

Docket No.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

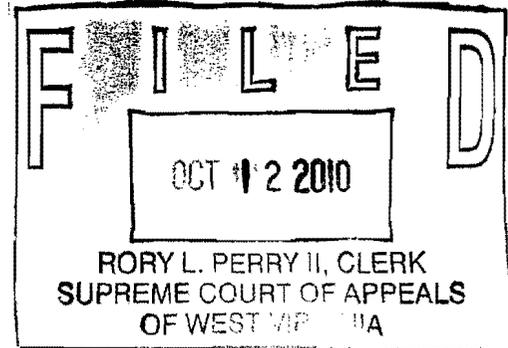
KRISTOPHER O , and  
CHRISTINA O

Petitioners,

v.

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

Respondents.



From Ohio County Abuse and Neglect Case No: 08-CJA-31  
The Honorable James P. Mazzone

THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES' RESPONSE TO  
PETITION FOR WRIT OF PROHIBITION

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**THE DEPARTMENT OF HEALTH AND HUMAN RESOURCES' RESPONSE TO  
PETITION FOR WRIT OF PROHIBITION**

Comes now the West Virginia Department of Health and Human Resources ("the Department") by and through its counsel, Assistant Attorney General Katherine M. Bond, and responds to Kristopher and Christina O petition for writ of prohibition filed with this Court on September 20, 2010. The O ask this Court to issue a rule to show cause why the Ohio County Circuit Court's March 29, 2010 order granting custody of Destiny D. to her paternal aunt should not be vacated, and to show cause why the Ohio County Circuit Court's May 18, 2010 order denying the O the right to intervene in the underlying abuse and neglect case should not be vacated. The Department contends that the Circuit Court correctly determined that Destiny's permanent placement should be with her paternal aunt and therefore respectfully requests that this Court refuse the petition for writ of prohibition.

**STATEMENT OF FACTS**

Destiny D. was born on April 21, 2008. Shortly after her birth, the Department took custody of Destiny, filed a petition of abuse and neglect against Destiny's biological parents, and placed Destiny with Kristopher and Christina C . Destiny's biological mother's parental rights were terminated at a hearing on November 24, 2008.

At a multidisciplinary treatment team meeting ("MDT") on April 22, 2009, the biological father, Larry W., indicated that his sister, Kathy M., had been attending visitations with him and was a possible child care resource for him. At that time, the biological father had not been adjudicated. See Exhibit A, MDT Summary Prepared April 22, 2009.

At the next MDT, on September 10, 2009, the MDT discussed possible relative placement options for Destiny should her father's parental rights be terminated. The MDT decided to inquire if Destiny's aunt, Kathy M., was interested in placement. See Exhibit B, MDT Summary Prepared September 15, 2009. Christina O indicated to the MDT that "she is interested in adoption *if no suitable relatives are located.*" Exhibit B (emphasis added).

The MDT next met on November 2, 2009. At that time it was becoming clear that Destiny's father's paternal rights may be terminated and that a permanent placement for Destiny needed to be found. The MDT discussed that placement with Kathy, Destiny's paternal aunt, would be appropriate if Kathy passed her home study. The C requested a bonding evaluation and stated that they wanted to adopt Destiny. The Department informed the C that relatives had to be considered for adoption before unrelated foster parents. See Exhibit C, MDT Summary Prepared November 6, 2009. Destiny's biological father's parental rights were terminated at a hearing on December 29, 2009.

Despite knowing since September 10, 2009, that the Department was looking to relatives for adoption of Destiny, the C never made an application to the Department to establish their intent to adopt Destiny. Furthermore, the C did not file their motion to intervene until March 26, 2010, three months after Destiny's father's parental rights were terminated. On March 29, 2010, the Circuit Court held a hearing to determine Destiny's placement and ordered Destiny to be placed with her paternal aunt, Kathy M.

On April 27, 2010, the Circuit Court considered the O motion to intervene. By order entered May 18, 2010, the Circuit Court denied the O motion to intervene. The Circuit Court determined that Destiny's placement with her paternal aunt was proper and that any intervention by the O would only unnecessarily delay her permanency. On September 20, 2010, one-hundred twenty-five days (125) after the entry of the Circuit Court's order denying their motion to intervene, the O filed their petition for writ of prohibition with the West Virginia Supreme Court.

### STANDARD OF LAW

"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." W.Va. Code § 53-1-1. "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).

### ARGUMENT AND DISCUSSION

The O argue that this Court should issue a rule to show cause against the Circuit Court for its March 29, 2010 order and its May 18, 2010 order because the Circuit Court erroneously denied the O the right to intervene and erroneously placed Destiny with her paternal aunt. The Department disagrees and responds as follows: (1) The O request for relief from the March 29, 2010 order and the May 18, 2010 order is untimely and should not be considered; and (2) The O did not have standing to intervene when their motion to intervene was ripe for hearing; and (3) The O never made an application to the Department to adopt Destiny; therefore, the Department correctly developed a more suitable long-term placement option.

