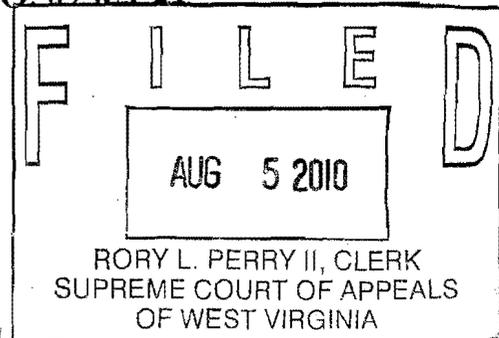


**BEFORE THE WEST VIRGINIA SUPREME COURT
OF APPEALS
AT CHARLESTON**

DOCKET NO: 35659

**IN RE: CECIL T.
D.O.B. 09-06-2008**

**LOGAN COUNTY CIRCUIT COURT
DOCKET NO. 09-IA-21**



APPELLANTS' BRIEF

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**KIND OF PROCEEDING AND
NATURE OF RULINGS IN
THE LOWER TRIBUNAL**

This action arises from a Petition filed by the West Virginia Department of Health & Human Resources (hereinafter WVDHHR/Petitioner below) in the Logan County Circuit Court on March 9, 2009, in which WVDHHR sought custody of Cecil T., II, on the grounds that the child was in imminent danger of abuse and neglect of his physical well-being because of his circumstances, to-wit: the parental rights of his biological mother April T. had been terminated by the Logan County Circuit Court (WVDHHR v. Cecil T., et al, Case No: 08-JA-550) and the child's father had been taken into custody by Federal authorities.

The child had originally been placed in the legal and physical custody of WVDHHR by the Court's Emergency Order on September 8, 2008. (See State v. April T., et al, Case No. 08-JA 550) Following involuntary termination of his mother's rights, Cecil T. II remained in the legal and physical custody of WVDHHR and was placed with foster parents Brett and Susan B. (Appellants/Intervenors below) while his father Cecil Edward T., was placed on an Improvement Period. On February 9, 2009, the Court determined that Cecil Edward T., had substantially complied with the terms of his Improvement Period and Cecil T. II was placed in the legal and

physical custody of his father by the Order of the Logan County Circuit Court.

On March 6, 2009 Respondent Cecil Edward T. was arrested by Federal Agents on Federal charges of being a Felon in Possession of a Firearm. He had previously been convicted of breaking and entering in the Logan County Circuit Court on August 4, 1992, a felony violation of W. Va. Code §61-3-12. He entered a plea of Guilty on June 1, 2009 and was sentenced to a term of incarceration of 12 months and one day on August 10, 2009. (U.S. v. Cecil Edward T. (SDWV Case No. 2:09-cr-00085))

At an undetermined time during this period, Cecil Edward T. entered a plea of guilty to two drug related counts of a Logan County Indictment which was pending against him the first time his son was taken. The child Cecil T. II was returned to the legal and physical custody of WVDHHR on March 6, 2009, the date of his father's arrest, by an Emergency Custody Order of the Logan County Circuit Court (WVDHHR v. Cecil Edward T., Case No. 09-JA-21-0). The child was returned to his placement with the foster parents Brett and Susan B. A Preliminary Hearing was conducted on March 17, 2009 and probable cause was found to believe the charges in the Emergency Petition were true. The Order was subsequently ratified by the Courts Order entered on July 13, 2009. An Amended Petition was entered

by WVDHHR on July 24, 2009. An adjudication of the WVDHHR Petition was conducted on July 27, 2009 and the Court issued an Order on August 12, 2009 finding Cecil T. II. to be a neglected child. On August 26, 2009, WVDHHR filed a Motion to Terminate the Parental Rights of Respondent Cecil Edward T.

A Dispositional Hearing of the WVDHHR Petition filed on March 6, 2009 was conducted on October 28, 2009. Appellants Brett and Susan B. had filed a Motion to Intervene, which was granted during the October 28th hearing. Joint Motions of WVDHHR, the Guardian ad Litem and the Appellants were entered for termination of the parental rights of Cecil Edward T. on the grounds of his failure and inability to provide for and protect his son in the past, and the uncertainty as to when, if ever, he would be able to provide for his child in the future. The Court denied the Joint Motions. Instead, Appellants were appointed by the Court as Guardians of the child. It was Ordered that the child would remain in their physical custody; that legal custody would remain with WVDHHR; and "...at the time of the adult Respondent's [Cecil Edward T.] release from prison, should he wish to make a record that he is fit to resume exercising his parental rights, the appropriate forum to make such a record is in the Family

Court.” (Order of January 29, 2010 WVDHHR v. Cecil Edward T., Logan County Circuit Court, Case No. 09-JA -21-0)

It is this Order with the Petitioners now seek to appeal.

