STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

In re **B.D.-1**

No. 20-0107 (Mason County 18-JA-28)

FILED
November 4, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Maternal Grandparents M.H. and P.H., by counsel Sarah E. Dixon, appeal the Circuit Court of Mason County's February 5, 2020, order denying their motion for immediate placement of the child B.D.-1.[1] The West Virginia Department of Health and Human Resources ("DHHR"), by counsel S.L. Evans, filed a response in support of the circuit court's order and a supplemental appendix. The guardian ad litem ("guardian"), Tanya Handley, filed a response on behalf of the child also in support of the circuit court's order. Petitioners filed a reply. On appeal, petitioners argue that the circuit court erred in removing the child from their home and placing him in the home of the paternal grandparents when there was a safety risk in being placed in that home with his siblings, that the placement was not in his best interests, that the removal was potentially psychologically damaging to him, and that the paternal grandparents' home was not suitable, among other things.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

In November of 2017, the DHHR filed a child abuse and neglect petition against the parents with regard to their three oldest children, D.D., B.D.-2, and B.D.-3. The DHHR alleged that the parents engaged in domestic violence in the children's presence and that the children were scared,

[1]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). Additionally, because B.D.-1 shares the same initials with two of his siblings who are not at issue on appeal, we will refer to them as B.D.-1, B.D.-2, and B.D.-3, respectively, throughout this memorandum decision.

exhausted, and did not want to return to the parents' home after school. Upon the children's removal from the parents' care, they were placed with their paternal grandparents.

B.D.-1, the only child at issue on appeal, was born in September of 2018. The DHHR filed an amended petition adding him to the proceedings and, at ten days old, he was placed with petitioners. Petitioners expressed a willingness to adopt all four children and, following the voluntary relinquishment of the parents' parental rights to all four children in May of 2019, the three older children were placed with petitioners to facilitate said adoptions. In July of 2019, petitioners signed an intent to adopt all four children.

In September of 2019, petitioner P.H. received notice from the children's elementary school that D.D., the oldest child, was falling asleep in class. Thereafter, petitioners limited the child's access to his video games. D.D. reportedly threatened to run away, and petitioner P.H. called the DHHR regarding the incident, indicating that it was the first time the child had "acted out" since he was placed with them. Later that day, D.D. ran away but was apprehended and confronted by petitioner M.H. D.D. was physically aggressive towards petitioner M.H., who called the police to assist him in calming the child. D.D. was then transported to River Park Hospital in Cabell County, West Virginia. The hospital discharged the child based upon a finding that he had no mental health issues. Petitioners refused to take the child back into their home and petitioner M.H. requested that the child go to a juvenile delinquent facility. D.D. was placed back with his paternal grandparents in an attempt to deescalate the situation and with the hope that he would eventually be placed back in petitioners' home. Petitioner M.H. refused allowing the child to return to petitioners' home because the child had gotten "his way" by being placed with the paternal grandparents. Petitioner M.H. believed that D.D. would never behave in petitioners' home again and that he should be placed in a residential facility. Petitioners indicated that they were no longer willing to adopt D.D. and "strongly disliked" that sibling visitation had been ordered.

In October of 2019, petitioners affirmed to the DHHR that they still desired to adopt the youngest three children. However, upon meeting with the adoption specialist in November of 2019, petitioners indicated that B.D.-2 and B.D.-3 were exhibiting negative behaviors, including defecating in shoe boxes and air vents. As such, petitioners stated that they no longer desired to adopt those two children, but still wanted to adopt B.D.-1. At a multi-disciplinary team ("MDT") meeting held in December of 2019, petitioner M.H. continued to express that he and petitioner P.H. no longer desired to adopt the three older children. Petitioner M.H. refused suggestions of therapy for the children and, for the first time, expressed that he was concerned for B.D.-1's safety around the other three children. Petitioner M.H. expressed that he would not permit sibling visitation, even if ordered by the circuit court. At the request of petitioners, B.D.-2 and B.D.-3 were removed and placed with the paternal grandparents.

A permanency hearing was held on December 19, 2019, but petitioners did not attend. The circuit court inquired into the permanency plan for B.D.-1 in light of petitioners' decision not to adopt the older children. The guardian requested the opportunity to hold an MDT meeting on the matter, which was held immediately following the hearing without notice to petitioners. There, the MDT members determined that it would be in B.D.-1's best interests to be removed from petitioners' home and placed with his siblings at the home of his paternal grandparents, as they had agreed to adopt all four children. Thereafter, B.D.-1 was removed from petitioners' home, and

petitioners subsequently filed a motion to intervene and a motion for immediate return of the child to their care.