#### **1. The O request for relief from the March 29, 2010 order and the May 18, 2010 order is untimely and should not be considered.**

The O argue that the Circuit Court erroneously denied them the right to intervene in Destiny's abuse and neglect case on the basis that they were no longer foster parents because they were foster parents when they filed their motion to intervene. To rectify the alleged error by the Circuit Court, the O filed a petition for writ of prohibition with this Court one-hundred twenty-five (125) days, over four (4) months, after the entry of the Circuit Court's order denying them the right to intervene. The O claim that if this Court does not grant them a writ of prohibition, they will suffer irreparable damage by not regaining custody of Destiny. The Department contends that the O request for relief is untimely. If the O were to suffer irreparable damage by the removal of Destiny from their home, they would not have

waited until nearly six (6) months after her removal to seek intervention from the Supreme Court.

Although the Department is unaware of any specific timeframe in which a party must file a petition for writ of prohibition, Rule 3(a) of the West Virginia Rules of Appellate Procedure ("WVRAP") states

No petition shall be presented for an appeal from . . . any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court . . .

Under WVRAP 3(a), a party has four months, or one-hundred twenty (120) days, to appeal an order to the Supreme Court. However, in child abuse and neglect cases, the appeal time is cut in half. Rule 49 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings ("WVRCAN") provides for accelerated appeals in abuse and neglect cases. It states

In order to provide the most inexpensive and expeditious procedure for appeal of Circuit Court orders under W.Va. Code § 49-6-1 et seq., a petitioner shall file his or her petition for appeal within sixty days of judgment without presentation of a transcript using the procedure provided in Rule 4A of the Rules of Appellate Procedure . . . An extension of the time limitations for appeal not to exceed an additional sixty days, may be granted by the court . . . but only upon a showing of extraordinary circumstances, and further provided that the request for an extension of time has been filed and served prior to the expiration of the initial sixty day time period for filing the petition for appeal.

WVRCAN 49. The purpose of the accelerated appeal in abuse and neglect cases is to not delay permanency for a child.

The O            titled their request for relief as a petition for writ of prohibition. However, the C            are essentially appealing the Circuit Court's May 18, 2010 order denying them the right to intervene in a child abuse and neglect case. That order was entered more than four (4) months before they filed their petition for writ of prohibition.

Further, the O ' petition was filed sixty-five (65) days after the expiration of the time limit for appeals in abuse and neglect cases. The Department is unaware of any Circuit Court order extending the time period for the O to challenge the May 18, 2010 order. Consequently, the Department contends that the O ' challenge to the Circuit Court's May 18, 2010 order is untimely.

More importantly, the O are also challenging the Circuit Court's March 29, 2010 order placing Destiny with her paternal aunt. Although the O claim that they will suffer irreparable harm if Destiny is not returned to their care, they waited almost six (6) months before taking any action to challenge the Circuit Court's placement decision. It is well established by West Virginia law that a child's best interest guides permanency decisions. The West Virginia Supreme Court has held

Once a court exercising proper jurisdiction has made a determination upon sufficient proof that a child has been neglected and his natural parents were so derelict in their duties as to be unfit, **the welfare of the infant is the polar star by which the discretion of the court is to be guided in making its award of legal custody.** Syllabus point 8, in part, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Syl. Pt. 3, *In re Emily*, 208 W.Va. 325, 540 S.E.2d 542 (2000) (emphasis added). The Supreme Court has further stated that, "in visitation as well as custody matters, we have traditionally held paramount the best interests of the child." Syl. Pt. 5, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996). By their own admission, the O have not had any visitation with Destiny since she was removed from their care. See Petition for Writ of Prohibition, p.5. Despite having had no contact with Destiny for almost six (6) months, and despite the guardian ad litem's representations at the April 27, 2010 hearing that Destiny is doing well in her current placement (see May 18, 2010 order, p.2-3), the O claim that it is in Destiny's best interest to be returned to their care.

This proposition is unsupported by any evidence. If the O were truly concerned that Destiny's placement with her aunt is not in her best interest, the O would have taken action sooner to keep Destiny in their care. However, as the O have not seen Destiny for almost six (6) months, there is no reason to believe that they can adequately express what is now in Destiny's best interest. Destiny has been residing with her paternal aunt for six (6) months and is doing well in that placement. It is not in Destiny's best interest to remove her from that placement and return her to a former foster family with whom she has had no contact for six (6) months. Because the O waited until almost six (6) months after Destiny's removal and more than four (4) months after the entry of the Circuit Court's order denying them the right to intervene to challenge the Circuit Court's orders, the Department contends that their request for relief is not timely and therefore should not be considered.

**2. The O did not have standing to intervene when their motion to intervene was ripe for hearing.**

The O claim that the Circuit Court incorrectly denied their motion to intervene because the Circuit Court determined that by the time their motion to intervene was heard the O were no longer foster parents and therefore did not have standing to intervene. The O argue that because they filed their motion to intervene while they were still foster parents, they should have been granted intervener status. The Department disagrees.

