court reviewed a Petition for Modification filed by the Appellant and determined that he had met the statutory requirements of a significant change in circumstances necessary to warrant a modification and set a hearing for the matter to be heard. Travis Griffith was soon after appointed as Guardian *Ad Litem* for the minor child.

At the hearing on October 7, 2009, Travis Griffith supplied his report to both counsel of record. In his report, he recommended that once the Appellant has provided the necessary documentation to the Court he should be given greater latitude in raising his son, including overnight visitation. He recommended that there be a gradual transition period where [redacted] would come to the Appellant's home with the Appellee to get him used to being there. The Guardian also recommended that if there was a steady and productive transition, the child will then move into an overnight visitation every other weekend with his father.

At the above-referenced hearing, the Appellant testified as to what he learned in the therapy sessions and again provided documentation on his attendance at the various therapy sessions. He provided additional documentation from [redacted] school, therapists, and medical providers that he had requested to get a better understanding of various needs. The Appellee argued that the Appellant provided no documentation stating that he "successfully" completed the therapy sessions. However, she did not provide any evidence that the Appellant did not successfully complete these

sessions. The Appellant's position was that if he had not successfully completed the sessions, it would have been stated in the letters provided by the various therapists.

Also, based on the September 1, 2009, order, the Court previously determined that the Appellant provided enough to warrant a modification. Further, when asked about how it would be possible for the Appellant to meet the standards of the Court and what constituted "successful" completion, the Court advised that it did not know.

Based upon paragraph two of the Court Order entered on November 9, 2009, the Appellant was required to provide the Court with written documentation from the professional service providers for the benefit of the infant child. Based upon paragraph three of the Court Order entered on November 9, 2009, the Court concluded that the Appellant had failed to provide the Court or the Guardian *Ad Litem* with written documentation from professional service providers showing he had "successfully" completed the Ordered therapy/counseling sessions. As a result of this finding the Appellant was denied his modification. The Circuit Court of Kanawha County, West Virginia affirmed this ruling in a Final Order entered on January 26, 2010.

ASSIGNMENTS OF ERROR

The following assignments of error have been made by the lower tribunal:

- 1. The Court erred and abused its discretion when it denied the Petitioner a modification of his parenting time.**
- 2. The Court erred when it found that the Appellant did not successfully complete the court-ordered requirements to warrant a modification of the current parenting plan.**

- 3. The Court erred and abused its discretion in not modifying the current parenting plan based upon the evidence provided by the Appellant.**
- 4. The Court erred and abused its discretion when denying the Appellant a modification of the current parenting without stating what additional requirements he needed to meet in order in get the parenting plan modified.**

STANDARD OF REVIEW

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law de novo. *Carr v. Hancock*, 216 W. Va. 474, 476, 607 S.E.2d 803, 805 (2004).

DISCUSSION

A. The Court erred and abused its discretion when it denied the Petitioner a modification of his parenting time.

The ruling of the Family Court raises significant constitutional issues that, upon information belief, this Honorable Court has never directly addressed. The question is this:

Do the United States and West Virginia constitutions place limitations on West Virginia Family Court decision-making on the allocation of custodial responsibility even if the Family Court has exercised proper

discretion comporting with the requirements of Chapter 48 of the West Virginia Code?

The Petitioner asserts that the answer to this question is “yes.”

Since the beginning part of the 20th Century, the United States Supreme Court has held that parents have a fundamental constitutional right to raise their children without state interference. One instance involved a state law prohibiting a person from teaching a language other than English, except in narrowly defined situations. See generally *Meyer v. State of Nebraska*, 262 U. S. 390 (1923). A child was taught German in violation of the statute. *Id.* at 397. The statute was challenged as violating the 14th Amendment to the United States Constitution. *Id.* at 399. The Court explained what is encompassed in the 14th Amendment:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id.

The Court explained that the inherent purpose of the statute was to promote a societal benefit. Specifically, the Court stated:

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and "that the English language should be and become the mother tongue of all children reared in this State."