AMENDED STATEMENT OF FACTS

A Petition was filed with the Logan County Circuit Court on September 9, 2008 by the West Virginia Department of Welfare (hereinafter WVDHHR) seeking immediate legal and physical custody of Cecil T. II (DOB 9-6-08). The Petition alleged as grounds for the taking that Cecil Edward T. and April T., parents of the child, “...posed an imminent danger to the child’s well being” as a result of the circumstances of their care and custody.¹ Specifically, the Petition alleged there had been two prior involuntary terminations of parental rights in relation to April T. (Logan County Circuit Court Case Nos: 03-JA 13-0 & 06-JA-34-0). Cecil T. II. was found presumptively positive for benzodiazepines, methadone and barbiturates at the time of his birth and appeared to be suffering minimal withdrawal symptoms.¹ April T. was found presumptively positive for methadone and benzodiazepines when tested following the birth.

Footnotes refer to the list of citations which appears at the conclusion of this Statement.

During a subsequent interview with a WVDHHR worker, April T. admitted to taking unprescribed methadone and allegedly prescribed benzodiazepines shortly before the child's birth.¹ Cecil Edward T. admitted to recent use of Vicodin and to pending drug charges against him in the Logan County Magistrate Court.¹ April and Cecil further advised the worker that they resided together as a couple.¹

WVDHHR reported in the Petition that their search for an appropriate relative placement resulted in their identification of a single relative willing to take Cecil T., II – Verna M. Ms. M. was found to be not physically able to care for the infant child because of her multiple health problems and her refusal to acknowledge to the interviewing worker the number of prescriptions she was required daily to ingest to address her physical problems.¹ This left no willing relatives to take the child.

Cecil T. II was placed in the legal custody of WVDHHR and physical custody of the Appellants Brett and Susan B. by the Court's Emergency Order of September 8, 2008.² At the Adjudication Hearing on December 9, 2008, April T., contrary to her original representation, admitted that she had no prescription for the Benzodiazepines which were found in her body and the body of her infant son following his birth. April had failed to attend any MDTs or hearings regarding the taking of her child, except for the

Preliminary Hearing of the WVDHHR Petition. She failed to appear for scheduled drug screens and pill counts between the time the child was taken and the Adjudicatory Hearing. Her parental rights to Cecil T. II were involuntarily terminated.³ This Order has not been appealed.

Cecil T., II was left in the legal custody of WVDHHR and the physical custody of Appellants by the Court's Order of December 9, 2008.³ The Court scheduled a hearing on November 24, 2008 to determine the status of Appellee Cecil Edward T. He had been awarded a PreAdjudicatory Out of Home Improvement Period in the November 24, 2008 Order by the Court, after advising the Court that he and April T. were no longer a couple.⁴ The Improvement Period was maintained despite his admission in the December 16, 2009 hearing⁵ that he and April T. had been found to be co-habiting for a short period during the Improvement Period. The conditions of the Improvement Period were based on Cecil Edward T.'s representations that the couple had separated.

The Court found at a hearing on February 9, 2009, that Cecil Edward T. had substantially complied with the terms of his Improvement Period despite his intervening Indictment in the Logan County Court for the drug charges previously noted by the Court. The Guardian ad Litem expressed concern over Appellee's continuing relationship with April T., his abnormal

drug screens submitted on days when his son was in his custody, and the lack of alternative care givers if Cecil Edward T. went to jail on the pending Indictment charges against him.

The Court awarded Cecil Edward T. custody of his son on February 9, 2009, over the expressed concerns for the child's safety by the Guardian ad Litem and the attorney for WVDHHR.⁵ The Order of February 9, 2009 acknowledges these concerns, but found Cecil Edward T. had substantially complied with the terms of the Improvement Period and the conditions which led to the filing of the Petition had been abated.⁶

Cecil T., age five months, had spent every day since he had been released from the hospital following his birth, in the physical custody and control of Appellants Brett B. and Susan B. when he was placed in the sole physical custody of his father on February 9, 2009. His father was unemployed, under Indictment and lacking any apparent support system that had been approved by WVDHHR or the Court.