The circuit court held a hearing on petitioners' motion for return of the child over the course of two days in January of 2020. Petitioners presented the testimony of a service provider, who testified that she observed the children to be physically aggressive and/or violent towards each other during their visits with the parents prior to the relinquishment of their parental rights. The service provider expressed concern over B.D.-1's safety while around the older children but conceded that she had not supervised any visits between the children from May of 2019 through December of 2019. Petitioners also presented the testimony of a licensed psychologist, who provided her expert opinion on the psychological impact of children removed from caretakers with whom they had formed an attachment. The psychologist testified that disrupting the infant-caregiver attachment during the first three years of life can potentially affect a child's future relationships, self-esteem, and psychological development. The petitioners then presented the testimony of the adoption specialist, who was generally sympathetic to petitioners' situation and believed that B.D.-1 had a bond with them. However, she testified that petitioners expressed that they did not want to adopt B.D.-2 and B.D.-3 and refused any sort of therapy. Petitioners did not report any safety concerns at that time. The specialist further testified that petitioner P.H. sent her a text message indicating that she and petitioner M.H. were considering moving to Florida to avoid visits between the siblings and testified that, at the December of 2019 MDT meeting, petitioner M.H.'s behavior indicated he was very unhappy with the sibling visits and that he might not facilitate sibling visits even if ordered by the circuit court.

Next, a Child Protective Services ("CPS") worker testified that the paternal grandparents did not have a completed home study and did not receive a subsidy for the children. The worker explained that the home study process had started when the three older children were initially placed with the paternal grandparents, but the process was interrupted by petitioners' decision to take placement of all four children around May of 2019. The worker was unsure why the home study had been delayed prior to petitioners taking physical custody of the children but stated that because the children had been removed from the paternal grandparents' and placed with petitioners, the home study was suspended. However, the home study paperwork had been resubmitted. The CPS worker further stated that the paternal grandparents' financial situation had not been an issue. He also testified regarding the December of 2019 MDT meeting and stated that petitioner M.H. indicated he would not facilitate sibling visits, even if they were ordered by the circuit court. The CPS worker reported that petitioner M.H. had an aggressive attitude and was extremely frustrated with the situation. The adoption supervisor, a CPS supervisor, and a case aide likewise testified that petitioner M.H. refused to facilitate sibling visitation at the December 2019 MDT meeting.

Petitioners testified that they believed that safety concerns existed as the older children had no bond with B.D.-1 and were physically aggressive towards him. However, during her testimony, petitioner P.H. conceded that she did not tell anyone about the older children's alleged behavioral issues, nor did she seek out counseling for them. Petitioner P.H. also admitted that she texted the adoption specialist about moving to avoid visits between the older children and B.D.-1. Petitioner M.H. testified that he resisted therapy for B.D.-2 and B.D.-3 because he did not think it would

help. He admitted that his behavior at the MDT meeting could have been perceived as a refusal to comply with court-ordered sibling visits but noted that he never said he would not comply.

By order entered on February 5, 2020, the circuit court denied petitioners' motion for immediate return of B.D.-1. The circuit court found that the testimony regarding any of the older children being a safety risk to B.D.-1 was not credible. The service provider had not supervised any visits for seven months during the proceedings and, at a visit in December of 2019, noted that there were no instances of aggression between the children. Additionally, the circuit court found that petitioners refused to try family counseling and exhibited a "pattern of giving up on their grandchildren when they have behavioral issues, to the point of contemplating moving out of the State to avoid seeing said grandchildren." Accordingly, the circuit court concluded that it "cannot find that [petitioners] are an appropriate placement for [B.D.-1] as the [c]ourt has grave concerns that the pattern will repeat itself should [B.D.-1] develop behavioral issues." According to the circuit court, petitioners'

> pattern of wanting to adopt a grandchild until he/she does not behave, and refusing to attempt to reconcile the grandchild's behaviors through any counselling or therapy, but, instead demanding placement or nothing, as [petitioners] have demonstrated, is not conducive to a permanency plan for any child, but, certainly not under these circumstances. There simply is [a] complete lack of commitment by [petitioners] to any of their grandchildren.

The circuit court also expressed concern over petitioners' "adamant refusal" to follow its orders regarding sibling visitation. Lastly, the circuit court found that the paternal grandparents were fit to care for the children and were willing to adopt all four children, that their home was suitable, and that it was in B.D.-1's best interests to be placed with his siblings. Petitioners appeal the February 5, 2020, order denying their motion for the immediate return of the child to their care.[2]

The Court has previously established the following standard of review in cases such as this:

> "Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 1, *In Interest of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

[2]The parents relinquished their parental rights to all four children in May of 2019. The permanency plan for the children is adoption by the paternal grandparents.