Id. at 401. At least implicitly, the purpose of the statute was at least in part to promote the best interests of children. Despite this, the Court determined that the statute

interfered with a parent's fundamental right to raise their children in a manner they consider proper, which includes teaching them the languages of their choosing. *Id.* at 403. Two years later the Supreme Court affirmed this decision in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U. S. 510 (1925). This liberty interest—the “interests of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized” by the United States Supreme Court, and this liberty interest has been reaffirmed as recently as the year 2000. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Further, this Court has recognized this fundamental right. In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person. *In Re: The Matter of Ronald Lee Willis*, 157 W. Va. 225, 237; 207 S.E.2d 129 (1973). Recently the West Virginia Supreme Court affirmed this holding when it held that “the Due Process Clauses of Article III, Section 10 of the Constitution of West Virginia and of the Fourteenth Amendment of the Constitution of the United States protect the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” Syllabus Point 3, *Turley v. Keese*, 218 W.Va. 231 (2005). Therefore, based on the case law of both the highest Court of the United States and the State of West Virginia a parent has a fundamental right to the care and custody of their children. However, this does not end the inquiry as to what standard the Court should apply when evaluating the actions of lower tribunals affecting fundamental rights.

Even more relevant to this Court's inquiry here is the Court's history of providing substantial protections to fathers who want to be part of their children's lives. This Court has held “that this State's Due Process Clause extends ‘substantial protection’ to

an unwed father [who] demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child." Syl. pt. 2, in part, *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 474 S.E.2d 554 (1996).

Therefore, though admittedly not stated in the context of a custody dispute between a custodial and non-custodial parent, this Court has concluded that Due Process extends fundamental right to non-custodial parents.

When fundamental rights are at stake, strict scrutiny is applied. See *Faulkner v. Jones*, 10 F.3d. 226 at 230-231 (4th Cir.1993). When strict scrutiny is applied, a state actor must demonstrate a compelling state interest and use the least restrictive means possible to achieve the compelling state interest. *Id.* at 231. This means that a lower court or other state actor could violate the fundamental rights of a parent or any other person. However, the above-referenced test must be met. A compelling state interest, must be demonstrated. Most importantly, though, a state actor cannot decide on whatever means it decides is best. The state actor has a duty to use the least restrictive means possible for achieving a compelling state interest.

Is the conduct of a judicial official state action? It has been the consistent ruling of the United States Supreme Court that state action includes action of state courts and state judicial officials acting within their official capacities. See *Shelly v. Kraemer*, 334 U.S. 1, 14; 68 S. Ct. 836, 842 (1948).

Based on these precedents, when allocating custodial responsibility, a Family Court must demonstrate a compelling state interest for not providing each parent with custody and control of their child. Further, a Family Court must also demonstrate the least restrictive means possible to achieve the compelling state interest.

A Court cannot give both parents who are not in a relationship together full custody all of the time—needless to say doing so is literally impossible. However, each parent nonetheless has a constitutionally protected right. Therefore, a Family Court as a state actor must consider the fundamental rights of both parents. Further, a Family Court must use the least restrictive means possible to achieve this compelling state interest.

The Appellant proposes the following framework to ensure his substantive due process rights are preserved. Because the Family Court is a state actor it has a duty to demonstrate and incorporate into a court order specifically why further visitation (1) is inconsistent with Chapter 48 of the West Virginia Code and (2) *that the least restrictive means are used to ensure the state's compelling state interest is achieved*. The Court cannot look solely at the West Virginia Code to determine whether the requisite burden has been met. While under West Virginia Code the Appellant has the burden to prove his case, once the evidence has been presented the Family Court has the burden the United States and West Virginia Constitutions place on it.