On March 6, 2009, 26 days after he was awarded custody of his son, Cecil Edward T. was arrested in his home by Federal undercover agents on charges of being a Felon in Possession of a Firearm. Cecil Edward T. had been convicted on the felony charge of Breaking and Entering on August 4, 1992 in the Logan County Circuit Court. Cecil Edward T. was arrested by

the Federal undercover agents who purchased the guns from him. The purchase was made in Appellee's home. His son Cecil Edward T. II was present. The agents found several guns in the home, in addition to those Cecil sold to the agents.⁷

A CPS worker was called to the home of Verna M., paternal grandmother of Cecil Edward T., II on March 6, 2009. Ms. M. had previously been found an inappropriate placement for the child because of multiple medical problems. The worker found the infant Cecil T. in Verna M.'s care. The child was lying in a playpen in a urine soaked diaper. Ms. M. acknowledged she had no appropriate bedding for the child. The worker reported finding Verna M. in respiratory distress on March 6, 2009. Ms. M. refused the worker's offer to call 911 for assistance. Verna M. has since died.

The child's legal and physical custody were returned to WVDHHR by the Court's Emergency Order of March 9, 2009 and has remained there at all times since. His father has occasionally spoken with him by phone, but Cecil T. II has spent all of his 22 months of life, but for the three and one-half weeks he spent in his father's custody, in the security of the home provided by Appellants Brett and Susan B.⁹

WVDHHR filed an Amended Petition, entered by the Court's Order of July 13, 2009,⁹ in which they reasserted all of the points in the original Petition,¹ and they added the details of Cecil Edward T.'s arrest. They filed a Motion to Terminate the Parental Rights of Cecil Edward T. on August 26, 2009.

An Adjudication Hearing was initiated July 27, 2009. Counsel for Cecil Edward T. stipulated to the truth of Paragraphs 1, 2, 3, 4.1, 4.3, 4.4, 5, 6 and 7 of the Amended Petition.¹⁰ The Court found in its Adjudication Order that Cecil Edward T. had put his son at risk of serious injury by conducting what Cecil T. believed was an actual sale of guns in his home. Moreover, because of his incarceration resulting from the unlawful sale, Cecil Edward T. was unavailable to care for his son. The Court determined that the infant was a neglected child.¹¹

Appellant Brett and Susan B. filed a Motion to Intervene on August 22, 2009, prior to the Dispositional Hearing of the new Petition on October 28, 2009. They advised the Court that they were prepared to offer testimony regarding the child's development and changes in his behavior following his visits with his father during the initial Improvement Period. They asked to be considered as potential adoptive parents for Cecil T. II.

The Appellants' Motion to Intervene was granted by the Court at the Dispositional Hearing on October 27, 2009.¹² WVDHHR argued their Motion to Terminate the Parental Rights of Cecil Edward T. on the grounds that the conditions of neglect which gave rise to the Court's Emergency Order removing legal and physical custody of the child from his father could not be corrected in the near future due to the father's past history of criminal activity, the uncertain future status of his incarceration and his failure to protect the child and provide him with the care necessary to ensure his health and well-being during the period he was awarded custody. The Guardian ad Litem and Appellants Brett and Susan B. joined in the Motion of WVDHHR and argued that the past history of Cecil Edward T.'s criminal activity; his failure to maintain the goals of the Improvement Period awarded him, as evidenced by his subsequent arrest for sale and possession of guns being sold out of the home he shared with his child, while the child was present, and the uncertain status of his future incarceration,¹² there was no feasible way the Court could provide a reliable plan for permanency for the child.

Counsel for Cecil Edward T. argued that the only allegation presented against him was his current incarceration. He asserted that this Court's holding in In Re: Brian James D., 209 WV 537 (2001) prohibited termination where the sole allegation is the parent's incarceration.

The Court entered an oral Order at the conclusion of the Dispositional Hearing on October 27, 2010 denying the Motions by WVDHHR, the Guardian ad Litem and the Intervenors to terminate Appellee's parental rights and found that WVDHHR had failed to establish by clear and convincing evidence that there is no reasonable likelihood that the conditions causing the Petition to be filed could be corrected following the release of Cecil Edward T. from prison.