Syl. Pt. 1, *In re Cecil T.*, 228 W. Va. 89, 717 S.E.2d 873 (2011).

On appeal, petitioners set forth numerous arguments relating to the removal of B.D.-1 from their care and his placement with his siblings in the home of his paternal grandparents. Petitioners claim that the circuit court disregarded substantial evidence that B.D.-1 had a significant bond with them and that placement with his siblings was not in his best interests. In support of this argument, petitioners point to their expert witness's testimony that disruption of the infant-caregiver attachment can be harmful to the child. They contend that B.D.-1 had been placed in their care since birth and that he had substantial bonds with them. In contrast, they claim the child had minimal bonds with his siblings and that the older siblings were aggressive and created a potential safety threat to him. Petitioners also aver that they have suitable housing and financial resources to care for the child, while the paternal grandparents allegedly live in "abject poverty," have little to no bond with the child, do not have an approved home study, and are charged with caring for the older children who have significant behavioral issues. According to petitioners, this evidence supports placement in their care.

Petitioners also claim that the circuit court improperly relied on the statutory sibling preference to the detriment of the child when placement with his siblings was not in his best interests. Petitioners claim that the removal of the child violated West Virginia Code §49-4-111(c) because the child had resided with them over six months and they had signed an intent to adopt the child.[3] Moreover, they contend that the placement in accordance with the sibling preference violated West Virginia Code § 49-4-111(e)(1) because the paternal grandparents did not make an application for placement of the child and their home was not properly approved through a home study.[4] Petitioners further contend that B.D.-1's placement with the paternal grandparents violated

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[3]West Virginia Code § 49-4-111(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 [DHHR] to establish an intent to adopt the child within thirty days of parental rights being terminated, the [DHHR] may terminate the foster care arrangement if another, more beneficial, long-term placement of the child is developed.

[4]West Virginia Code § 49-4-111(e)(1) provides that

> [w]hen a child is in a foster care arrangement and is residing separately from a sibling or siblings who are in another foster home or who have been adopted by another family and the parents with whom the placed or adopted sibling or siblings reside have made application to the [DHHR] to establish an intent to adopt or to enter into a foster care arrangement regarding a child so that the child may be united or reunited with a sibling or siblings, the [DHHR] shall, upon a determination of the fitness of the persons and household seeking to enter into a foster care arrangement or seek an adoption which would unite or reunite siblings, and if

(continued . . .)

West Virginia Code § 49-4-111(e)(2) as said placement is psychologically and physically harmful to the child.[5] Petitioners point out that the service provider testified that the older children were very aggressive with each other and that there were concerns for B.D.-1's safety in their presence. Further, they argue that following D.D.'s release from the hospital, he was not provided with any further treatment or therapy, which also constitutes a safety risk to B.D.-1. Petitioners state that the sibling preference does not outweigh B.D.-1's best interests and that the circuit court erroneously emphasized the need to place the siblings together. Lastly, petitioners contend that the child's removal was wrongfully performed without a transition period or arranged visits and without giving them notice to the MDT meeting wherein the determination to remove the child was made.

This Court has long held a statutory preference for placing siblings in the same home:

> "W.Va. Code § [49-4-111(e)(1)] provides for a "sibling preference" wherein the West Virginia Department of Health and Human Resources is to place a child who is in the department's custody with the foster or adoptive parent(s) of the child's sibling or siblings, where the foster or adoptive parents seek the care and custody of the child, and the department determines (1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children. In any proceeding brought by the department to maintain separation of siblings, such separation may be ordered only if the circuit court determines that clear and convincing evidence supports the department's determination. Upon review by the circuit court of the department's determination to unite a child with his or her siblings, such determination shall be disregarded *only* where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit or that placement of the child with his or her siblings is not in the best interests of one or all of the children."

Syl. Pt. 4, *In re Carol B.*, 209 W. Va. 658, 550 S.E.2d 636 (2001). However, petitioners correctly note that such preferences must be tempered by the best interests of the child. Indeed, "if allegiance to a preferential placement does not promote the children's best interests, such preference must

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> termination and new placement are in the best interests of the children, terminate the foster care arrangement and place the child in the household with the sibling or siblings.