The above-referenced standard has not been met. No restrictions are placed on anyone spending time with this child unsupervised except for his biological father and paternal relatives. Neither his maternal relatives nor those with whom the Appellee has had relationships have ever had to show evidence that they properly understood this child's special needs. If significant restrictions such as those placed on the Appellant are the least restrictive means for achieving the best interest of the child, the restrictions should be placed on everyone, including the Appellee, other family members, and any other person with whom the child stays. This would be the only rational manner for the state to act. If denying the Appellant overnight visitation is the least restrictive means

for achieving a compelling state interest, why does the state not place such restrictions on everyone other than the mother?

Some litigants throughout the country and even in West Virginia have asserted on equal protection grounds or otherwise a constitutional right to equal parenting. The Appellant does not assert this. The Appellant, however, asserts that Family Court decision-making has an affect on the constitutional rights of non-custodial parents based on the 14th Amendment to the United States Constitution and the Due Process Clause of Article III, Section 10 of the West Virginia Constitution.

The actions of the Family Court were not consistent with the requirements of the United States and West Virginia Constitutions. Therefore, the burden the Family Court has placed on the Appellant should be lifted or at least modified to ensure the Appellant's fundamental rights are preserved to the fullest extent possible.

B. The Court erred when it found that the Appellant did not successfully complete the court-ordered requirements to warrant a modification of the current parenting plan.

A finding of fact is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Stephen L. H. v. Sherry L .H.*, 195 W. Va. 384, 465 S.E. 2d 841 (1995).

The Family Court specifically found in the court order that the Appellant had failed to provide the Court or the Guardian *Ad Litem* written documentation from professional service providers as proof that the Appellant has successfully completed the ordered therapy/counseling sessions.

The Appellant provided in his Petition for Modification three letters from health care providers showing that he attended all of the requisite therapy sessions. According to the February 23, 2009 order, the Appellant was to document his attendance and successful completion of the therapy/ counseling sessions by providing the Court with written documentation from the professional service providers. The fact that the letters did not say he failed to complete or comply leads to the conclusions that he “successfully” completed them. He achieved what he set out to do, which was to comply with the order of the Court so he could have meaningful parenting time with his child. The Appellant also testified as to what he learned about his son’s special needs and how to help him. This testimony also supported the fact that he successfully completed these therapy sessions. The Appellee provided no evidence to the contrary and the court had no evidence to the contrary. The Court cannot conclude without any evidence that he did not successfully complete the sessions, especially when “successful completion” has not been defined. All evidence provided showed that the Appellant did exactly what the court ordered to the extent this could be determined.

Also, the Court order found that the Appellant had failed to meet the burden of proof necessary to warrant a modification of the aforesaid Order from February 23, 2009. The Court agreed that the Appellant had met his burden in an order on September 1, 2009 by finding that after the review of the Appellant’s Petition for Modification, he had met the statutory requirements of a significant change of circumstances necessary to warrant a modification. The only issue remaining at the hearing on October 7, 2009, was supposed to be on how the order would be modified. The only change in circumstances that would warrant a modification in this matter would have been the Appellant attending the requisite number of therapy appointments

and showing the proper documentation. Had he not done this, the Court would not have granted his Petition for Modification by an order dated September 1, 2009. The only additional evidence the Court was provided at the hearing on October 7, 2009 supported the Appellant's position. The Court had no basis to change its previous ruling on September 1, 2009, as it was not presented with any new evidence that was contrary to the position taken on September 1, 2009.

Therefore, the Court's ruling that the Appellant had not successfully completed the requisite number of therapy sessions is clearly erroneous.

C. The Court erred and abused its discretion in not modifying the current parenting plan based upon the evidence provided by the Appellant.

An abuse of discretion occurs in three principal ways: (1) when a relevant factor that should have been given significant weight is not considered; (2) when all proper factors, and no improper ones, are considered, but the family court judge in weighing those factors commits a clear error of judgment; and (3) when the family court judge fails to exercise any discretion at all in issuing the order. If an order lacks adequate detail, the case will be remanded for additional specificity. See *Banker v. Banker*, 196 W.Va. 535, 548; 474 S.E.2d 465, 478 (1996).