In the written Order entered on January 29, 2010¹³ the Court placed the physical custody of the child with the Appellants and assigned them as his guardians. The Order preserved WVDHHR legal custody and provided "...at the time of the Adult Respondent's release from prison, should he wish to make a record that he is fit to resume exercising his parents rights, the appropriate forum to make such a record is in the Family Court." No provisions were made for visitation other than the Court's finding that "...during the Adult Respondent's incarceration, visitation with the infant Respondent is not in the best interests of the Infant Respondent."¹²

The Infant child remains in the physical custody of the Appellants/Intervenors below.

Cecil Edward T.'s incarceration is ongoing. Its duration is unknown at this time.

CITATIONS

1. See Petition for Immediate Custody of Minor Children in Imminent Danger, Case No. 08-JA-55, Paragraph Four.
2. See Emergency Order, Case No., 08-JA-55, of September 8, 2008.
3. See Order of November 24, 2008, Case No. 08-JA-55.
4. See Order of December 16, 2008, Case No. 08-JA-55.
5. See Order of February 9, 2009, Case No. 08-JA-55.
6. See Petition, Exhibit One
7. See Petition Exhibit Two
8. It was reported that Cecil Edward T. left his son in the care of his mother Verna M., during this period despite the determination by WVDHHR that she was not an appropriate caregiver for the child.
9. See Petition Exhibit Four
10. July 27, 2009 Hearing
11. See Petition Exhibit Five
12. See Petition Exhibit Six
13. The delay between the hearing on October 27, 2009 and entry of an Order was the result of the Petitioners/Intervenors' Motion to Reconsider and the oral Order of the Court given as the Dispositional

Hearing and competing proposed Orders submitted by Counsel for the Respondent/Appellee and counsel for the Intervenors.)

14. Cecil Edward T.'s counsel advised the Court at a hearing on October 28, 2009, that his client had his client had been sentenced to a term of one-to-five years on his State Indictment, on October 7, 2009, to be served concurrently with his Federal sentence.

ASSIGNMENT OF ERRORS

1. The Court erred when it failed to provide a meaningful Permanency Plan for the child Cecil T. II.
2. The Court erred when it found that WVDHHR failed to show clear and convincing evidence there is no reasonable likelihood that the conditions that led to the finding of neglect could be corrected in the near future.
3. The Court erred when it failed to find that the best interest of the child Cecil T. II would be served by the termination of his biological father's parental rights.

STANDARD OF REVIEW

This Court explained in In Re: Emily, 208 W. Va. 325, 332-540 S.E.2d 542, 549 (2000) that “for appeals resulting from abuse and neglect proceedings, such as in the case sub-judice, we employ a compound standard of review. Conclusions of law are subject to a de nova review, while findings of fact are weighed against a clearly erroneous standard.” Also see In the Interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996)

“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 reviewed in its entirety.” Also see In Re: Asting and Breona R. 648 S.E.2d 346 (2007)

LEGAL ARGUMENT

I

**The Court Has Erred By Failing To
Provide a Meaningful Permanency
Plan For The Infant Cecil T. II**

A.

**The Courts Order Sets No
Guidelines/ Time Limits to
Determine the Child's Uncertain
Future Placement**

Cecil T. II has spent 21 of the 22 months of his life in the physical custody of Appellants Brett and Susan B. This placement has been repeatedly and unequivocally approved by the Child Protective Services of WVDHHR and by the lower Court. Appellants have cooperated with the directives of the Court and WVDHHR in every effort to make the child available to his father. Yet, after 22 months, the contact between the two has been limited to a few phone calls, meaningless to Cecil T. II, and three and one half weeks when the child was placed in his father's custody. The child was five months old. Cecil Edward T. left his son alone during this time with the child's paternal grandmother who WVDHHR had previously found to be an inappropriate caretaker because of her physical infirmities. The child was found, in her care, lying in a urine soaked diaper in a play pen, after Cecil Edward T. was arrested by Federal agents.

At the time Cecil Edward T. first appeared in response to the Petition filed below, he was under Indictment on two State drug charges. Within four weeks of the time the Court awarded him custody of his child, Cecil Edward T. was arrested on charges of being a Felon in Possession of Firearms. He had a previous Felony Breaking and Entering conviction from 1992 at the time he sold several firearms to the Federal agents from his home. His son Cecil T. II was present in his home when the sale and arrest took place.

The lower Court has refused to grant the Motions of the Guardian ad Litem, WVDHHR, and the Appellants to terminate the parental rights of Cecil Edward T., instead passing the decision on to a Family Court at some uncertain time in the future. The Family Court, unfortunately, will not be as familiar with abuse/neglect law and procedures as the Juvenile Court because these cases do not normally come within their jurisdiction.