[5]West Virginia Code § 49-4-111(e)(2) provides that

> [i]f the [DHHR] is of the opinion based upon available evidence that residing in the same home would have a harmful physical, mental or psychological effect on one or more of the sibling children or if the child has a physical or mental disability which the existing foster home can better accommodate, or if the [DHHR] can document that the reunification of the siblings would not be in the best interest of one or all of the children, the [DHHR] may petition the circuit court for an order allowing the separation of the siblings to continue.

yield to the placement that is most beneficial to the children." *In re K.L.*, 241 W. Va. 546, 557, 826 S.E.2d 671, 682 (2019) (citing *In re Elizabeth F.*, 225 W. Va. 780, 787, 696 S.E.2d 296, 303 (2010)).

Having reviewed the record, we find no error in the circuit court's conclusion that placement with the siblings in the home of the paternal grandparents is in B.D.-1's best interests. We first note that petitioners attempt to twist the circuit court's findings to state that placement with his siblings outweighs B.D.-1's best interests. This is simply not true. The circuit court reviewed the testimony and evidence presented and determined that placement with his siblings was in B.D.-1's best interests, especially given petitioners' behavior throughout the proceedings. Although petitioners heavily rely on the testimony of their expert witness regarding infant-caregiver attachment and the testimony of the service provider regarding aggression amongst the children, the circuit court heard this evidence and assessed its weight accordingly. The record demonstrates that petitioners' expert witness only testified generally to infant-caregiver attachment and had no personal knowledge of B.D.-1 or his situation and, therefore, could not give a personalized recommendation. Further, in its order denying petitioner's motion for the return of the child, the circuit court determined that the service provider had "no involvement with the family from the end of May [of 2019] until December [of 2019], when she supervised one visit between the three children who were residing with [petitioners] and [D.D.], who was residing with [the paternal grandparents]." The circuit court noted that the service provider "acknowledged during her testimony [that] she had not seen the children interact at all in 7 months except for one visit in December, at which none of the children were attacked or otherwise injured by any of the other children." Moreover, while petitioners claim that the older children are a safety risk to B.D.-1, they did not voice any concerns over the children's allegedly aggressive behavior from the time the children were placed with them in May of 2019 until an MDT meeting held in December of 2019, which was after petitioners had determined they no longer wanted to adopt the three older children. To the extent that petitioners weigh their own testimony, and that of their expert witness and the service provider, as more credible than the other evidence presented, we note that the circuit court heard this testimony and made this credibility determination for itself. We decline to disturb such determinations on appeal. *See Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997) ("A reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.").

Based on the evidence, we find no error in the circuit court's application of the sibling preference. The DHHR is to place siblings in the home wherein other siblings have been placed or adopted when the DHHR determines "(1) the fitness of the persons seeking to enter into a foster care or adoption arrangement which would unite or reunite the siblings, *and* (2) placement of the child with his or her siblings is in the best interests of the children." *Carol B.*, 209 W. Va. at 660-61, 550 S.E.2d at 638-39, syl. pt. 4, in part. Here, the DHHR had already determined that the paternal grandparents were fit for placement of the children as the older three were placed with them at the time of removal.

Although petitioners raise concerns over the fitness of the paternal grandparents, the record indicates these concerns are without merit. Contrary to petitioners' arguments, the CPS worker testified that there were no financial concerns with placement of all four children in the paternal

grandparents' home. While the CPS worker did not know why the home study was not completed, the process had been started and then suspended upon placement of the children in petitioners' home. Once the children were removed and placed with the paternal grandparents, the paperwork for the home study was resubmitted, and the guardian contends it has since been approved. Moreover, at the hearing on petitioners' motion, the CPS worker indicated that workers had been in and out of the home and no issues with fitness had been raised.

To the extent petitioners claim that the paternal grandparents never made application for B.D.-1's placement, we find no error. The paternal grandparents previously had the three older children in their home and acquiesced to placement of all of the children with petitioners to allow them to be together. Every time petitioners refused to adopt a child, the paternal grandparents immediately welcomed that child back into their home. When concerns over B.D.-1's continued placement with petitioners came up, the paternal grandparents also demonstrated a willingness to adopt him. As such, while the paternal grandparents did not apply for placement of the child upon his birth, it is clear from the record that they were attempting to keep him with his siblings, whether at petitioners' home or their own.