In this case a relevant factor that should have been given significant weight was not. The factor that the Court failed to consider was that the original court order found that if the Appellant provided the documentation that he successfully completed the request number of therapy sessions, he would be able to modify his plan. The letters the Appellant provided, along with his testimony, showed that he successfully completed the court-ordered requirements to the extent this could be determined. However, the Court

simply failed to weigh this factor in making its ruling. Had the Court weighed this factor in any manner, it would have outweighed any concern the court had in regards to his unrestricted parenting time with the minor child. Instead the Court concluded without justification that the Appellant had not met the previously ordered requirements and gave the Appellant no direction on what he would need to do to be successful on a modification of the parenting plan. Therefore, the Court failed to give weight to a relevant factor.

The Family Court considered improper factors to make its decision. Instead of considering the letters from the professionals along with the Appellant's testimony in weighing whether the Appellant should have his one overnight visit with the minor child, the Court decided without any supporting evidence that he did not meet the requirements in the previous order. Since the Family Court considered a factor that was not supported by any evidence, there was a clear error of judgment in determining the Appellant did not meet the requirements in the previous court order.

The Family Court failed to exercise any discretion in determining what the Appellant would have to do in order to justify his one overnight visit every other weekend. The Appellant provided all the proof the Court needed to show that he understood the needs of his child and that he could properly handle those needs. The Family Court in interpreting the previous Court should have used its discretion to determine that the modification was warranted. The Court using discretion would have clearly found the Appellant complied with all requirements.

The Family Court has discretion to make rulings in regards to what the Appellant would have to accomplish to get his one overnight visitation every other weekend. The Family Court failed to use its discretion in giving the Appellant any additional

requirements when it refused to modify the current parenting plan. When asked by the Appellant's counsel what additional requirements needed to be met, the Court responded that "it did not know." By the Family Court failing to exercise proper discretion in this situation, the Appellant will not get to have an overnight visitation with the minor child and an increase in parenting time more than a few hours per week, which is a modest request. Based upon all of the above, the Court abused its discretion.

D. The Court erred and abused its discretion when denying the Appellant a modification of the current parenting plan without stating what additional requirements he needed to meet in order in get the parenting plan modified.

The Court concluded at the hearing that the Appellant had not attended the requisite amount of therapy sessions. When the Court was specifically asked at the October 7, 2009, hearing how many appointments needed to be attended, the Court specifically stated that it did not know. This ruling is an error and abuse of discretion.

1. SUBSTANTIVE DUE PROCESS VIOLATION

By the Court not modifying the current parenting plan based upon the finding that Appellant did not complete all of the court-ordered requirements, but failing to state what specific requirements the Appellant would need to meet before the Court would modify the current parenting plan, Appellant is being denied his due process rights under the West Virginia and United States Constitutions.

In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person. *In Re: The Matter of Ronald Lee Willis*, 157 W. Va. 225, 237; 207 S.E.2d 129 (1973). The Supreme Court of the United States has

recognized the right to raise one's children is a fundamental personal liberty guaranteed by the due process clause of the Fourteenth Amendment. *Id.* When fundamental rights are at stake, strict scrutiny is applied. See *Faulkner v. Jones*, 10 F.3d. 226 at 230-231 (4th Cir.1993). When strict scrutiny is applied, a state actor must demonstrate a compelling state interest and use the least restrictive means possible to achieve the compelling state interest. *Id.* at 231. It has been the consistent ruling of the United States Supreme Court that state action includes action of state courts and state judicial officials acting within their official capacities. See *Shelley v. Kraemer*, 334 U.S. 1, 14; 68 S. Ct. 836, 842 (1948).