The lower Court offers no reason to believe that the criminal patterns which have traced through the life of Cecil Edward T. will disappear after his eventual release from prison. When he is released, he will have little work history, no job, no home, no support system to assist him in caring for an infant son and no history of creating a responsible, secure environment for his child. If he was to be released next month, it would be months

before Cecil Edward T. would be able to create a safe environment for his son. The lower Court has failed in its duty to create a predictable, reliable plan for the future of Cecil T. II.

Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family matters, must be the health and welfare of the children. In Re: David M., 182 W.Va. 57 385 S.E.2d 912 (1989) Syl. Pt. 3, In Re: Katie S. 198 W.Va. 79, 479 S.E.2d 589 (1996); In Re: Tyler D., Alexander A., and Nevreh D. 213 W.Va. 149, 578 S.E.2d 343 (2003)

Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with regard to the rights of the child(ren). Syl. Pt. 7, In Re: Brian D., 194 W. Va. 623, 461 S.E.2d 129 (1995); Syl. Pt. 3, In Re: Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999); In Re: Charity H., 599 S.E.2d 631, 215 W. Va. 208 (W.Va. 04/16/2004)

Cecil Edward T. may have technically complied with the terms of the initial Improvement Period awarded to him by the Court while his son was in the protective custody of Appellants Brett and Susan B. but he was incapable of maintaining these goals as a full time father. It is worthy of note that when the Court made the determination to award custody of Cecil

T., II to his father at the conclusion of the Improvement Period it was over the concerns expressed by WVDHHR and the Guardian ad Litem. It was also done at a time when the father was under a two count drug related Indictment, of which he was eventually convicted and required to serve time.

What was the response of Cecil Edward T. to the Court's show of faith in returning his son to him? Within four weeks he was selling guns out of the house he shared with his son. How many chances does Cecil Edward T. receive to become a responsible parent? How long is Cecil T. II expected to wait, in limbo, not knowing if he will be taken again from his foster parents – the only parental figures he recognizes?

West Virginia law and the Rules of Procedure for Child Abuse and Neglect do not contemplate the shift of responsibility for permanency which would occur under the lower Court's Order.

These rules shall be liberally construed to achieve safe, stable, secure permanent homes for abused and/or neglected children and fairness to all litigants...These rules are designed to accomplish the following purposes:

(a) To provide fair, timely and efficient disposition of cases involving suspected child abuse or neglect.

(b) to provide judicial oversight of case planning.

(c) to ensure a coordinated decision making process.

(d) to reduce unnecessary delays in Court proceedings through strengthened Court case management. W. Va. Rules of Proc. Child Abuse & Neglect, Rule 1.

The rules clearly direct that a Permanency Hearing shall be conducted within 30 days following a Dispositional Hearing and “The purpose of the Permanency Hearing is to determine the permanency plan for the child...” Rules of Proc. Child Abuse and Neglect, Rule 36(a).

The Court has left Cecil T., with an uncertain future to be determined by a father who has failed to protect him in the past and a Court which lacks the Juvenile Court’s familiarity with abuse/neglect law and the facts of this case.

B.

The Best Interest Of The Child Is The Polar Star In All Abuse/Neglect Proceedings

This Court has over the last twenty years emphatically reiterated its position that in all custody matters, and especially in matters involving children who are the victims of abuse or neglect, the best interest of the child is the polar star for the Court in determining the child’s future. In Re: Jeffrey R. L. 190 W.Va. 24, 435 S.E.2d 162 (1993); In Re: Carlita B. 185 W. Va.

613, 408 S.E.2d 365 (1999); In Re: Samantha S. and Hope S., W.Va. Supreme Court Docket No. 33713 (2008)

The Court has found this rule to be particularly compelling in the case of children under three years of age. (See In Re: R J M, 164 W. Va. 496, 266 S. E. 2d 114 (1980); In Re: Darla B. 175 W.Va. 137, 331 S.E.2d 868 (1985). In the Matter of R.O. 180 W. Va. 190, 375 S.E.2d 823 (1988)

Despite the fundamental nature of parental rights, these rights are limited and can be forfeited if the parents are shown, by clear and convincing evidence to be unfit and unworthy of the guardianship of their children. (See In Re: Jeffrey R. L., supra; State v. Jessica M. 191 W. Va. 302, 445 S.E.2d 254 (1994)) Appellee Cecil Edward T. failed to protect his son from his ongoing criminal activity while the child was in his custody March 6, 2009. This failure occurred following months of intensive supervision and services by WVDHHR during his Improvement Period. Cecil Edward T. has exhibited no signs of ability to protect his infant son from the stress that would result from future changes of placement.

