

FILE COPY



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0027

(Kanawha County Circuit Court Civil Action No. 18-P-142)

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BILL CROUCH, SECRETARY, and
KANAWHA COUNTY CHILD PROTECTIVE
SERVICES DIVISION,

**DO NOT REMOVE
FROM FILE**

Petitioners,

v.

THE HONORABLE LOUIS H. BLOOM,
Judge of the Circuit Court of Kanawha County,
JENNIFER R. VICTOR, and
JENNIFER N. TAYLOR, Guardians ad Litem
for the Circuit Court of Kanawha County,

Respondents.

**Verified Response to Petition for Writ of Prohibition of
Respondent Guardians ad Litem**

Jennifer R. Victor, WVSB 7601
Victor & Victor, LLP
1319 Quarrier Street
Charleston, WV 25301
Phone: 304.346.5638
Fax: 304-346-0451
vvhlaw@suddenlinkmail.com
Guardian ad Litem, Respondent

Jennifer N. Taylor, WVSB 4612
1118 Kanawha Blvd.,
East Charleston, WV
25301
Phone: 304.342.1887
Fax: 304-343-7450
jennifer@jtaylor-law.com
Guardian ad Litem, Respondent

Table of Contents

QUESTIONS PRESENTED2

STATEMENT OF THE CASE3

SUMMARY OF ARGUMENT14

STATEMENT REGARDING ORAL ARGUMENT AND DECISION17

ARGUMENT17

A. Standard of Review.17

B. A writ of prohibition is not an appropriate remedy where the Petition is merely an attempt to obtain an impermissible appeal of a discretionary, interlocutory order issued in a Writ of Mandamus action that requires the Petitioners to perform their legal duties to children in the child abuse and neglect system as required by federal and state laws.....20

C. A writ of prohibition is not an appropriate remedy to circumvent the discretionary order of the Circuit Court to maintain the mandamus action; to expand the scope of the mandamus proceeding to include CPS Divisions, adoption and foster care units statewide; and to include in the mandamus action the improper housing practices of the Petitioners that permit children to be kept overnight in CPS Division offices or hotels contrary to law and the Department’s own rules and regulations.22

D. A writ of prohibition is not an appropriate remedy when the Circuit Court’s discretionary, interlocutory rulings in the mandamus proceeding did not violate the Separation of Powers Doctrine.31

E. A writ of prohibition is not an appropriate remedy when the Petitioners cannot demonstrate that they will be damaged or prejudiced in any way that is not correctable on appeal; cannot demonstrate that the Circuit Court’s order is an oft-repeated error or manifests a persistent disregard for the law; and cannot demonstrate a new or important issue of first impression.35

CONCLUSION39

VERIFICATION40

Table of Authorities

CASES

<i>Appalachian Power Co. v. Public Service Comm'n</i> , 296 S.E.2d 887, 176 W.Va. 711 (1982) ..	31
<i>Chapman v. West Virginia Housing Authority</i> , 3 S.E.2d 502, 121 W.Va. 319 (1939)	31
<i>Christina L.</i> , 194 W.Va. 446, 460 S.E.2d 692 (1995)	24
<i>Cooper v. Gwinn</i> , 298 S.E.2d 781, 171 W. Va. 245 (1981)	35
<i>Crain v. Bordenkircher</i> , 178 W. Va. 96, 357 S.E.2d 778 (1987)	23
<i>Crawford v. Taylor</i> , 138 W.Va. 207, 75 S.E.2d 370 (1953)	18
<i>Delardas v. Cty. Court of Monongalia Cty.</i> , 155 W.Va. 776, 186 S.E.2d 847 (1972)	32
<i>Delardus v. Morgantown Water Comm.</i> , 137 S.E.2d 426, 148 W. Va. 776 (1964)	37
<i>E.H. v. Matin</i> , 284 S.E.2d 232, 168 W.Va. 248 (1981)	22, 23
<i>E.H. v. Matin</i> , 428 S.E.2d 523, 189 W.Va. 102 (1993)	22
<i>E.H. v. Matin</i> , 432 S.E.2d 207, 189 W.Va. 445 (1993)	22
<i>Hinkle v. Black</i> , 262 S.E.2d 744, 164 W. Va. 112 (1979).	21
<i>In re Brandon Lee H.S.</i> , 629 S.E.2d 783 (W.Va. 2006)	33
<i>In re Christina L.</i> , 194 W.Va. 446, 454 n. 7, 460 S.E.2d 692, 700 n. 7 (1995)	24
<i>In Re Jeffrey R.L.</i> , 190 W.Va. 24, 435 S.E.2d 162 [1993]	24
<i>In re Scottie D.</i> , 185 W.Va. 191, 406 S.E.2d 214, 220 (1991)	24
<i>In the Interest of Tiffany Marie S.</i> , 470 S.E.2d 177, 196 W.Va. 223 (1997)	19
<i>James M. v. Maynard</i> , 185 W.Va. 648, 408 S.E.2d 400 (1991)	24
<i>Kristopher O. and Christina O. v. Mazzone</i> , 706 S.E.2d 381, 227 W.Va. 184 (2001)	24
<i>McMellon v. Adkins</i> , 300 S.E.2d 116, 171 W. Va. 475 (1983)	23
<i>Ney v. West Virginia Workers' Compensation Fund</i> , 186 W. Va. 180, 411 S.E.2d 699 (1991)	23
<i>Nobles v. Duncil</i> , 202 W.Va. 523, 505 S.E.2d 442 (1998)	32
<i>Perry v. Barker</i> , 289 S.E.2d 423, 169 W. Va. 531 (1982)	23
<i>Snyder v. Callaghan</i> , 284 S.E.2d 241, 168 W. Va. 265 (1981)	23
<i>Starcher v. Crabtree</i> , 348 S.E.2d 293, 176 W.Va. 707 (1986)	31
<i>State ex rel. Aaron v. King</i> , 199 W.Va. 533, 485 S.E.2d 702 (1997)	23
<i>State ex rel. Allen v. Bedell</i> , 454 S.E.2d 77, 193 W.Va. 32 (1994)	17
<i>State ex rel. Allstate Ins. Co. v. Gaughan</i> , 640 S.E.2d 176, 220 W.Va. 113 (2006).	18
<i>State ex rel. Am. Elec. Power Co. v. Nibert</i> , 237 W. Va. 14, 784 S.E.2d 713 (2016)	18
<i>State ex rel. Arrow Concrete Co. v. Hill</i> , 194 W.Va. 239, 460 S.E.2d 54 (1996)	21
<i>State ex rel. Barker v. Manchin</i> , 279 S.E.2d 622, 167 W. Va. 155 (1981)	23
<i>State ex rel. Bobrycki v. Hill</i> , 202 W. Va. 335, 504 S.E.2d 162 (1998)	18
<i>State ex rel. Brotherton v. Moore</i> , 230 S.E.2d 638, 159 W. Va. 934 (1976)	23
<i>State ex rel. Buxton v. O'Brien</i> , 97 W. Va. 343, 125 S.E. 154 (1924)	23, 32
<i>State ex rel. East End Assoc. v. McCoy</i> , 198 W.Va. 458, 481 S.E.2d 764 (1996)	23
<i>State ex rel. Greenbrier Cty. Airport Auth. v. Hanna</i> , 151 W.Va. 479, 153 S.E.2d 284 (1967)	32
<i>State ex rel. Hall v. County Court of Mercer County</i> , 129 S.E.2d 712, 100 W. Va. 11 (1925)	28
<i>State ex rel. Hoover v. Berger</i> , 483 S.E.2d 12, 199 W.Va. 12, (1996)	19
<i>State ex rel. Justice v. King</i> , 852 S.E.2d 292 (W. Va. 2020)	18, 31, 32, 33
<i>State ex rel. Lambert v. Cortellessi</i> , 182 W. Va. 142, 386 S.E.2d 640 (1989)	23
<i>State ex rel. Nelson v. Ritchie</i> , 177 S.E.2d 791, 154 W. Va. 644 (1970)	28, 29