In this case, the Appellant is the biological parent of this minor child and therefore has a fundamental right to unrestricted parenting time with his minor child. Since this is a fundamental right strict scrutiny is applied. Since strict scrutiny is applied in this situation and the Court is a state actor, the Court must establish it is using the least restrictive means possible to achieve a compelling state interest. The Appellant's right to parenting time of this child is being restricted based upon the fact that the child has special needs. The Court restricted this access without any evidence presented that the Appellant could not meet this child's special needs while the child was in his custody.

When specifically asked by Appellant's counsel what the Appellant had to do to convince the court that he could meet this child's special needs, the Court gave no guidance. ***At this point, the Appellant's fundamental rights were clearly violated.*** Even if the Court concluded the Appellant did not meet the established requirements of the Court, the least restrictive means would have been to give the

Appellant additional, specific requirements to fulfill so he could have unrestricted parenting time with his child.

2. PROCEEDUREAL DUE PROCESS VIOLATION

Without the Court giving additional instructions on what the Appellant needed to do in order to get unrestricted parenting time with his minor child, the applicable order as applied is unconstitutionally vague and violates the Appellant's due process rights.

A law either forbidding or requiring the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. See *Connally v. General Constr. Co.*, 269 U.S. 385; 466 S. Ct. 126; 70 L. Ed. 322 (1926). Further, due process requires that a person be free from "arbitrary treatment by the state." See *State ex rel. Askin v. Dostert*, 170 W. Va. 562 at 568 (1982). The court order states that he failed to successfully attend the ordered therapy/ counseling sessions without stating how many sessions he needs to attend and without defining "successfully." The Court seemingly acknowledged this when the Appellant was advised that the number of sessions needed to meet the standards of the Court is unknown. If the Constitution requires anything it is that a person have clearly defined for them what they can do to increase visitation with their children.

Based upon this ruling the Court could tell the Appellant that he did not attend enough therapy sessions for unsupervised visits even if the Appellant attended counseling sessions for three months, six months, or even years. The Court could also advise the Appellant that even though he attended several counseling sessions, he did not participate the way the Court wanted, forever limiting him to supervised visits with

his child. Therefore, this directive was unconstitutionally vague. Based upon all of the above, an error and abuse of discretion has occurred.

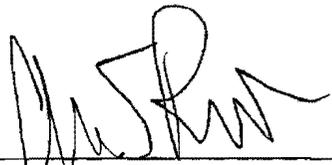
CONCLUSION AND RELIEF REQUESTED

Based upon the above, the Court erred and abused its discretion with the court order entered on November 9, 2009 which the Circuit Court affirmed on January 26, 2010.

Wherefore, Appellant prays that this Honorable Court grant his Petition for Appeal of this order and other relief as follows:

1. That the Court reverse the ruling that the Appellant had failed to provide this Court or the Guardian *Ad Litem* heretofore appointed by the Court with written documentation from professional service providers for the benefit of said infant child that in fact the Appellant has successfully completed the Ordered therapy/counseling sessions;
2. That the Court reverse the ruling that the Appellant had failed to meet the burden of proof necessary to warrant a modification of the aforesaid Order entered on February 23, 2009;
3. That the Court adopt a ruling allowing the Respondent to have unsupervised parenting time with the minor child;
4. In the alternative to the above, that the Court remand this matter to the Family Court of Kanawha County, thus directing the Court to order a plan consistent with the United States and West Virginia constitutions;
5. All other relief that is necessary or just to grant.

Mickey Justice
By Counsel



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DAWN PALMER (NOW LACY)
Petitioner (Appellee here),

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09-D-48
(Judge Jennifer F. Bailey)
Family Court Civil Action No. 05-D-2062
(Judge Kenneth Ballard)

MICKEY JUSTICE,
Respondent (Appellant here).

Certificate of Service

I, Christopher T. Pritt, counsel for the Appellant, Mickey Justice, certify that I have sent a true and exact copy of the "Docketing Statement" and "Petition for Appeal by Mickey Justice of the January 26, 2010 Order of the Circuit Court of Kanawha County" via U.S. Mail, postage prepaid to the following:

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Dated this 6th day of July, 2010.



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