C.

**The Court Has Sacrificed the Permanency
Of A Home For Cecil T. II For The
Unrealistic Hope That Cecil Edward T.
Will Improve His Parenting Skills.**

Cecil Edward T. was afforded a full array of social and personal services during his Improvement Period following the first taking of his child. There is no evidence of any request or need of Cecil Edward T. during this period that was not addressed. When the Court found that he had substantially complied with the terms of the Improvement Period, the Guardian ad Litem and the WVDHHR expressed concern over the Court's decision to return the child to his father's custody.

The law provides that there is a reasonable end to a neglectful parent's rightful expectation for continuing services to improve parenting skills.

The precedent of this Court supports the proposition that children are entitled to permanency to the greatest degree possible. See *In re Jonathan G.*, 198 W.Va. 716, 482 S.E.2d 893 (1996); *State ex rel. Amy M. v. Kaufman*, 196 W.Va. 251, 470 S.E.2d 205 (1996); *In re Brian D.*, 194 W.Va. 623, 461 S.E.2d 129 (1995); *In re Lindsey C.*, 196 W.Va. 395, 473 S.E.2d 110 (1995) (Workman, J., dissenting). Consistent with that goal, this Court explained as follows in pertinent part of syllabus point one of *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991); "Child abuse and neglect cases must be recognized as being among the

highest priority for the court's attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." In re: Isaiah, A. W.Va. Sup. Court, Docket No. 35031 (2010)

...courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened....' Syl. Pt. 1, In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 7, In re: Carlita B., 185 W.Va. 613, 616, 408 S.E.2d 365. Indeed, termination of parental rights may be employed without intervening alternatives where there is no reasonable likelihood of correction of the conditions constituting abuse and neglect. Syllabus point one of In re Jeffrey R..L., 190 W.Va. 24, 435 S.E.2d 162 (1993), explains this point succinctly, as follows:

Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, W.Va. Code, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under W. Va. Code, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syl. Pt. 2, In re R.J.M., 164 W.Va. 496, 266 S.E.2d 114 (1980) Syl. Pt. 4, In re Jonathan

P., 182 W.Va. 302, 387 S.E.2d 537
(1989) In re: Isaiah, A. supra.

The case of In Re: Isaiah A., the Court was faced with a similar query that as in the case now before the Court. How many last chances to protect an infant child should be afforded to a neglectful parent. This Court answered by setting deadlines.

“With regard to the time frame in which final disposition of abuse and neglect cases should be made, this Court has recognized that “[a]lthough it is sometimes a difficult task, the trial court must accept the fact that the statutory limits on improvement periods (as well as our case law limiting the right to improvement periods) dictate that there comes a time for decision, because a child deserves resolution and permanency in his or her life...” In re Amy M., 196 W.Va. at 260, 470 S.E.2d at 214. Indeed, improvement periods are “regulated, both in their allowance and in their duration, by the West Virginia Legislature, which has assumed the responsibility of implementing guidelines for child abuse and neglect proceedings generally.” In re Emily, 208 W.Va. at 334-35, 540 S.E.2d at 551-52, In re: Isaiah, Supra.

Had the Court seen fit to award Cecil Edward T. a Post Adjudicatory Improvement Period following his most recent Dispositional Order of

January 29, 2010, it would have now exceeded the six-month limit for post adjudicatory improvement periods set by W.Va. Code §49-6-12 (a)(1996). The Court did not award a post-adjudicatory improvement period. Instead it has left the child with an unpredictable future with no guidelines. There is no evidence that sometime during this unchartered voyage, the ability of Cecil T.'s father to protect and responsibly parent the child will improve to the point where they can be safely reunited. The Court's unrealistic hope is at the expense of the sense of permanency to which Cecil T. II is entitled.

II

**THE COURT ERRED WHEN IT FOUND
THAT WVDHHR FAILED TO SHOW CLEAR
AND CONVINCING EVIDENCE THAT THERE
IS NO REASONABLE LIKELIHOOD THE
CONDITIONS OF ABUSE AND NEGLECT
CAN BE CORRECTED IN THE NEAR FUTURE**

A.