<i>State ex rel. Owners Ins. Co. v. McGraw</i> , 760 S.E.2d 590, 233 W.Va. 766 (2014)	19, 22, 24
<i>State ex rel. Paul B. v. Hill</i> , 496 S.E.2d 198, 201 W.Va. 248 (1997)	17
<i>State ex rel. Peachier v. Sencindiver</i> , 233 S.E.2d 425, 160 W.Va. 314 (1977).....	17, 24
<i>State ex rel. Philyaw v. Williams</i> , 438 S.E.2d 64, 190 W. Va. 272 (1993).....	37
<i>State ex rel. Public Service Commission v. Indian Creek Gas Co.</i> , 179 S.E.2d 574, 154 W. Va. 835 (1971)	29
<i>State ex rel. Stewart v. Alsop</i> , 533 S.E.2d 362, 207 W. Va. 430 (2000).....	17
<i>State ex rel. Suriano v. Gaughan</i> , 480 S.E.2d 548, 198 W. Va. 339 (1996)	18
<i>State ex rel. West Virginia Div. of Natural Resources v. Cline</i> , 200 W. Va. 101, 488 S.E.2d 376 (1997)	18
<i>State ex rel. West Virginia Fire Cas. Co. v. Karl</i> , 487 S.E.2d 336, 199 W.Va. 678 (1997)	18
<i>State v. Scritchfield</i> , 167 W.Va. 683, 280 S.E. 2d 315 (1981).....	24
<i>W. Va. Dep't of Health & Human Res. v. E.H.</i> , 236 W.Va. 279, 778 S.E.2d 728 (2015)	22
<i>Walls v. Miller</i> , 251 S.E.2d 491, 162 W. Va. 563 (1978).....	23
<i>Walter v. Ritchie</i> , 156 W.Va. 98, 191 S.E.2d 275 (1972).....	32
<i>W. Va. Dept. of Health and Human Resources v. E.H., et al.</i> , 236 W. Va. 194, 778 S.E.2d 643 (2015)	23, 34
<i>Wheeling Bridge T. Ry. Co. v. Paull</i> , 19 S.E. 551, 39 W.Va. 142 (1894)	31
<i>Wilfong v. Wilfong</i> , 156 W.Va. 754, 197 S.E.2d 96 (1973).....	21

RULES

Rule 16, <i>W.Va. Rules App. P.</i>	17
Rule 19, <i>W.Va. Rules App. P.</i>	17
Rule 15, <i>W.Va. Rules of Civil Procedure</i>	25
Rule 65, <i>W.Va. Rules of Civil Procedure</i>	2
Rule 18(a), <i>Rules of Procedure for Child Abuse and Neglect Proceedings</i>	24

STATUTES

<i>W.Va. Code</i> §14-2-2	23
<i>W.Va. Code</i> §53-1-1	17
<i>W. Va. Code</i> §53-1-6	25
<i>W. Va. Code</i> §49-4-01(f)(1).....	24
<i>W.Va. Code</i> §49-4-604(b).....	24

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 22-0027

(Kanawha County Circuit Court Civil Action No. 18-P-142)

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BILL CROUCH, SECRETARY, and
KANAWHA COUNTY CHILD PROTECTIVE
SERVICES DIVISION,

Petitioners,

v.

THE HONORABLE LOUIS H. BLOOM,
Judge of the Circuit Court of Kanawha County,
JENNIFER R. VICTOR, and
JENNIFER N. TAYLOR, Guardians ad Litem
for the Circuit Court of Kanawha County,
Respondents.

Respondents' Verified Response to Petition for Writ of Prohibition

The Respondents, Jennifer R. Victor and Jennifer N. Taylor, Guardians ad Litem practicing in child abuse and neglect proceedings before the Circuit Court of Kanawha County, West Virginia, ("Respondent Guardians"), now present their brief in opposition to the Petition for a Writ of Prohibition filed by the West Virginia Department of Health and Human Resources, ("the Department"), Bill Crouch, Secretary, and the Kanawha County Child Protective Services ("CPS") Division, ("Petitioners").

The Respondent Guardians pray that, for the sake of the safety and welfare of the children who are involved in abuse and neglect proceedings in this state, the Writ of Prohibition be denied. The Respondent Guardians further pray that this Court uphold the discretionary decisions of Judge Louis H. Bloom of the Circuit Court of Kanawha County to grant their Petition for Writ of

Mandamus requiring the Petitioners to perform their legal duties to properly staff, train, and operate the CPS Divisions as required by federal and state laws, regulations, and rules; to amend and expand the Writ of Mandamus to include CPS Divisions, adoption and foster care units statewide; to include within the scope of the mandamus the Department's practice of housing children involved in abuse and neglect cases in CPS Division offices and hotels; and to prohibit the Petitioners from housing said children overnight in CPS offices or hotels overnight.

The Petitioners have failed to meet the stringent standards for obtaining a writ of prohibition, as they have not shown clear error as a matter of law in this discretionary, interlocutory decision. Therefore, the Petition for a Writ of Prohibition should be denied, and the mandamus proceeding in the Circuit Court of Kanawha County should be permitted to proceed as ordered.

QUESTIONS PRESENTED

1. Whether the petition for writ of prohibition is merely an attempt to obtain an impermissible appeal of a discretionary, interlocutory order issued in a writ of mandamus action that requires the Petitioners to perform their legal duties to children in the child abuse and neglect system as required by federal and state laws?
2. Whether the petition for writ of prohibition is an appropriate remedy to circumvent the discretionary order of the Circuit Court to maintain the mandamus action; to expand the scope of the mandamus proceeding to include CPS Divisions, adoption, and foster care units statewide; and to include in the mandamus action the improper housing practices of the Petitioners that permit children to be kept overnight in CPS Division offices or hotels contrary to the law and the Department's own rules and regulations?
3. Whether the petition for writ of prohibition is an appropriate remedy to circumvent the discretionary, interlocutory rulings of the Circuit Court in the mandamus action in which the Circuit Court's rulings do not violate the Separation of Powers Doctrine?

4. Whether the petition for writ of prohibition is an appropriate remedy when the Petitioners cannot demonstrate that they will be damaged or prejudiced in any way that is not correctable on appeal; cannot demonstrate that the Circuit Court's order is an oft-repeated error or manifests a persistent disregard for the law; and cannot demonstrate a new or important issue of first impression?

STATEMENT OF THE CASE

This matter arises out of a Petition for Writ of Mandamus filed by the Respondents, two Guardians ad Litem who practice before the Circuit Court of Kanawha County, who felt compelled to draw attention to the abysmal failure of the Department and the CPS Divisions in addressing the needs and rights of the most vulnerable citizens in this state, the children who are the unwilling victims in the abuse and neglect proceedings.

The Respondent Guardian Jennifer R. Victor first filed a Motion for Contempt in an abuse and neglect case involving two children, *In re B.W. and G.W.*, Kanawha County Civil Action Nos. 16-JA-249 and 250. Appendix [hereinafter App.] at page numbers 1-5. The Respondent noted that CPS caseworkers failed to prepare reports and permanency plans and failed to provide discovery in a timely fashion. App. 2. The Respondent noted that case management was in turmoil and that turnover was so high that case managers were unfamiliar with the facts of the case and the services provided. App. 2-3. The Respondent noted that many of the problems with CPS could be ameliorated by hiring and maintaining an adequate workforce, but that would require the efforts of DHHR management at the state level. App. 3. The Respondent moved that the Department be held in contempt for its failure to meet its obligations imposed by state and federal law, and specifically for failing to maintain adequate staffing in the Kanawha County CPS Division. App. 3-4.

The Circuit Court entered a Rule to show Cause on or about June 22, 2017, and appointed a second Guardian ad Litem, Jennifer N. Taylor, as co-counsel with Ms. Victor. App. 6-8. The Department filed a Response to the Petition for Contempt on or about July 24, 2017, and acknowledged that the CPS Division inefficiently handled juvenile abuse and neglect cases, blaming the failure on staffing issues and the statewide opioid crisis. App. 10-17.

From July through November 2017 the Circuit Court held a series of hearings in which both parties presented evidence of the problems and issues inherent to the child abuse and neglect system and the purported efforts the Department was making in attempting to correct those issues. App. 18-22. On December 13, 2017, the Guardians ad Litem filed their Amended Petition for Contempt, seeking to expand the scope of the proceedings to encompass staffing of CPS offices statewide and seeking additional sanctions. App. 23-27. The Department filed its objection to the Petition and the Amended Petition, and sought to dismiss the proceedings. App. 28-40.

After intense negotiations, the Department and the Guardians ad Litem entered into an Agreed Order and Stipulation Agreement on March 29, 2018, whereby the Department acknowledged that there is “an ongoing systemic problem at the Department with maintaining adequate staffing, retention and training” of CPS employees in the Kanawha County office, and agreed to take certain actions to correct the problems. App. 41-57. The Stipulation Agreement required the Department to continue filing monthly reports, previously ordered by the Circuit Court, reflecting the status of staffing at the Kanawha County CPS offices, which was a major issue behind the failure of the Petitioners to properly staff, train, and operate the CPS Divisions. App. 49.

Thereupon, the parties agreed to, and the Circuit Court so ordered, the filing of a Petition for Writ of Mandamus by the Guardians ad Litem. App. 51-57. Although the Guardians ad Litem sought to include all CPS Divisions statewide, the Circuit Court limited the scope of the proceedings to the Kanawha County Division, reserving the right to revisit the issue if the evidence called for the same. App. 42, 161, 186-187.

The Guardians ad Litem filed their original verified Petition for Writ of Mandamus against the Department, Bill Crouch, Secretary, and the Kanawha County Child Protective Services Division on April 25, 2018. App. 51-57. The Writ alleged that the Department, the Secretary, and the Kanawha County CPS Division failed to properly staff, train, and operate the Kanawha County CPS Division so as to protect the children who are affected by abuse and neglect proceedings. App. 54. As a result of said failure, child abuse and neglect cases were delayed, investigations and reports were not completed, and the permanent placements of the children were stymied. App. 54.

The Writ of Mandamus further alleged that the Department, the Secretary, and the Kanawha County CPS Division had a clear legal duty to perform the acts which the Guardians ad Litem sought to compel, as established by state and federal statutes, state rules, federal regulations, and internal policies and procedures of the Department. App. 53.

On May 11, 2018, the Circuit Court issued a Rule to Show Cause, finding that the Guardians ad Litem had a clear legal right to file a petition for writ of mandamus requiring the Department, the Secretary, and the Kanawha County CPS Division to perform their legal duties; that the Respondent Guardians ad Litem had no other recourse available to them; and that the

Petitioners had a duty to protect the children involved in abuse and neglect proceedings. App. 60.

The Circuit Court further found that the verified Petition for Writ of Mandamus contained sufficient averments to state a prima facie case to issue the requested writ of mandamus. App. 60. The Circuit Court further found that the petition contained detailed averments that demonstrated that the Department, the Secretary and the Kanawha County CPS Division failed to fully staff, train and operate the CPS Division in Kanawha County “as required by applicable state and federal laws, rules and regulations, and all internal policies and procedures of the Department; failed to meet timelines and deadlines established by statutes, rules, regulations, policies or procedures; and that the children charged to the care and custody of the Department in abuse and neglect proceedings ultimately suffered from delayed proceedings, multiple placements and lack of permanency.” App. 60.

The Petitioners filed their Response to the Petition for Writ of Mandamus on May 23, 2018, denying the allegations of the Guardians ad Litem (notwithstanding the specific admissions included in the Stipulation Agreement) and citing various efforts on the part of the Petitioners to increase wages, improve the hiring, training, and retention of CPS employees, and develop internal procedures regarding the same. App. 63-72.

The Circuit Court held review hearings on the matter on June 21, 2018, and September 5, 2018. App. 73. At one point the Circuit Court noted that the Petitioners had made progress in filling the vacancies in the Kanawha County CPS office. App. 75. The Department then filed a Motion to Dismiss on December 13, 2018, noting the aforementioned progress and asserting that the continued mandamus action and court review was not needed. App. 78- 87. The Circuit

Court noted continuing problems with the Kanawha County CPS Division and held in abeyance its ruling on the motions to dismiss. App. 90-91, 100, 103-104, 109, 120. The Circuit Court held another review hearing on April 12, 2019, and noted several areas of continuing concern with CPS staffing and performance, and adoptions that were unnecessarily delayed. App. 129-133. The Circuit Court again held in abeyance its ruling on the renewed motion to dismiss. App. 132.

During the course of a hearing on January 29, 2020, the Respondent Guardians ad Litem asserted that the efforts of the Department had not resulted in any significant progress, especially with regard to staffing, not only in Kanawha County, but statewide. The evidence showed that the staffing issues had worsened, notwithstanding the efforts of the Department. App. 135. The Respondent Guardians ad Litem then moved for leave to file an Amended Petition for Writ of Mandamus, seeking to broaden their claims to apply to CPS Divisions statewide and to make clear that their claims included the staffing and operation of adoption and foster care units within the Department. App. 135-136.

The Department objected to the motion, and the Circuit Court therefore directed the parties to brief the issues of whether the Petition for Writ of Mandamus should be expanded to consider the staffing, training, and operation of CPS Divisions statewide; the operation and performance of adoption and foster care units; and similar issues affecting children in state custody pursuant to a child abuse and neglect proceeding throughout the state of West Virginia. App. 137. The parties filed their respective briefs accordingly. App. 141-149, 150-159, 160-188, 189-196, 197-208.

The Circuit Court then conducted a series of evidentiary hearings on the motion from September 24, 2020, through September 29, 2021. The Respondent Guardians ad Litem

presented testimony from multiple witnesses, including Department employees, the Secretary, the West Virginia Legislative Auditor's office, and the Foster Care Ombudsman. The Guardians ad Litem also presented a multitude of documentary evidence, including reports from the Legislative Auditor, the Foster Care Ombudsman, and information gleaned from the Department's own reports, charts, and records, all of which reflected that the operation and staffing of the CPS Divisions statewide was not at the levels required by federal or state standards. See, Supplemental Appendix of Respondent Guardians ad Litem [hereinafter, Supp. App. Resp.] pages 7-150. Moreover, the evidence demonstrated that the operational and staffing problems were not only within the CPS Division offices, but also applied to adoption and foster care units maintained by the Department. App. 209-213, 214-218, 219-223, 224-237.

Over the objection of the Department, by order entered December 21, 2021, the Circuit Court granted the Respondent Guardians ad Litem leave to file their Amended Petition for Writ of Mandamus to include CPS offices statewide, and to consider the staffing and performance of adoption units, foster care units, and similar issues affecting children throughout the state. App. 224-237. The Circuit Court also directed the parties to work cohesively to develop a long-term plan to achieve all the goals of the Court, the Guardians ad Litem, and the Department, as contemplated in the proceedings, including a timeline for implementation of said goals. App. 234-235.

The Respondent Guardians ad Litem filed their Amended Petition for Writ of Mandamus on December 22, 2021. App. 329-339. The Department, the Secretary, and the Kanawha County CPS Division filed their Motion to Dismiss on January 5, 2022. App. 340-354.

Meanwhile, in another child abuse and neglect case, evidence was presented that the Kanawha County CPS caseworkers housed children entrusted to their care in the Division's offices overnight. App. 374-379, 381. In some cases, the CPS Division would obtain hotel rooms for the children and caseworkers until such time as an appropriate placement could be obtained. App. 375-378. (Said actions are hereinafter sometimes referred to as the "housing practices.")

The Circuit Court entered an order in the underlying child abuse and neglect case prohibiting the Department from continuing these housing practices statewide. App. 374-376, 378, 383-385. The Respondent Guardians ad Litem then moved for an emergency hearing in the instant matter, requesting that the Circuit Court include the housing practices in the mandamus action. App. 386-388. The Petitioners filed their objection to the hearing. App. 392-398.

The Circuit Court conducted an emergency hearing on this issue in the mandamus action on January 6, 2022, and considered testimony from various employees of the Department, including Commissioner of Social Services Jeffrey Pack, Kanawha County Community Services Manager Michael Hale, and Kanawha County Social Services Coordinator Sandra Wilkerson. Supplemental Appendix [hereinafter Supp. App.] at pages 420-527. Each of these witnesses acknowledged the housing practices, and further acknowledged that such practices were a violation of federal and state standards, as well as rules, policies and procedures of the Department. Supp. App. 443-444, 452, 456, 465, 480, 493, 502.

The witnesses confirmed that children were kept overnight in CPS Division offices statewide, and also at hotels for days at a time. Supp. App. 437-438, 441, 465-467, 493. Such

placements often result in property damage, flight risks, and concerns that the children would “get away, run into traffic, end up in the wrong place with the wrong people.” Supp. App. 453, 475. In both the office overnight stays and hotel stays, two CPS workers are required to stay with children, working in four-hour shifts, and are expected not to sleep. Supp. App. 447-450, 453, 455-456.

The housing practices are so common that each CPS district office submits monthly reports to the Department entitled “Children Overnight in Hotels, Offices, and Hospitals.” Supp App. 456-459, 465-466, 478, 494, 503-504. During the past year the overnight stays per month in offices and hotels ranged from none to two or three weeks. Supp. App. 437-438, 441. In October 2021, there were around six days when the Kanawha County CPS office did NOT have children staying overnight. Supp. App. 466.

Commissioner of the Bureau for Social Services, Jeffrey Pack, testified that the Department was well aware of these housing practices. Supp. App. 493. He spoke at a judicial conference in September 2021 and specifically noted that the issue of requiring youths in the custody of the Department to stay overnight in CPS offices or hotels is an ongoing problem. Supp. App. 427, 493. Commissioner Pack was aware of the Department’s problematic housing practices well before the motion for emergency hearing was filed in November 2021. Supp. App. 493, 514. Commissioner Pack testified that the problem of housing children overnight in hotels and Department offices is a statewide problem. Supp. App. 505.

When children are kept overnight at the Kanawha County CPS office, they are required to sleep in an office that has been converted to a sleeping area, with a pull-out sleeper sofa, television, and computer games. There are storage drawers, but no closets. The children use

the same bathroom facilities as the employees. Supp. App. 438-439. When more than one child requires a sleeping area, the child is accommodated with an elevated cot in the conference room. Supp App. 440. The children are not provided with nutritious, balanced meals through certified dietitians or food handlers, but rather receive takeout or carryout meals or are taken to eat by staff. Supp. App. 440, 486. CPS employees provide snacks to the children or purchase meals for them on the Department purchasing card. Supp. App. 445. The CPS office does not have a freezer or stocked food. They do have a microwave and an electric oven. Supp. App. 440.

There are no shower or bathing facilities set up in the Kanawha County CPS offices. Supp. App. 439, 461, 487. The Department contracts with Patchwork or the Davis Child Shelter to transport the children to those facilities to take showers every other day. Supp. App. 487. The CPS office does not keep a supply of hygiene supplies such as soap, towels, toothpaste, and toothbrushes, but the children are provided with the same when they are taken elsewhere to shower. Supp. App. 446.

The children do not have the ability to store or clean their clothes or belonging. There are no facilities in the CPS offices to wash and clean the clothes. Often staff will take the clothes home and wash them for the children. Supp App. 446-447.

Children housed in CPS offices overnight do not attend school. Supp. App. 441, 462. They do not receive mental health counselling or other related services. Behaviors of the children often escalate because they are not being appropriately maintained and treated. Supp. App. 471. One child who stayed three weeks was violent, threw a stapler at an employee, and

decompensated while in the office without services and adequate care. Supp. App. 442, 466, 470.

CPS employees are detrimentally affected by housing children in their offices. Supp. App. 478-479. While the Kanawha County CPS Division office does have 24-hour security, that does not necessarily guarantee the safety of either the children or the employees. Supp. App. 447. One child housed in the Kanawha County CPS office stole an employee's car. Supp. App. 477. Another walked around the office and took things off of desks. Supp. App. 477. Two others made threats or attacked workers. Supp. App. 476-477.

When the children stay overnight at CPS offices, the Department mandates that a minimum of two employees to stay with them. Supp. App. 447-450, 453, 455-456. They each work four-hour shifts, usually in addition to their regular eight-hour shift. Supp. App. 448. The workers remain in the general vicinity of the child, but do not necessarily sit or stay in the converted sleeping area. Supp. App. 447. They are not permitted to sleep during the four-hour shifts. Supp. App. 447. Employee fatigue has become a factor for these workers, including CPS case manager, youth service workers, CPS supervisors, youth service supervisors, and case aides. Supp. App. 450.

The housing practices of the Petitioners have caused low morale among employees. Supp. App. 479. Employees of the Department have commented that they were unhappy and were going to look for employment elsewhere because of the overnight stay requirements. Supp. App. 479. The employees suffer from other stressors as well, including low staffing numbers, workloads, and working shifts with children for a very long time. Supp. App. 479. The

Kanawha County CPS office in particular has suffered a significant loss of personnel, which has affected the care of the children entrusted to its care. Supp. App. 445-446, 479.

The Department does not have any written policies on housing children in offices or hotels. Supp. App. 456. The Department does have guidelines, rules, and regulations regarding how children are being maintained in other facilities. Supp. App. 443. The Department is not meeting any of those guidelines when it houses children in either a hotel or a CPS office. Supp. App. 443-444, 452. The CPS offices do not meet the applicable guidelines, rules, or state statutory requirements for foster home facilities or emergency shelters. Supp. App. 452, 480. Hotels in which the children are housed do not meet the state statutory requirements or the rules for foster care, shelter placement, or general residential facilities for children. Supp. App. 456, 480.

After hearing the arguments and representations of counsel, the Circuit Court held that the housing practices issue was well within the scope of the mandamus proceeding. Supp. App. 426-427. After considering the testimony and other evidence offered at the hearing, the Circuit Court verbally reiterated its prior order entered in the M.P. case, and issued a blanket prohibition against housing any children in the abuse and neglect system in CPS offices statewide. Supp. App. 521-523. The Circuit Court further prohibited the Department and CPS caseworkers from housing such children in hotels for more than two days. Supp. App. 522-523.

The Petitioners filed a motion and supplemental motion with the Circuit Court to stay the order. App. 403-408, 409-418. By order entered January 12, 2022, the Circuit Court confirmed its verbal orders and denied the motions to stay. Supp. App. 528-531.

On January 13, 2022, the Petitioners filed their Writ of Prohibition in this Honorable Court, seeking a prohibition of the Circuit Court's continuing consideration of the Writ of Mandamus action; a prohibition against the Circuit Court expanding the scope of the Writ of Mandamus to include CPS Divisions, adoption and foster care units statewide, as well as the housing issues raised by the Respondent Guardians ad Litem; and a prohibition of the Circuit Court order mandating that the Department and CPS Divisions statewide shall not house any child who is in their care, temporarily or permanently, at any local Department office at any time or any hotel for more than two consecutive nights. The Petitioners simultaneously filed their Motion for Stay of Circuit Court Proceedings and a Motion for Expedited and/or Emergency Relief.

By Order entered January 19, 2020, this Court granted the Motion to Stay, and denied the Motion for Expedited and/or Emergency Relief. The parties were unaware of this Court's order granting the stay until January 25, 2022. The Circuit Court also appeared unaware of this Court's order granting the stay, inasmuch as the Circuit Court entered its Order Granting Amended Writ of Mandamus on January 20, 2022. On January 25, 2022, the Circuit Court also entered its Amended Order for Emergency Hearing Held January 6, 2022, and Amended Order Denying Motions for Stay.