Petitioners' attempt to minimize the bond B.D.-1 shared with either the paternal grandparents or his siblings. However, the record indicates that the paternal grandparents saw B.D.-1 during visits between the child and his parents and that the child interacted well with the paternal grandparents, as well as his siblings, when placed in their care in December of 2019. We have noted that a lack of sibling bond does not negate the sibling preference when the opportunity for developing a bond exists. *Id.* at 666, 550 S.E.2d at 644 ("We do not believe, however, that this fact [of the lack of sibling bond] negates the sibling preference. [The baby] and her siblings are still quite young in age so that, given the opportunity, [the baby] can still bond with her siblings, come to appreciate their companionship, and ultimately enjoy all of the advantages in life afforded by growing up with brothers and sisters."). Accordingly, we find no error in the determination that the paternal grandparents were a fit placement.

Turning to the second factor in syllabus point 4 of *Carol B.*, we likewise find that placement of B.D.-1 with his siblings in the home of the paternal grandparents was in his best interests. As noted by the circuit court, petitioners demonstrated a "pattern of giving up on their grandchildren when they have behavioral issues." Although the child resided with petitioners for a little over a year, they demonstrated a lack of commitment to their grandchildren and a divisive attitude. Petitioners declined to adopt their older grandchildren at the slightest inconvenience and refused to obtain therapy to address any of the behaviors the children allegedly demonstrated. Moreover, petitioners indicated a willingness to move out of state to avoid visiting the older grandchildren. The circuit court found that petitioners' claims of aggressive behaviors or safety concerns were not credible. Petitioners did not raise any issues with safety until the December of 2019 MDT meeting, and the service provider had not had any contact with the family for seven months prior to the sibling visit in December of 2019. Interestingly, petitioners refused to obtain therapy for the older children's behaviors but cite to D.D.'s lack of therapy as a safety concern. However, River Park Hospital discharged D.D. as there were no mental health issues present, and the paternal grandmother testified that the children had not exhibited any behaviors or aggression since being placed in her care. While petitioners contest the findings that they refused to comply with court-ordered sibling visitation, the record demonstrates that several MDT members testified that

petitioner M.H. refused to comply and petitioner M.H. himself acknowledged during his testimony that his behavior could have indicated an intent to refuse to comply. Given petitioners' behaviors and the MDT members' concerns over placement with them, the paternal grandparents indicated their willingness to adopt the child alongside the other three children petitioners cast aside.

Having heard the evidence presented, the circuit court concluded that it "cannot find that [petitioners] are an appropriate placement for [B.D.-1] as the [c]ourt has grave concerns that the pattern [of giving up on their grandchildren] will repeat itself should [B.D.-1] develop behavioral issues." The circuit court further found that the paternal grandparents' residence was suitable, that they were fit to care for the children, and that it was in B.D.-1's best interests to be placed with his siblings and adopted by the paternal grandparents. As noted above,

> [u]pon review by the circuit court of the [DHHR]'s determination to unite a child with his or her siblings, such determination shall be disregarded only where the circuit court finds, by clear and convincing evidence, that the persons with whom the department seeks to place the child are unfit or that placement of the child with his or her siblings is not in the best interests of one or all of the children.

Id. at 660-61, 550 S.E.2d at 638-39, syl. pt. 4, in part. In looking at the totality of the evidence set forth, we cannot find that the circuit court erred in determining that placing B.D.-1 with his siblings at the home of the paternal grandparents was in his best interests.

Next, while petitioners argue that the DHHR erred in removing B.D.-1 from their home in violation of West Virginia Code § 49-4-111(c) because they signed a notice of intent to adopt the child, we find no merit to this argument. Petitioners have shown that their signing an intent to adopt means very little as they signed an intent to adopt for all three older grandchildren and then subsequently refused to adopt them. Further, petitioners refused to obtain therapy for the children; spoke to the adoption specialist about moving out of state to avoid sibling visits; and refused to facilitate sibling visits at the MDT meeting, even if it were to be ordered by the circuit court.

Additionally, we find no error in the immediate removal of the child from petitioners' care. It is true that "[l]ower courts in cases such as these should provide, whenever possible, for a gradual transition period, especially where young children are involved." Syl. pt. 3, in part, *James M. v. Maynard*, 185 W. Va. 648, 408 S.E.2d 400 (1991). However, the record demonstrates that there were valid concerns that petitioners would leave the state with the child to avoid complying with sibling visitations. Lastly, although petitioners raise issue with the lack of notice to an MDT meeting, against DHHR policy, they fail to provide documentation of said policy and further fail to comment on what the appropriate relief would be for violation of an internal DHHR policy. If any error occurred, we find that it was harmless under the circumstances given our findings that placement with the paternal grandparents was proper and in the best interests of the child. Accordingly, we find that they are entitled to no relief in this regard.

For the foregoing reasons, we find no error in the decision of the circuit court, and its February 5, 2020, order is hereby affirmed.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison