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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

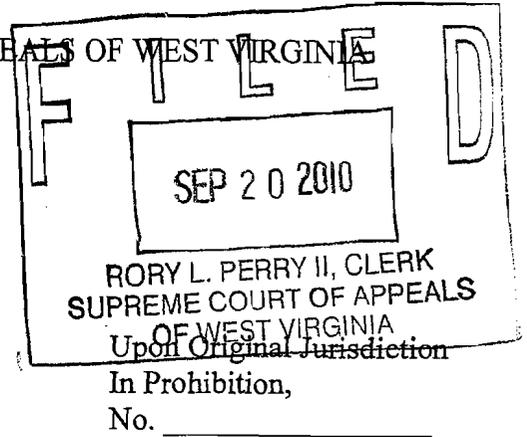
KRISTOPHER O and
CHRISTINA O

Petitioners,

v.

THE HONORABLE JAMES P. MAZZONE,
Judge of the 1st Judicial Circuit, and
WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,

Respondents.



VERIFIED PETITION FOR WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA
Civil Action No. 08-CJA-31

KRISTOPHER AND
CHRISTINA O

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KRISTOPHER O , and
CHRISTINA O

Petitioners,

v.

Upon Original Jurisdiction
In Prohibition,
No. _____

THE HONORABLE JAMES P. MAZZONE,
Judge of the 1st Judicial Circuit, and
WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION

NOW COME the Petitioners, Kristopher and Christina O , by and through counsel, Teresa C. Toriseva, Esquire, pursuant to the provisions of Article VIII, Section Three of the West Virginia Constitution, W. Va. Code § 53-1-1, *et seq.*, and Rule 14(a) of the Rules of Appellate Procedure for the Supreme Court of Appeals of West Virginia, and respectfully request that this Honorable Court issue an order directing Respondents to show cause (1) why the Circuit Court's Order of March 29, 2010, granting legal and physical custody of infant Destiny D. to her paternal aunt, should not be voided by granting this Verified Petition for a Writ of Prohibition and (2) why the Circuit Court's Order of May 18, 2010, denying Petitioners' Motion to Intervene in the matter of infant Destiny D., should not be voided by granting this Verified Petition for a Writ of Prohibition. In support hereof, Petitioners state and aver as follows:

MEMORANDUM OF LAW CITING RELEVANT AUTHORITIES

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 21, 2008, the infant Destiny D. was born five weeks premature to a drug-abusing mother. On April 28, 2008, the West Virginia Department of Health and Human Resources ("DHHR") filed a Petition for Relief from Parental Abuse and Neglect with the Circuit Court of Ohio County, West Virginia (the "Circuit Court"). Upon being provided legal custody of Destiny D. by the Circuit Court, the DHHR placed the infant in the foster care of Kristopher and Christina O Petitioners, following her discharge from the hospital on May 6, 2008. Petitioners were advised by the DHHR that Destiny D. was born testing positive for cocaine. Destiny D. remained in the continuous foster care of Petitioners at all times prior to the Circuit Court's Order of March 29, 2010, as discussed below, for a period in excess of twenty two (22) months. (See Exhibit A, May 18 Order of the Circuit Court)

While Destiny D. was in the foster care of Petitioners, the DHHR pursued the termination of the parental rights of her biological mother and father. On November 24, 2008, the Circuit Court held a dispositional hearing terminating the parental rights of the mother of Destiny D. (Jennifer D.) The Circuit Court issued an order terminating the parental rights of Jennifer D. on November 5, 2009. On December 29, 2009, the Circuit Court held a dispositional hearing terminating the parental rights of the father of Destiny D. (Larry W.). The Circuit Court issued an order terminating the parental rights of Larry W. on March 24, 2010. (See Exhibit A, May 18 Order of the Circuit Court)

Around the time of November 24, 2008 hearing on the parental rights of Jennifer D., Jason Prettyman, Social Services Supervisor for the DHHR and coordinator for the Multi-

Disciplinary Treatment Team assigned to the case of Destiny D., advised Petitioners that the parental rights of Destiny D.'s parents were in the process of being terminated. Mr. Prettyman orally asked Petitioners whether they would be interested in the adoption of Destiny D. if such parental termination was achieved, and Petitioners responded in the affirmative by saying "Absolutely." Throughout the remainder of time in which Destiny D. was in their foster care, Petitioners orally conveyed their intent to adopt Destiny D. to case workers at the DHHR on multiple occasions, both before and after the termination of parental rights for Destiny D.'s biological parents. In particular, Christina O reaffirmed her desire to adopt Destiny D. to Terry Beatty, Region One Home Finder for the DHHR, during a home study conducted to ensure the suitability of Petitioners' home for continued foster care generally. Petitioners also advised the Guardian *ad Litem* ("GAL") for Destiny D. in January 2010 of their intention to adopt the infant. In addition, between approximately November 2009 and March 29, 2010, Petitioners on multiple occasions requested that the DHHR conduct a bonding assessment to establish the bond that Destiny D. had formed with their family. Despite these several and consistent expressions of Petitioners' intent to adopt Destiny D., at no time during their foster care of Destiny D. did anyone at the DHHR or otherwise advise Petitioners of any requirement for them to submit a written application to convey their intent to adopt Destiny D. upon the termination of such parental rights. Petitioners at all times believed in good faith that they had made their intention to adopt Destiny D. known to the DHHR. (See Exhibit C, Affidavit of Christina Osecky)

Commencing in April 2009, when Destiny D. was one-year old, the DHHR arranged for Destiny D.'s biological father, Larry W., and her paternal aunt, Kathy M., to have

weekly 90-minute supervised visits with Destiny D. Prior to that time, Kathy M. had not had any contact with Destiny D. These visits continued until Larry W.'s paternal rights were terminated by the Circuit Court on December 29, 2009. Upon information and belief, Kathy M. was not present during all of the supervised visits held between April and December, 2009. Following the termination of Larry W.'s parental rights, the DHHR arranged for Kathy M. to have supervised visits with Destiny D. for two (2) hours per week. These weekly supervised visits continued through March, 2010. (See Exhibit C, Affidavit of Christina O)

On March 25, 2010, Petitioners were notified by the DHHR that the DHHR would take Destiny D. out of their custody and permanently place her into the custody of Kathy M. on March 29, 2010. Petitioners were not notified by the DHHR or any other interested party that a permanency hearing for Destiny D. would be held in the Circuit Court on March 29, 2010. Petitioners only learned of this permanency hearing when their counsel, Teresa C. Toriseva, contacted the secretary of the Circuit Court Judge, the Honorable James P. Mazzone, to request a hearing regarding Petitioners' Motion to Intervene in the ongoing proceedings. Petitioners, through their counsel, attempted to be heard at what they subsequently learned to be the permanency hearing by filing a Motion to Intervene with the Circuit Court on March 26, 2010. (See Exhibit B, Affidavit of Teresa C. Toriseva)

On March 29, 2010, Circuit Court Judge, the Honorable James P. Mazzone, held a permanency hearing in the matter of Destiny D., the abuse and neglect case 08-CJA-31. Petitioners were not provided an opportunity to be heard at this hearing in order to request that their Motion to Intervene in the matter, pursuant to Rule 24 of the West Virginia Rules of Civil Procedure, be granted. Specifically, Petitioners and their counsel entered the

Courtroom for the hearing and were asked to leave after being advised that the hearing was closed. Upon information and belief, the Motion to Intervene was discussed on the record by Judge Mazzone, the GAL, and the Ohio County prosecuting attorney. At the conclusion of this hearing, which lasted approximately fifteen (15) minutes, the Circuit Court ordered that Destiny D. be immediately placed in the physical and legal custody of Kathy M. (the "March 29 Order"). Petitioners were afforded no visitation rights with respect to Destiny D, notwithstanding their immediate request. (See Exhibit B, Affidavit of Teresa C. Toriseva)

On April 27, 2010, the Circuit Court held a hearing to consider Petitioners' Motion to Intervene, and on May 18, 2010, issued an order denying said Motion (the "May 18 Order"). In issuing the May 18 Order, the Circuit Court made the following findings:

1. Petitioners, as former foster parents, lacked standing to intervene in the matter;
2. Intervention by the Petitioners, at such time and during such stage of the proceedings, would be contrary to the best interests of Destiny D.;
3. Petitioners had failed to submit a written application for adoption of a foster child to the DHHR within thirty (30) days following the termination of the father's parental rights on December 29, 2009, pursuant to W. Va. Code § 49-2-14(c); and
4. The DHHR is required to pursue, and West Virginia law favors, placement with blood relatives for abused and neglected children.

See Exhibit A. As a result of the May 18 Order, Destiny D. has remained in the custody of her paternal aunt, Kathy M., and Petitioners have not been afforded the opportunity to see or visit the child.

II. JURISDICTION AND STANDARD OF REVIEW

This Verified Petition for Writ of Prohibition is filed pursuant to Article VIII, Section Three of the West Virginia Constitution, granting this Honorable Court original jurisdiction in prohibition, and pursuant to W. Va. Code § 53-1-1 and Rule 14(a) of the West Virginia Rules of Appellate Procedure.

“The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” State ex rel. Lynn v. Eddy, 152 W.Va. 345, 356, 163 S.E.2d 472 (1968); W. Va. Code § 53-1-1. “The writ is no longer a matter of sound discretion, but a manner of right; it lies in all proper cases whether there is other remedy or not.” Norfolk & W. Ry. V. Pinnacle Coal Co., 44 W. Va. 574; 30 S.E. 196 (1898).

“Traditionally, the writ of prohibition speaks purely to jurisdictional matters.” State ex rel. Williams v. Narick, 164 W. Va. 632, 635, 264 S.E.2d 851 (1980). “In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines

that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

“Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate. . . .” Syl. pt. 2, Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973).

A Writ of Prohibition is the appropriate and only available remedy for Petitioners for the following reasons:

1. The Circuit Court exceeded the bounds of its legitimate authority in issuing the March 29 Order and the May 18 Order.
2. Petitioners have no other adequate means, such as direct appeal, to obtain the relief desired; and
3. Petitioners will be damaged or prejudiced in a way that is not correctable on appeal.

III. ARGUMENT

A WRIT OF PROHIBITION SHOULD BE GRANTED TO REQUIRE RESPONDENTS TO SHOW CAUSE WHY THE MARCH 29 ORDER AND THE MAY 18 ORDER SHOULD NOT BE VOIDED

1. **The Circuit Court exceeded the bounds of its legitimate authority in issuing the March 29 Order, prior to which Petitioners (foster parents) were not afforded notice and the opportunity to be heard.**

The March 29 Order to remove Destiny D. from Petitioners’ foster care, prior to which Petitioners were provided no notice of any permanency hearing and during which

Petitioners were afforded no opportunity to be heard, is clear-cut, legal error that is plainly in contravention of a clear statutory mandate. W. Va. Code § 49-6-5a(c) provides that, in abuse and neglect cases when the court has determined that reasonable efforts to preserve a family are not required, “[a]ny foster parent, preadoptive parent or relative providing care for the child shall be given notice of and the opportunity to be heard at the permanency hearing provided in this section.” Prior to conducting the permanency hearing for Destiny D. on March 29, 2010, the Circuit Court had terminated the parental rights of both biological parents of Destiny D, and the DHHR had been pursuing placement for the infant outside of her immediate family. These actions demonstrate that both the Circuit Court and the DHHR had determined that reasonable efforts to preserve Destiny D.’s immediate family were no longer required. Once this determination had been made, the requirements of W. Va. Code § 49-6-5a(c) were triggered, and Petitioners had a right to be notified of said permanency hearing and to be afforded an opportunity to be heard therein. The failure of the Circuit Court to provide such opportunity to Petitioners represents a clear violation of W. Va. Code § 49-6-5a(c).

Furthermore, by ordering the immediate removal of Destiny D. from Petitioners’ foster care without affording Petitioners an opportunity to be heard or with any visitation rights (transitional or otherwise), the March 29 Order failed to uphold well-established principles of jurisprudence in cases of abuse and neglect. This Honorable Court “has repeatedly held that in a contest involving the custody of an infant where there is no biological parent involved, the best interests of the child are the polar star by which the discretion of the court will be guided.” Syl. Pt. 1, State ex rel. Treadway v. McCoy, 189 W.

Va. 210, 429 S.E.2d 492 (1993). In State ex rel. Kutil v. Blake, 223 W.Va. 711, 720-21, 679 S.E.2d 310 (W. Va. 2009), this Honorable Court has further held:

The length of time each of the foster children was in the home no doubt would affect the strength of the emotional bond that had developed between each child and Petitioners as well as their sense of comfort and security with their home environment. The only home [the foster child] had ever known in the eleven months of her life had been Petitioners' foster home. Surely bonding had occurred between the infant and Petitioners to a much larger extent than with children who had lived in the household for a much shorter period of time. We have been clear in pointing out that "[t]he best interests of a child are served by preserving important relationships in that child's life." Syl. pt. 2, State ex rel. Treadway v. McCoy, 189 W.Va. 210, 429 S.E.2d 492 (1993). This concern extends to the relationship a child in foster care has with foster parents. As we held in syllabus point eleven of In re Jonathan G., 198 W.Va. 716, 482 S.E.2d 893 (1996), "[a] child has a right to continued association with individuals with whom he has formed a close emotional bond, including foster parents, provided that a determination is made that such continued contact is in the best interests of the child." Cf. In re Clifford K., 217 W.Va. 625, 619 S.E.2d 138 (2005) (recognizing that a foster parent may attain the status of psychological parent when the relationship is not temporary in duration and exists with the consent and encouragement of a child's legal parent or guardian).

As explained by Chief Justice Davis, writing for the majority, this Court has held that:

... a psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.

In re Clifford K., 217 W.Va. at 644. At the time of the removal of Destiny D. from their foster care, the Petitioners had developed a strong emotional bond with Destiny D. while caring for her since she was fifteen (15) days old, or for a period in excess of twenty-two (22) months. This was the only family Destiny D. had ever known, and they were clearly her psychological parents as such concept has been expounded by this Honorable Court. Yet they were afforded no opportunity by the Circuit Court to appear and participate in a permanency hearing ostensibly being conducted to determine the best interests of Destiny D.

with regard to her permanent placement. Consequently, Destiny D. was placed with a relative with whom she had had minimal contact prior to such hearing. Petitioners were also prevented from seeking any visitation rights for Destiny D., preventing the child from maintaining the only close associations that she had formed during her life.

In denying Petitioners an opportunity to be heard at the permanency hearing for Destiny D., the Circuit Court has exceeded its legitimate bounds of authority, and Petitioners respectfully request that this Honorable Court issue a rule to show cause why the March 29 Order should not be voided, and, ultimately, a writ of prohibition.

2. The Circuit Court exceeded the bounds of its legitimate authority in issuing the May 18 Order, which denied Petitioners (foster parents) the right to intervene.

The May 18 Order denying Petitioners' Motion to Intervene in the matter of Destiny D. is predicated upon findings that are clearly erroneous as a matter of law.

a. Petitioners had standing as current foster parents at the time of the filing of their Motion to Intervene.

The Circuit Court, citing In re Michael Ray T., 206 W.Va. 434, 525 S.E.2d 315 (1999), held, in part, that Petitioners, as former foster parents, lacked standing to intervene in the matter. Yet the May 18 Order includes no mention of the fact that at the time Petitioners initially requested to have their Motion to Intervene heard on March 26, 2010, they were the current—not former—foster parents of Destiny D. Indeed, the only reason that Petitioners became former foster parents at all was the March 29 Order itself, which removed Destiny D. from their foster care without providing Petitioners an opportunity to be heard in connection therewith. This represents a misapplication of the holding of In re Michael Ray T., in which this Honorable Court addressed the question of whether former

foster parents were entitled to intervene in abuse and neglect proceedings and decided in the negative as follows:

Reviewing the circuit court's decision, we note, at the outset, that the Williamses were not actually the foster parents of Michael, Scottie, and Tonya at the time they sought intervention. Rather, they stood in the position of the children's former foster parents. Under a strict application of our holding in Jonathan G., which dealt exclusively with the child's then current foster parents, the Williamses are not entitled to intervene in the children's abuse and neglect proceedings. See Syl. pt. 1, 198 W. Va. 716, 482 S.E.2d 893.

In applying the holding of this case to the matter at hand, the Circuit Court has in effect penalized Petitioners for being former foster parents when in fact they were made so against their will only by virtue of a permanency hearing by the Circuit Court in which they were not permitted to intervene. This situation bears little resemblance to the facts of In re Michael Ray T., where the foster children in question were removed by the DHHR prior to any permanency hearing on the basis of an alleged breach of confidentiality by the foster parents.

b. In considering the best interests of Destiny D., the Court incorrectly deemed Petitioners to be former foster parents.

Relying on its misapplication of the holding of In re Michael Ray T., the Circuit Court further found that intervention by the Petitioners, at such time and during such stage of the proceedings, would be contrary to the best interests of Destiny D. For reasons stated above, such a finding was clearly in error to the extent that it failed to consider that Petitioners were in fact current foster parents at the time they initially sought to intervene in the March 29 permanency hearing. The rationale for denying intervenor status to former foster parents was also explained by Chief Justice Davis, writing for the Court, in In re Michael Ray T. as follows:

Accordingly, in the interest of expediting the resolution and conclusion of abuse and neglect proceedings, we are hesitant to expand the realm of intervenors to individuals who are no longer guardians or custodians of the children at issue for fear that “unjustified procedural delays” undoubtedly would attend the ever-increasing roster of interested participants. See Syl. pt. 3, in part, Jonathan G., 198 W. Va. 716, 482 S.E.2d 893; Syl. pt. 1, in part, Carlita B., 185 W. Va. 613, 408 S.E.2d 365.

The facts of this case, however, do not support the treatment of Petitioners as former foster parents. Rather, Petitioners were the physical custodians of Destiny D. until she was removed from their foster care pursuant to the permanency proceedings on March 29 in which they were denied an opportunity to be heard by the Circuit Court. As such, Petitioners were in effect penalized for the Circuit Court’s error.

c. Petitioners’ intention to adopt Destiny D. was communicated to, and understood by, the DHHR on multiple occasions prior to and after the termination of parental rights.

The Circuit Court also held in the May 18 Order that Petitioners’ failure to file a “written application” for adoption of a foster child to the DHHR within thirty (30) days following the termination of the parental rights of Destiny D.’s father on December 29, 2009 constituted grounds for a termination of Petitioners’ foster care pursuant to W. Va. Code § 49-2-14(c). Such a finding relies on a narrow reading of W. Va. Code § 49-2-14(c) that does not comport with the underlying facts of this matter and that is neither in accordance with the spirit nor the intent of Chapter 49, Article 2 of the West Virginia Code.

In the matter at hand, from the onset of Petitioners’ foster care of Destiny D., they advised the DHHR of their hope and intent to adopt Destiny D. upon the termination of parental rights. Furthermore, within thirty days of the termination of the father’s parental rights on December 29, 2009, and indeed, prior to such date, Petitioners specifically conveyed their intent to adopt Destiny D. to various case workers at the DHHR and to the GAL. Yet at no time were Petitioners advised by the DHHR of any deadline for the filing of

a written application concerning the adoption of Destiny D. Instead, Petitioners in good faith believed that they had made their intention to adopt Destiny D. known to the DHHR.

The decision of the Circuit Court to find grounds for termination of Petitioners' foster care arrangement under W. Va. Code § 49-2-14(c) was in clear error in this matter. Section 49-2-14(c) provides, in part, as follows:

When a child has been residing in a foster home for a period in excess of six consecutive months in total and for a period in excess of thirty days after the parental rights of the child's biological parents have been terminated and the foster parents have not made an application to the department to establish an intent to adopt the child within thirty days of parental rights being terminated, the state department may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed . . .

At all times during their foster care of Destiny D. following the termination of the father's parental rights, Petitioners in good faith believed that they had established their intent to adopt Destiny D. with the DHHR. Yet the Circuit Court found that grounds for termination of their foster care had been met solely because they had not "filed a written application for adoption." Section 49-2-14(c) does not provide for, nor were Petitioners advised of, a requirement for a "written" application. Moreover, such a hyper-technical reading of the statute in question runs counter to the spirit and intent of the Legislature in setting forth such guidelines for foster care. In State ex rel. Treadway v. McCoy, this Honorable Court characterized the spirit and intent of these laws as follows:

The Legislature has expressly encouraged foster parents who develop emotional ties to the children for whom they care to adopt those children. W.Va. Code 49-2-17 (1978). This section subsidizes adoptions by such foster parents:

Whenever significant emotional ties have been established between a child and his foster parents, and the foster parents seek to adopt the child, the child shall be certified as eligible for subsidy conditioned upon his adoption under applicable adoption procedures by the parents.

The goal is to encourage foster parents not to treat the children placed in their care as an income producing commodity, but rather to love their foster children as their own. The Legislature wants foster parents to know that if they become attached to a child in their care, the bureaucrats will not come and take the child away. Presumptively, if a child is in a loving and caring foster home, the child will be harmed by being removed from that home and placed in a strange, unknown home. The state, therefore, has implemented a policy encouraging foster parents to adopt their foster children.

State ex rel. Treadway, 189 W. Va. at 213. The decision of the Circuit Court to terminate Petitioners' foster care arrangement on such a hyper-technical finding neither reflects nor advances the spirit and intent of the Legislature in this regard. In the matter at hand, the foster parents did become attached to the child in their care, and vice versa, yet because of the Circuit Court's erroneous reading of the statute in question and the intent of the Legislature with respect thereto, bureaucrats did come to Petitioners' home and remove their foster child to place her in a strange home unknown to her.

- d. **The only statutory preferences with regard to adoption of children in the legal custody of the State involve grandparents and reunification of siblings; no such statutory preference exists for blood relatives generally.**

The Circuit Court also held in the May 18 Order that the DHHR is required to pursue, and West Virginia law favors, placement with a blood relative for abused and neglected children. This finding is erroneous as a matter of law. In cases where the parental rights of the biological parents have been terminated or relinquished, West Virginia law does clearly require the DHHR to pursue placement of a child with any known grandparent or grandparents. See W. Va. Code § 49-3-1(a)(3); see also Syl. Pt. 4, Napoleon S. v. Walker, 217 W. Va. 254, 617 S.E.2d 801 (2005). There is also an express statutory preference for placements that reunite siblings for either foster care or adoption purposes. See W. Va. Code § 49-2-14 (e)-(f). These statutory preferences do not extend, however, to

blood relatives generally. This Honorable Court addressed this very question in State ex rel.