**There Is Clear And Convincing Evidence
That The Conditions Of Neglect Cannot
Be Corrected In The Near Future**

After termination of the parental rights of the child's mother in September 2008, Cecil Edward T. was awarded an Improvement Period with services under the supervision of WVDHHR. Four months later, despite serious concerns expressed by WVDHHR and the child's Guardian ad

Item, the Court determined that Cecil Edward T. had substantially complied with the terms of his Improvement Period and Ordered the return of legal and physical custody of the child to his father on February 6, 2009.

Twenty-five days later, Cecil T. was arrested when he sold four firearms, including a semi-automatic rifle, from the home he reported to share with his infant son. Having previously been convicted of Felony Breaking and Entering by the Logan County Circuit Court on August 4, 1992, he was charged with being a Felon in Possession of a Firearm. He pled guilty to the charge and was sentenced to incarceration of 12 months and one day.

While the Circuit and Federal proceedings progressed, Cecil Edward T. was indicted by the Logan County Grand Jury on drug related charges which allegedly occurred before the birth of the infant Cecil Tabor. He was subsequently convicted and is being allowed to serve his one to five year State sentence concurrently with his Federal sentence.

Despite 18 months of efforts by the WVDHHR to rehabilitate him and to support him in creating a safe home environment for his child, Cecil Edward T. showed no evidence of present ability to abandon his past life style and become a responsible, caring parent. Instead he showed a

continuing pattern of criminal behavior. His behavior cut short to three and one-half weeks his custody of his son..

Cecil Edward T.'s criminal history prior to the State taking emergency custody of his child in 2008, his continuing criminal activity after the Court awarded him legal and physical custody of his son, which resulted in his incarceration of at least one year and one day, and his failure to maintain the goals of his Improvement Period, provided the Court with clear and convincing evidence that Cecil Edward T. is not capable of protecting the health and well-being of his son. It shows he cannot be rehabilitated by WVDHHR in the near future into a responsible parent who can ensure his child's safety and protection in his custody. His criminal, irresponsible behavior is not an isolated incident. It is a pattern which he has chosen.

At such time as Cecil Edward T. is released from prison, he must find regular employment, locate and create a home which provides a safe and healthy environment for his son, employ caretaker assistance for the periods he is at work and generally provide evidence that he will not continue his past pattern of criminal and drug related activity before he can be trusted to protect his child from further neglect. Appellants contend this confluence could not occur in less than one year. By this time the child Cecil Tabor

would have spent only three weeks of his three year life in the custody of his father.

This Court has previously found that although a parent may perform all of the tasks of a family case plan in the completion of an Improvement Plan, their rights may be terminated where their attitudes and beliefs have not been changed during the Improvement Period. (In Re: Jonathan Michael D., 194 W. Va. 20, 459 S.E.2d 131 (1995))

While this court has recognized that a lower court's discretion includes considerable flexibility in fashioning the appropriate relief in these cases, this court has also declared "...there comes a time for decision." Amy M. v. Kaufman, 196 W.Va. 251, 260, 470 S.E.2d 205, 214 (1996) In re: Isaiah, supra.

The Court has provided no reasoning to justify hope that Cecil Edward T. will improve his parenting skills and no justification for further delay in releasing this child for an adoption which would ensure his future security. The WVDHHR, the Guardian ad Litem and the Appellants have cited substantial evidence that Cecil Edward T.'s parental performance will not improve and he will not break from the criminal patterns of activity in his life.

B.

**There Has Been No Bonding
Between The Child And His Father**

The home to which Cecil Edward T. brought his infant son when the Court awarded him legal and physical custody of the child, was in the immediate vicinity of the home of the child's paternal grandmother, Verna M. It could reasonably be assumed that Ms. M. had assisted him with the care of the child, despite the Court's finding that she was not an appropriate placement for the child. When WVDHHR workers visited the grandmother's home on the day of her son's arrest on Federal charges, they found the five-month-old infant, Cecil T. II lying in a playpen in a urine soaked diaper. Ms. M. had no appropriate bedding for the child. When the worker arrived at the home, they found the grandmother in respiratory distress. She acknowledged she was in poor health but refused their offer to call 911. Ms. M., the only apparent support system for Cecil Edward T., died on or about October 29, 2009.

The entirety of Cecil Tabor, Jr.'s life, but for the three weeks he was in the custody of his father, has been spent in the custody of the Appellants Brett and Susan B. WVDHHR reports he is doing well there and support their request to be considered as potential adoptive parents of the child. Arguably they could be considered the psychological parents of this 22

month old child. (See In Re: Clifford K., 217 W.Va. 625, 619 S.E.2d 138 (2005); In the Matter of the Petition of Cary L. B. (W.Va. Docket No. 34218 Ft. 8 06/22/2009) It can also be argued, and WVDHHR reports, that Cecil T., II, has bonded with the Appellants while, due to the continuing criminal activity of Cecil Edward T., there has been no opportunity for bonding between the child and his biological father.

III.

A.

The Best Interests Of The Child Cecil T. II Would Be Served By Termination Of His Biological Father's Parental Rights

The child Cecil T., II has been put on hold for twenty-two months, while the Court has unsuccessfully attempted to rehabilitate his father. Now it proposes to maintain this uncertainty for an unpredictable period of time until the father is released from jail and initiates what will undoubtedly be protracted litigation in Family Court. The child and his foster parents, who have provided him with the only consistent love and support he has known deserve better.

We find no error in the lower court's factual findings. However, the lower

court's application of law to the incontrovertible facts is erroneous, and its ultimate conclusion to allow Isaiah to remain in temporary foster care placement without termination of parental rights is an abuse of discretion. The determinative standard, as provided and defined by statute and quoted above, is whether there is "no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future." W.Va. Code §49-6-5(a)(6). The lower court's utilization of a standard such as whether there is a "glimmer of hope" that the mother can make a diligent effort to remedy the situation is inconsistent with the criteria expressly provided by statute. In re: Isaiah A., supra.

The lower Court found at the Dispositional Hearing below that WVDHHR failed to provide grounds for termination, in that this Court's holding in In re: Emily & Amos B., 208 W.Va. 325, 540 S.E.2d 542 (2000) precluded an Order of Termination based solely on a parent incarceration. The Court ignored, however, this Court's additional holding that case. The trier of fact in abuse/neglect cases was to consider all pertinent information regarding the case that was available. The Court below was not required to determine whether termination was justified solely on the basis of the father's incarceration. It was empowered to consider the well established

life style of Cecil Edward T. which led to his incarcerations; it could have considered the total lack of parental responsibility shown when the father sold guns from his home knowing he risked additional necessary, non relative placement of his son by even being in the same location as the guns he sold to the agents because of his prior felony convictions.

Cecil Edward T. had an opportunity to parent his child with a full array of services provided by WVDHHR. He chose to ignore his responsibilities and pursue the pattern of criminal activity in his life. It is his son's turn now.

This Court has consistently held that abuse and neglect cases must be given the highest priority to ensure their prompt resolution in order to provide permanency for the children involved therein. See Syllabus Point 1, *In re Carlita B.*, supra. It is a child's natural right to have proper care, adequate nutrition, shelter, and nurturance; and to not be neglected, abused, or faced to live in a substandard, scarring environment. But in too many cases in this Court, we see children who are denied permanency by being left in legal limbo for long periods of time during their formative years. This phenomenon not only causes concern this may be the top of the iceberg, but engenders the question as to whether we must begin to reexamine child protective services in a more systemic

manner. In the matter of B. B., K.B.,
T.B., P.B., J.B., B.B., and T.F. W.Va.
Supreme Court, Docket Number
34599 (2009) Workman, J.,
Concurring Opinion.

CONCLUSION

Wherefore, Appellants pray that this Court reverse the Order of the Logan County Circuit Court entered on January 29, 2010, and Order that the Court below to grant the Joint Motions of WVDHHR, the Guardian ad Litem and the Appellants to terminate the parental rights of Cecil Edward T. to his son Cecil T. II thus freeing the child for permanency through adoption.

**PETITIONERS
BRETT .
SUSAN B.**

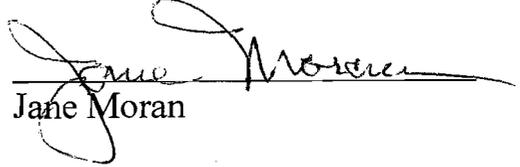
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CERTIFICATE BY ATTORNEY

I, Jane Moran, counsel for Appellants Brett B. and Susan B., certified that the facts alleged in this Brief are presented accurately to the best of my ability.

/s/Jane Moran



Jane Moran

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2010, the required copies of the foregoing Brief of Appellant were filed with the Clerk of The West Virginia Supreme Court of Appeal. I hereby certify that a true and accurate copy of the Brief of Appellant was mailed, via first class postage pre-paid, this 5th day of August 2010.

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