The O filed their motion to intervene on March 26, 2010, three (3) days before the March 29, 2010 hearing to move Destiny to her paternal aunt's house. Pursuant to West Virginia Rules of Civil Procedure ("WVRCR"), Rule 6(d)(1), a motion must be served at least nine (9) days before the hearing if served by mail, and at least

seven (7) days before the hearing if served by hand delivery. Furthermore, under WVRCAN 17(c)(4), all motions must be accompanied by a notice of hearing. The O did not accompany their motion with a notice of hearing. Therefore, although the O filed their motion to intervene before the hearing set to determine if Destiny should be placed with her aunt, under the WVRCP, that motion was not ripe for consideration until AFTER Destiny was removed from the O ' home. Consequently, by the time the O motion to intervene could be heard, the O were no longer Destiny's foster parents and, as stated by the Circuit Court, they did not have standing to intervene.

The O knew in September of 2009 that the Department was going to place Destiny with an appropriate relative, but they did not take any action to intervene in the abuse and neglect case until three (3) days before the hearing to implement the Department's relative placement choice. The O had plenty of time between December 29, 2009 (the date Destiny's biological father's rights were terminated) and March 29, 2009 (the date of the hearing to place Destiny with her aunt) to intervene in the abuse and neglect case, but they did not do so. Therefore, the Circuit Court's determination that they did not have standing to intervene when their motion was ripe for hearing is not clearly erroneous and should be upheld.

**3. The O never made an application to the Department to adopt Destiny; therefore, the Department correctly developed a more suitable long-term placement option.**

The O argue that the Circuit Court improperly placed Destiny with her paternal aunt because they were not given the right to be heard during the permanency hearing. They further assert that they told the Department that they wanted to adopt

Destiny; therefore, under W.Va. Code § 49-2-14(b), the Circuit Court could not move the child without an evidentiary hearing. The Department agrees that the O verbally told it that they were interested in adopting Destiny. However, a verbal statement regarding a desire to adopt a child does not satisfy the requirement that foster parents make an application to the Department establishing their intent to adopt a child.

W.Va. Code § 49-2-14(c) states

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: Provided, That if the child is twelve years of age or older, the child shall be provided the option of remaining in the existing foster care arrangement if the child so desires and if continuation of the existing arrangement is in the best interest of the child.

Emphasis added. In its May 18, 2010 order, the Circuit Court determined that the Department correctly chose to move Destiny to her paternal aunt's house on March 29, 2010 based on the relative preference. The Circuit Court further found that the C had not made a written application for adoption with the Department. As no written application was made to the Department, under W.Va. Code § 49-2-14(c), the Department correctly developed a more beneficial, long-term placement for Destiny with her paternal aunt.

The O claim that the Circuit Court's determination that they made no written application for adoption with the Department is erroneous because there is no requirement in W.Va. Code § 49-2-14(c) that the application be made in writing. They argue that because they verbally told the Department that they wanted to adopt Destiny,

the Department could not proceed with another adoption placement under W.Va. Code § 49-2-14(c). While the O had verbally informed the Department that they were interested in adopting Destiny, the Department contends that an informal verbal conversation regarding adoption does not meet the criteria set forth in W.Va. Code § 49-2-14(c). W.Va. Code § 49-2-14(c) specifically addresses **an application** to the Department to establish the foster parents' intent to adopt the child. The word "application" implies that the notice of intent to adopt must be completed in writing. Consequently, the Circuit Court correctly determined that the C had not fulfilled the requirement in W.Va. Code § 49-2-14(c). Therefore, the Department rightfully developed a more beneficial long-term placement for Destiny.

The O also argue that the Circuit Court incorrectly relied on the Department's position that relative placement must be given preference over non-relative placements. The O assert that West Virginia law only includes a preference for grandparents and for siblings. As Destiny was not placed with a grandparent or with siblings, the C contend that the Circuit Court should not have changed her placement to her paternal aunt.

Although West Virginia law does not specifically include language that preference should be given to all relatives, both the Department's adoption policy and federal law direct the Department to give adult relative placements preference. The Department's Adoption Policy § 7.3 states, in pertinent part,

A Grandparent or an adult relative with a positive home study certifying the home for adoption must be given preference over the non-relative home even if the non-relative home has the appearance of a better placement choice.

Exhibit D, Adoption Policy § 7.3. This Department policy is based on federal law. The Social Security Act governing the requirements for the award of federal funds to state child welfare programs states

[T]he State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.

42 U.S.C.A. 671(a)(19). Given the language in federal law and in its policy, the Department correctly determined that Destiny's aunt, as a relative, should be given preference over the O , a non-relative. Therefore, the Circuit Court's determination that a relative should be given preference was not clearly erroneous. Furthermore, the guardian ad litem has reported that Destiny is doing well in her current placement with her paternal aunt. Therefore, that placement should not be disrupted at this time.

### CONCLUSION

WHEREAS, the O did not try to challenge the Circuit Court's orders in a timely manner, and the child is doing well in her relative placement with her paternal aunt, the Department respectfully requests that this Court uphold the rulings of the Circuit Court and refuse the O ' petition for writ of prohibition. The Department asks for any other relief this Court deems fit.

Respectfully Submitted,

West Virginia Department of  
Health and Human Resources,  
by counsel.

**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**