Kutil v. Blake as follows:

The only express legislative preferences we have found with particular regard to adoption of children in the legal custody of the State involve grandparents and reunification of siblings. Specifically, West Virginia Code § 49-3-1(a)(3) establishes that a grandparent or grandparents found to be both suitable and willing to adopt a child in DHHR's custody be given priority over other prospective adoptive parents, and West Virginia Code § 49-2-14(e) & (f) expresses the preference that DHHR reunite siblings for either foster care or adoption purposes if such arrangement is available and is determined to be in the best interests of the children. Neither of these preferences are automatic, however, as they turn on the best interests of the child who is the candidate for adoption.

State ex rel Kutil, 223 W.Va. at 722 n.20. In the matter at hand, Destiny D. was neither placed with a grandparent nor with a family wherein she could be reunited with any siblings.

The Circuit Court did not include any statutory or case law support for its finding that West Virginia law provides preference for placement with blood relatives. Such a finding may be predicated on the language of W. Va. Code § 49-6-5a(b), which provides:

In cases where the department has demonstrated a compelling reason for determining it would not be in the best interests of the child to return home, the court shall determine whether the child should be referred for termination of parental rights, be placed for adoption, be placed with a fit and willing relative, be placed with a legal guardian or placed in another planned permanent living arrangement. At the conclusion of each permanency hearing, the court must enter an order stating whether or not the department made reasonable efforts to finalize the permanency plan.

While this provision does include the phrase "fit and willing relative", it also provides for placement with a "legal guardian" such as a foster family. There is, however, no preference set forth in W. Va. Code § 49-6-5a(b) for any of the alternative placement options identified therein. Alternatively, the Circuit Court may have been relying on the internal adoption policies promulgated by the DHHR, which do include preferences for relative placement in

certain circumstances. Such polices, however, do not carry the weight of law and were not binding on the Circuit Court when it considered this question.

To the extent that the Circuit Court concluded that there is a clear preference under West Virginia law for the placement of abused and neglected children with blood relatives generally, it did so in error.

3. Petitioners have no other adequate means, such as direct appeal, to obtain the relief desired

Petitioners have no adequate means to obtain the relief sought herein. By virtue of the decision of the Circuit Court to deny intervenor status to Petitioners pursuant to the May 18 Order, Petitioners do not have standing to file a petition of appeal in this matter. The May 18 Order also leaves Petitioners without any right to be informed of the status of Destiny D. or to be heard by the Circuit Court in her regard. Given that all hearings and files relating to Destiny D. are closed, Petitioners have been left with no access to any reports or documents relating to the well being of a child that they love as their own.

4. Petitioners will be damaged or prejudiced in a way that is not correctable on appeal.

Absent the granting of the Writ of Prohibition sought herein, Petitioners shall continue to suffer from the emotional damage associated with losing a child with whom they had developed strong emotional bonds while becoming her psychological parent during twenty two (22) months of foster care. If Petitioners are not afforded the opportunity regain custody of Destiny D. and pursue their consistent intention to adopt her, they shall suffer irreparable damage.

IV. RELIEF REQUESTED

WHEREFORE, based upon the foregoing arguments, legal support, and matters set forth herein, Petitioners respectfully request that this Honorable Court issue a rule directing the Respondents named herein to show cause (1) why the Circuit Court's Order of March 29, 2010, granting legal and physical custody of infant Destiny D. to her paternal aunt, should not be voided by granting this Verified Petition for a Writ of Prohibition and (2) why the Circuit Court's Order of May 18, 2010, denying Petitioners' Motion to Intervene in the matter of infant Destiny D., should not be voided by granting this Verified Petition for a Writ of Prohibition. Petitioners also respectfully request that this Honorable Court issue a rule providing that Destiny D. be placed in their physical custody pending any future proceedings in this matter by the Circuit Court or otherwise.

Respectfully submitted,

**KRISTOPHER AND
CHRISTINA O**
By counsel


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EXHIBITS

ON

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