SUMMARY OF ARGUMENT

The Petitioners seek, through the guise of a writ a prohibition, an impermissible interlocutory appeal of the Circuit Court's discretionary decision to require the Petitioners to perform their legal duty in properly staffing, training, and operating CPS offices in Kanawha County so as to safeguard the children entrusted to the custody and care of the

Petitioners. The Petitioners object to the Circuit Court expanding the scope of the mandamus action to include CPS Division offices statewide, as well as foster care and adoption units, even though the evidence submitted at the various hearings clearly established that the problems existed throughout the entire state of West Virginia. The Petitioners also seek, in essence, this Court's permission to continue with a dangerous, incomprehensible, and most likely illegal practice of housing children overnight in CPS Division offices and hotels – none of which meet even the minimal Department standards or federal or state guidelines.

The Circuit Court did not commit clear error, nor did it exceed its power, by granting the original Petition for Writ of Mandamus filed by the Respondent Guardians ad Litem. The Department, its CPS Division offices, and the Secretary each have a clear legal duty to adhere to all federal and state standards regarding the operation of CPS offices and the safety and welfare of children placed within the custody of the Department through abuse and neglect cases. The initial mandamus action was necessitated by the Petitioners' failure and inability to meet that clear legal duty, and because there was no other available recourse to make them do so.

Likewise, the Circuit Court did not commit clear error or exceed its power by expanding the mandamus action statewide as to CPS Divisions, adoption and foster care units; or expanding it to include children who are improperly housed in Division offices or hotels. These issues are not only relevant and key to the efficient and effective operation of the CPS divisions statewide, but are also crucial to the health, safety, and well-being of

the children in the care of the Department.

Most importantly, the Circuit Court did not err in prohibiting the Department from housing children in the abuse and neglect system overnight in CPS Division office or hotels. The Department's own witnesses acknowledged that such practices did not meet even the minimal internal policies and procedures regarding safe placement of children, let alone any state or federal standards. The fact that such practices are so common that the Department requires monthly reports on children housed overnight in offices, hotels, and hospitals from each county establishes that the Petitioners have failed in their legal duty to protect said children on several levels.

After the last hearing, it became obvious that the Petitioners realized that the matters raised in the initial mandamus were getting worse instead of better. They now seek to evade court review of their actions, which are in clear violation of multiple federal and state rules, laws, and standards, and their lack of actions. Instead, the Petitioners seek to remove themselves from the close scrutiny of the Circuit Court, and from the inquiries made by the Respondent Guardians ad Litem, as to their ability to staff, operate, and maintain the CPS offices, and to properly care for the children placed in the custody of the Department.

None of the factual or legal arguments of the Petitioners form a sufficient basis for the extraordinary relief of a writ of prohibition. Accordingly, the Petition for Writ of Prohibition should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents believe that the issues presented are neither novel nor do they present unsettled areas of law, therefore Respondents do not believe oral argument is necessary. Should the Court grant oral argument, Respondents certainly welcome the same and believe that this case would fall under Rule 19 of the *W.Va. Rules App. P.*

ARGUMENT

A. Standard of Review.

The standard of review applicable to a writ of prohibition is set forth in the provisions of *W.Va. Code §53-1-1, et seq.*, and Rule 16 of the *W. Va. Rules App. P.* as well as long-established holdings by this Honorable Court. "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code §53-1-1.*" Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 233 S.E.2d 425, 160 W.Va. 314 (1977).

The Petitioners have not and cannot demonstrate their entitlement to relief by way of prohibition. "To justify this extraordinary remedy, the Petitioners have the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." *State ex rel. Stewart v. Alsop*, 533 S.E.2d 362, 364, 207 W. Va. 430 (2000) (internal punctuation omitted)(citing *State ex rel. Paul B. v. Hill*, 496 S.E.2d 198, 204, 201 W. Va. 248, 254 (1997) and *State ex rel. Allen v. Bedell*, 454 S.E.2d 77, 82, 193 W. Va. 32, 37 (1994)).

A writ of prohibition is an extraordinary proceeding – one that is not to be used as a substitute for an appeal. "Prohibition lies only to restrain inferior courts from proceeding in

causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 75 S.E.2d 370, 138 W.Va. 207 (1953). This Court has made it clear that it is "restrictive in its use of prohibition as a remedy." *State ex rel. West Virginia Fire & Cas. Co. v. Karl*, 487 S.E.2d 336, 341, 199 W.Va. 678, 683 (1997); *State ex rel. Allstate Ins. Co. v. Gaughan*, 640 S.E.2d 176, 182, 220 W.Va. 113, 118 (2006).

When evaluating extraordinary writs, the West Virginia Supreme Court of Appeals reserves the granting of such relief to "really extraordinary causes." *State ex rel. Suriano v. Gaughan*, 480 S.E.2d 548, 554, 198 W. Va. 339, 345 (1996) (internal citations omitted.); *State ex rel. Am. Elec. Power Co. v. Nibert*, 784 S.E.2d 713, 718, 237 W. Va. 14, 19 (2016). "Historically, we have limited our exercise of original jurisdiction in prohibition because it is an extraordinary remedy reserved for extraordinary cases." *State ex rel. Justice v. King*, 852 S.E.2d 292, 297 (W. Va. 2020) (citing *State ex rel. West Virginia Div. of Natural Resources v. Cline*, 200 W. Va. 101, 105, 488 S.E.2d 376, 380 (1997) and *State ex rel. Bobrycki v. Hill*, 202 W. Va. 335, 337, 504 S.E.2d 162, 164 (1998)). "For this reason, this Court will grant a writ of prohibition 'to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.'" *State ex rel. Justice v. King*, 852 S.E.2d at 297 (internal citations omitted).

"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*, 483 S.E.2d 12, 199 W.Va. 12 (1996).

There is a significant burden of proof required to demonstrate that a circuit court's finding is 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 part, *In the Interest of Tiffany Marie S.*, 470 S.E.2d 177, 196 W.Va. 223 (1997); *State ex rel. Owners Ins. Co. v. McGraw*, 760 S.E.2d 590, 594, 233 W. Va. 776, 780 (2014).

- B. A writ of prohibition is not an appropriate remedy where the Petition is merely an attempt to obtain an impermissible appeal of a discretionary, interlocutory order issued in a Writ of Mandamus action that requires the Petitioners to perform their legal duties to children in the child abuse and neglect system as required by federal and state laws.**

In their Petition for Writ of Prohibition, the Petitioners failed to demonstrate that they have no other adequate means, such as direct appeal, to obtain the relief desired. This query implicates the first factor in this five-factor analysis.

The Petitioners did not contest the jurisdiction of the Circuit Court of Kanawha County. Rather they asserted that the Circuit Court exceeded its legitimate powers and committed clear legal error by continuing and expanding a mandamus action “beyond the four corners” of the original mandamus petition. That position failed, however, because there is no legal or moral basis for the Petitioners to continue to fail to meet and maintain federal, state, and internal statutes, guidelines, and protocols regarding not only the staffing and training of CPS caseworkers, but also the operation of CPS Division offices, the investigation of child abuse and neglect cases, and, most importantly, the housing, care, and safety of children placed in the custody of the Department.

The Petitioners now seek to not only prohibit the expansion of the writ of mandamus below, but to dismiss it altogether as an improper interference by the Circuit Court in the day-to-day operations of the Department. Such a desire to avoid its clear legal duty to the children is not a basis for a writ of prohibition.

The Petitioners have not shown any of the elements necessary to support their request for a Writ of Prohibition.

The first element – whether the party seeking the writ has no other adequate

means to obtain the desired relief – is not applicable in a mandamus action where there has not yet been a final order issued. The Petition is, in essence, an appeal of an interlocutory order that does not terminate the proceedings in the Circuit Court, which is not appropriate at this time. *Hinkle v. Black*, 262 S.E.2d 744, 164 W. Va. 112 (1979). The principle of non-appealability in interlocutory rulings is to prevent the loss of time and money involved in piecemeal litigation, and to allow an action to continue towards a resolution on its own merits. *State ex rel. Arrow Concrete Co. v. Hill*, 460 S.E.2d 54, 194 W.Va. 239 (1995); *Wilfong v. Wilfong*, 197 S.E.2d 96, 99, 156 W.Va. 754, 758, (1973).

The interlocutory nature of the order below is demonstrated by the directions issued at the January 6, 2022, hearing. The Circuit Court has asked for additional monthly information from the Department, and has set the matter for further review on April 6, 2022. Supp. App. 522. Moreover, the Circuit Court has instructed the Department to develop and implement a plan that will prohibit and cease the housing practices at issue. Supp. App. 521-522. All of this leads to the conclusion that the mandamus action has not yet reached a final state where anything can be appealed.

The Petitioners do not like where the underlying action is headed, given the extensive testimony that demonstrates the Department's failure to properly operate and maintain its CPS offices, so they now seek this Court's authority to circumvent not only applicable federal and state standards, but to grant an interlocutory appeal in a matter where a final order has not been entered.

The fact that the underlying mandamus action has been ongoing since 2017 is not sufficient reason to find that any factor in the *Hoover* analysis has been met. To the contrary, a

matter requiring a state agency to perform its legal duties can go on for decades, as demonstrated by the “*Hartley*” mandamus action, *E.H. v. Matin*, 284 S.E.2d 232, 168 W.Va. 248 (1981). In *Hartley*, the Kanawha County Circuit Court was directed by this Supreme Court to oversee the Department in achieving the legislative mandate of providing appropriate care and treatment to those individuals who were involuntarily hospitalized. In 1983 the Circuit Court ultimately accepted the West Virginia Behavioral Health System Plan, a comprehensive mental health plan, which addressed the various standards, conditions, and facilities, but continued to monitor the case until 2002 when, by agreement of the parties, the case was removed from the active docket of the court. See, *E.H. v. Matin*, 432 S.E.2d 207, 189 W.Va. 445 (1993) (approving continued circuit court monitoring); *W. Va. Dep’t of Health & Human Res. v. E.H.*, 236 W.Va. 279, 778 S.E.2d 728 (2015); *E.H. v. Matin*, 428 S.E.2d 523, 189 W.Va. 102 (1993).

This Court and the public are no doubt aware of the numerous media reports regarding tragic and alarming problems with Child Protective Services. “We cannot shut our eyes to matters of public notoriety and general cognizance.” *E.H. v. Matin*, 284 S.E.2d at 241, (internal citations and punctuation omitted).

- C. A writ of prohibition is not an appropriate remedy to circumvent the discretionary order of the Circuit Court to maintain the mandamus action; to expand the scope of the mandamus proceeding to include CPS Divisions, adoption and foster care units statewide; and to include in the mandamus action the improper housing practices of the Petitioners that permit children to be kept overnight in CPS Division offices or hotels contrary to law and the Department’s own rules and regulations.**

Under its five-factor analysis, this Court has determined that the third factor, the existence of clear error, is the most significant. *State ex rel. Owners Ins. Co. v. McGraw*, 760 S.E.2d at 594, 233 W. Va. at 780. The Circuit Court’s rulings were not clearly erroneous because the evidence established that (1) there was a clear legal right in the petitioners to the

relief sought; (2) there was a legal duty on the part of the respondents to do the thing which the petitioners sought to compel; and (3) there was an absence of another adequate remedy. See, *State ex rel. Aaron v. King*, 485 S.E.2d 702, 199 W.Va. 533 (1997); Syl. Pt. 1, *State ex rel. East End Assoc. v. McCoy*, 481 S.E.2d 764, 198 W.Va. 458 (1996).

A petition for a writ of mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made. Syl. Pt. 1, *State ex rel. Buxton v. O'Brien*, 125 S.E. 154, 97 W. Va. 343 (1924); Syl. Pt. 2, *State ex rel. Lambert v. Cortellessi*, 386 S.E.2d 640, 182 W. Va. 142 (1989); *Ney v. West Virginia Workers' Compensation Fund*, 411 S.E.2d 699, 186 W. Va. 180 (1991).

A petition for a writ of mandamus is appropriate under the provisions of *W.Va. Code* §14-2-2 when it is filed as institutional reform litigation directed at a state agency and seeks relief statewide. *W.Va. Dept. of Health and Human Resources v. E.H.*, 236 W. Va. 194, 778 S.E.2d 643 (2015); *Crain v. Bordenkircher*, 357 S.E.2d 778, 178 W. Va. 96 (1987).

Mandamus is also an appropriate vehicle for the expeditious litigation of important questions of public policy. *McMellon v. Adkins*, 300 S.E.2d 116, 119, 171 W. Va. 475 (1983) (listing *Perry v. Barker*, 289 S.E.2d 423, 169 W. Va. 531 (1982) (wage payment bond); *Snyder v. Callaghan*, 284 S.E.2d 241, 168 W. Va. 265 (1981) (mine safety); *E.H. v. Matin*, 284 S.E.2d 232, 168 W. Va. 248 (care of mental patients in state hospitals); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 167 W. Va. 155 (1981) (mine safety); *Walls v. Miller*, 251 S.E.2d 491, 162 W. Va. 563 (1978) (mine safety); *State ex rel. Brotherton v. Moore*, 230 S.E.2d 638, 159 W. Va. 934 (1976) (management of industrial home for girls)).

A circuit court has great discretion in entering an order of mandamus, and generally, its actions will not be disturbed under an appeal filed in the guise of a writ of prohibition. As noted previously, "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 233 S.E.2d 425, 160 W.Va. 314; Syl. Pt. 1, *State ex rel. Owners Insurance Co. v. McGraw*, 760 S.E.2d 590, 233 W. Va. 776.

The Respondent Guardians ad Litem had a duty to their clients to bring the Writ of Mandamus and the Amended Writ of Mandamus. They have the duty and responsibility to advocate for the children assigned to them at every level. *James M. v. Maynard*, 408 S.E.2d 400, 411, 185 W.Va. 648 (1991); *In re Christina L.*, 460 S.E.2d 692, 700, 194 W.Va. 446, 454 (1995); *In Re Jeffrey R.L.*, 435 S.E.2d 162, 190 W.Va. 24 (1993); *Kristopher O. and Christina O. v. Mazzone*, 706 S.E.2d 381, 227 W.Va. 184 (2001); *State v. Scritchfield*, 280 S.E. 2d 315, 319, 167 W.Va. 683, 688-689 (1981); *In Re Scottie D.*, 406 S.E.2d 214, 220, 185 W.Va. 191, 198 (1991). See also, *W. Va. Code* §§ 49-4-601(f)(1), 49-4-604(b); Rule 18(a) and Appendix B of the Rules of Procedure for Child Abuse and Neglect Proceedings.

In their original Petition for Writ of Mandamus, the Respondent Guardians ad Litem asserted that the Petitioners have a clear legal duty to function as required by the applicable state and federal statutes, rules, regulations, policies and procedures and to protect the children entrusted to the care of the Department through child abuse and neglect proceedings. App. 51-57. There is an entire statutory framework outlining the responsibilities of the Department to the children in its care because of child abuse and neglect proceedings, as well

as rules and regulations developed by the Department to implement those responsibilities. *See, W. Va. Code §§ 49-1-1 et seq.* There are also federal rules and regulations that impose requirements upon the states, and authorize federal funding for the care of dependent children.

The Petition for Writ of Mandamus requested that the Circuit Court require the Department, the Secretary and the Kanawha County CPS Division to perform their legal duties to properly staff, train, and operate the Kanawha County CPS Division so as to protect the children who are affected by abuse and neglect proceedings. App. 51-57. In their Amended Petition, the Respondent Guardians ad Litem sought to expand the scope of the mandamus action to CPS offices statewide, as well as to adoption and foster care units. App. 329-339. At the emergency hearing on January 6, 2022, the Respondents sought to include the housing of children in CPS Division offices and hotels. Supp. App. 431. All of these issues relate to the operation of CPS offices and the duty of the Department to protect the children entrusted to its care through abuse and neglect proceedings.

The Circuit Court of Kanawha County had the jurisdiction and discretion to accept the original petition for a writ of mandamus filed by the Respondent Guardians ad Litem, and also had the authority to expand that mandamus action when it became clear that the Petitioners failed to meet the standards and legal duties to which they are bound. *See W.Va. Code §53-1-6* (permitting amendments to petitions for writ of mandamus). *See also* Rule 15 of the *W.Va. Rules of Civil Procedure* (leave to amend shall be given freely when justice so requires.) Likewise, the Circuit Court had the discretion to determine what was needed to protect the children who are the subjects and, ultimately, the victims of the Petitioners' actions, including

barring the Petitioners from continuing improper housing practices.

The evidence established at the multiple hearings over the past few years clearly showed that the staffing problems that were central to the operational issues included in the original writ were not just in Kanawha County. The reports from the Department, the Ombudsman, and the Legislative Auditor reflected poor hiring, training, and retention in every single CPS Division office statewide. The testimony and other evidence adduced also reflected inadequate placement options of every variety. Supp. App. 467-468.

The Circuit Court also properly exercised its discretion in expanding the scope of the mandamus action to include consideration of the improper housing practices, namely housing children overnight in Division offices or hotels. As admitted by the witnesses, children who stayed overnight in Division offices did not have proper care, food, sleeping quarters, clothing, mental or physical health care, or supervision. Supp. App. 465-492. The CPS workers were required to stay with the children overnight, working in shifts of two without being permitted to sleep. Supp. App. 447-450, 453, 455-456. None of the offices and none of the hotels met even the minimum standards for child placement. Supp. App. 443-444, 452, 456, 480. The Petitioners knew that such housing practices existed but failed to timely correct or stop the custom. CPS Division offices routinely generated monthly reports, statewide, regarding children housed in offices, hotels, or hospitals. Supp App. 456-459, 465-466, 478, 494, 503-504. The Respondent Guardians ad Litem were unable to determine how long these housing practices have been a problem, because the Department failed to provide copies of those reports as required by the Circuit Court. Supp. App. 523-524. Commissioner Pack spoke of the problem at a judicial conference in September 2021. Supp. App. 493. The Department had

specific notice of the Circuit Court's concerns about these practices as early as November 2021, when the underlying *M.P.* case was heard. App. 355-382.

The Petitioners had ample time to consider the improper housing practices and produce a plan to resolve the problem. They have done nothing to end the practices, but actually seem to be approving of and encouraging them. Commissioner Pack testified that the Department was developing a new policy – and the goal of the new policy would be to minimize the time children would be in a Department office overnight, not to eliminate or stop the practice. Supp. App. 516.

The orders issued in this matter by the Circuit Court of Kanawha County are not clearly erroneous as a matter of law. The most significant factor, as noted in *Hoover*, is not an issue in the present case. Requiring the Petitioners to adhere to federal and state laws, regulations, and rules, as well as the internal guidelines and standards of the Department is not a clear error of law. To the contrary, it is a mandate. The self-serving statements of the Petitioners that they were taking steps to address staffing shortages, their success at getting various legislation enacted, and their failures allegedly caused by the pandemic and the opioid crisis do not establish that there is any error as a matter of law on the part of the Circuit Court. The focus of the mandamus is on what the Department is NOT doing – properly training its CPS staff; properly housing and caring for the children entrusted to its care; and ensuring that the abuse and neglect proceedings are consistent with the requirements of federal and state mandates.

The Petitioners argument that the housing practices and the consequential staffing issues do not fall within the mandamus action because they had no opportunity to present evidence on the issue is without merit. The Department's own witnesses were present at the

last hearing and testified that the housing practices have been ongoing; that the practices have been acknowledged for a long period of time; that they have resulted in monthly reports specifically designed to advise how many children were housed in offices, hospitals or hotels overnight; and that the Department was actually working on a policy – to minimize, but not eliminate the housing practices. To say that the Petitioners had no notice of the issue lacks credibility. To say they had no opportunity to respond to the issue defies the fact that counsel for the Department had every opportunity at the hearing to ask any question regarding the practices.

The Respondents are incredulous that the Petitioners take issue with the Circuit Court's finding that housing children overnight in CPS Division offices and hotels is unacceptable because such placements lacks the necessary sleeping, hygiene, and educational facilities for any child's care, and pose a safety hazard for both children and DHHR personnel. Yes, hotels have accommodations for sleeping and hygiene. But they do NOT meet the requirements for foster care placement established by federal law, state law, or even the Department's own internal policies and procedures. The guidelines do not make exceptions for the Department to violate their own standards. The safety and well-being of the children must come first, regardless of the inconvenience to the Department.

The Petitioners asserted that the Department is willing to correct its deficiencies and that mandamus is therefore inappropriate. "Mandamus will not issue to compel a party to perform an act which he has already begun to do, and it is apparent that he will in good faith perform." *State ex rel. Nelson v. Ritchie*, 177 S.E.2d 791, 154 W. Va. 644 (1970), citing Syl. Pt. 2, *State ex rel. Hall v. County Court of Mercer County*, 129 S.E.2d 712, 100 W. Va. 11 (1925). The

Nelson case is not in the line of cases involving institutional reform litigation, and is distinguishable from the instant case for a number of reasons.

In *Nelson*, the Highway Commissioner was required to perform a discrete specific duty, to select a site and begin construction of a new bridge. The Court looked to the circumstances of the case and the actions performed to determine whether the Highway Commissioner had actually refused to comply with his obligations. The Court found that the Highway Commissioner had engaged in a number of actions to bring the matter to fruition, and that it was, in part, the actions of the petitioners that had delayed the bridge selection process.

Nelson, 177 S.E.2d at 794-795.

This very case upon which the Petitioners relied specifically noted, however, that a state agency not only has a public duty, but has the duty to complete that obligation in a timely manner. In *Nelson*, this Court reminded the parties that, while the mandamus action was not proper at the time, if the Highway Commissioner did not complete his duties in a timely manner, mandamus would lie. *Nelson*, 177 S.E.2d at 796.

In a similar case, the Court denied a mandamus petition seeking to compel compliance with a Public Service Commission order. *State ex rel. Public Service Commission v. Indian Creek Gas Co.*, 179 S.E.2d 574, 154 W. Va. 835 (1971). The Court found that substantial compliance with the order had already occurred, and that steps had been taken toward completing the remaining obligations. The Court noted, however, that “the ultimate aim . . . must be pursued promptly, with diligence and without unreasonable delay. Should this not be done . . . within a reasonable time, this matter may be reconsidered to determine whether Indian Creek Gas Company will be compelled by mandamus to perform its duty.” *Id.*, 179 S.E.2d at 577.

In the instant case, the Department keeps saying it is willing to fix the issues raised by the Respondents and it has, indeed, done many things toward that end, but it has not accomplished its goals in a timely manner, and its efforts have not been significantly successful. As reflected in the first and the last staffing reports tendered by the Department, the staffing issues are worse now than they were when the underlying action first began. Supp. App. Resp. 7-12.

The party's "willingness" to perform its duty is a question of fact for the Circuit Court, as are issues of good faith, compliance, and timeliness. The Circuit Court must consider the facts and circumstances of the case, including progress toward the objective, in determining a party's willingness to perform its duties. The Circuit Court cannot rely solely on the self-serving assertions of the party against whom the writ of mandamus is sought.

The Petitioners should not be permitted to circumvent their clear legal duty to protect the safety and well-being of children placed in the abuse and neglect system simply because they believe the Circuit Court has imposed on so many of the day-to-day operations of the Department. If the Department cannot resolve the issues that directly affect the operation of its CPS Division offices and the children placed in its care on its own, the supervision of the Circuit Court is crucial. Only with someone holding their feet to the fire is it possible for the Petitioners to do what they are required to do by law – protect the children.

D. A writ of prohibition is not an appropriate remedy when the Circuit Court's discretionary, interlocutory rulings in the mandamus proceeding did not violate the Separation of Powers Doctrine.

The Petitioners' claims that the Circuit Court's orders and the continuation of the mandamus action below are a violation of the separation of powers doctrine ignores the basic premise behind a writ of mandamus – that the courts require a state agency to perform its legal duties.

Only direct and fundamental encroachments by one branch into the traditional powers of another branch violate the separation of powers doctrine contained in Section 1 of Article V of the West Virginia Constitution. Syl. Pt 1, *Appalachian Power Co. v. Public Service Comm'n*, 296 S.E.2d 887, 176 W.Va. 711 (1982); *Starcher v. Crabtree*, 348 S.E.2d 293, 176 W.Va. 707 (1986). This Court has indeed “recognized the need for some flexibility in interpreting the separation of powers doctrine in order to meet the realities of modern-day government and particularly the proliferation of administrative agencies.” *Id.*; *Appalachian Power*, 296 S.E.2d at 889; *Chapman v. West Virginia Housing Authority*, 3 S.E.2d 502, 121 W.Va. 319 (1939); *Wheeling Bridge T. Ry. Co. v. Paull*, 19 S.E. 551, 39 W.Va. 142 (1894).

This Court recently analyzed the separation of powers doctrine in *State ex rel. Justice v. King*, 852 S.E.2d 292, noting that in several jurisdictions “courts have applied, or at least recognized, the rule that mandamus will lie to compel the governor to perform an act which is of a ministerial nature, where he has no discretion in the matter and his duty to perform the same is clear, if there is no other adequate legal remedy for the protection of the rights of the public or third parties who have an interest in such performance.” *Id.*,

852 S.E.2d at 301.

This Court reiterated that “It also is well-settled law in this State that ‘[m]andamus lies to require the discharge by a public officer of a nondiscretionary duty.’” Syl. Pt. 3, *State ex rel. Greenbrier Cty. Airport Auth. v. Hanna*, 153 S.E.2d 284, 151 W. Va. 479 (1967); *Nobles v. Duncil*, 505 S.E.2d 442, 202 W. Va. 523 (1998); *Delardas v. Cty. Court of Monongalia Cty.*, 186 S.E.2d 847, 155 W. Va. 776 (1972). *See also, Walter v. Ritchie*, 191 S.E.2d 275, 282, 156 W. Va. 98, 110 (1972). (“Mandamus will lie to compel performance of a nondiscretionary duty of an administrative officer though another remedy exists, where it appears that the official, under misapprehension of law, refuses to recognize the nature and scope of his duty and proceeds on the belief that he has discretion to do or not to do the thing demanded of him.”)

“Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made.” Syl. Pt. 1, *State ex rel. Buxton v. O'Brien*, 125 S.E. 154, 97 W. Va. 343; Syl. Pt. 8, *Nobles v. Duncil*, 505 S.E.2d 442, 202 W. Va. 523 (1998).

The *Justice* decision held that “while mandamus may lie against a public official to cause that official to *act* in accordance with a mandatory duty, if the performance of that duty requires an exercise of discretion, mandamus may direct that the duty be performed, but it may not be used to direct the *manner* in which a public official performs the duty.” *State ex rel. Justice v. King*, 852 S.E.2d at 302. The Court then concluded:

[T]he speculative nature of the enforcement of remedies that may result does not mean that courts should not—or are without authority to—issue writs of mandamus

against public officials. The public has a reasonable expectation that its elected officials will uphold the duties of their offices/positions and follow the law, and writs of mandamus to compel compliance with these obligations will be issued when deemed necessary by the courts.

Id. at 308.

Likewise, the public has a reasonable expectation that the West Virginia Department of Health and Human Resources will uphold the duties of the office and follow the law regarding the care of children entrusted to its custody through abuse and neglect proceedings. In the very case cited by the Petitioners, this Court found that a circuit court order recognizing staffing shortages in an individual abuse and neglect case and directing the Department to take steps to correct the same was appropriate in the context of a motion for contempt:

[The circuit court order noted] that the current staff shortage of twelve unfilled positions directly impacts on “the proper oversight that D.H.H.R. should be giving to this case, including proper visitation and considerations of placement.” Given the trial court’s recognition in the November 5, 2004, ruling of how the staff shortage was contributing to the attention that the Department could necessarily give all cases, not just Brandon’s case, we do not find the inclusion of staffing directives in the contempt order to be beyond the scope of the predicate order. Clearly, the staffing concerns were not being raised for the first time in the contempt order and, as a constitutional officer charged with upholding the numerous statutory enactments that govern the protection of this state’s children from abuse and neglect, the trial court had the authority, subject to the limitations required in this opinion, to compel the Department to act to remedy the serious effects of the significant staff shortage at issue, specifically, in this case and, generally, in other abuse and neglect proceedings before that court.

In re Brandon Lee H.S., 629 S.E.2d 783, 788 (W. Va. 2006) (emphasis added).

Much like the Circuit Court in *Brandon*, the Circuit Court of Kanawha County has recognized how staffing issues and shortages have negatively affected the children in the abuse and neglect system, as well as the employees of the Department, and has taken steps to

address the same. Given that the staffing issues have been known to the Petitioners since at least that decision, it is obvious that the Petitioners cannot correct the problems alone, and that they need supervision and guidance by the Court.

This Court found that the separation of powers doctrine was not implicated in the *Hartley* institutional reform litigation. *W.Va. Dept. of Health and Human Resources v. E.H.*, 778 S.E.2d at 657. There, the Circuit Court did not tell the Department how to fulfill its obligations; it simply required the Department to comply with agreements it had already made.

In the instant case, the Circuit Court made it clear that it was not intruding upon the Department's authority. The Circuit Court inquired of the Commissioner whether the Department could rent and staff its own space to house children, in order to alleviate the problems with the housing practices. The Circuit Court then noted "[I]t's not really my jurisdiction to tell you how to run your department. The issue before me is whether you're going to be continuing – whether there's going to be any prohibition of housing these people, these young people, these very vulnerable young people in offices and hotels. The solutions are your responsibility to come up with, not the Court's." Supp. App. 510. In directing the Department to implement alternatives to its improper housing practices, the Circuit Court stated, "I am not going to in this proceeding tell the State how to do that. It's their obligation to do that, but it is my obligation to make sure that the children are properly cared for, and I'm finding that they are not currently being cared for appropriately while in an office setting and in a hotel room." Supp. App. 522.

The Department, and not the Circuit Court, is failing to respect the Separation of Powers Doctrine. The Circuit Court has an obligation to ensure that the children of West Virginia who find themselves in the custody of the Department through a child abuse and neglect proceeding receive substantive due process and enjoy the benefit of the laws enacted for their safety and well-being. *See, Cooper v. Gwinn*, 298 S.E2d 781, 786, 171 W. Va. 245 (1981).

There are no substantial, clear-cut, legal errors made by the Circuit Court in this matter that are plainly in contravention of clear statutory, constitutional, or common law mandates. To the contrary, the actions of the Petitioners that fail to meet federal, state, and even internal standards regarding the care of children in the abuse and neglect system clearly contravene statutory, constitutional, or common law mandates – and basic principles of safety and common sense. Requiring the Petitioners to perform the legal duty to which they are bound is not an error of law, and there is no probability or likelihood of the Petitioners obtaining any other result in the proceedings below.

E. A writ of prohibition is not an appropriate remedy when the Petitioners cannot demonstrate that they will be damaged or prejudiced in any way that is not correctable on appeal; cannot demonstrate that the Circuit Court's order is an oft-repeated error or manifests a persistent disregard for the law; and cannot demonstrate a new or important issue of first impression.

The Petitioners have failed to demonstrate legal or evidentiary support for any of the remaining factors in the five-factor analysis that this Court must consider in evaluating the petition for writ of prohibition. An analysis of the second factor indicates no damage or prejudice to the Petitioners that is not correctable on appeal.

The Petitioners will not be damaged or prejudiced in any way if the mandamus action is permitted to proceed. The Petitioners did not, in fact, point to anything in their argument that supports this factor. Other than asserting an interference with the operations of the Department – i.e., the Circuit Court’s requirement that the Department perform its legal duties – and an alleged impossibility to comply with the Circuit Court’s orders, the Petitioners could not point to any damage or prejudice they would suffer if required to do what is mandated by both federal and state laws.

The Petitioners claimed it is “impossible” to comply with the Circuit Court’s order obliging the Department to cease housing children overnight in CPS division offices and to cease housing children in lodging facilities for more than two consecutive nights per emergency. Supp. App. 530. The Petitioners argued that because of this impossibility, they risk being in contempt of Court.

The Petitioners asserted that all of the witnesses at the January 6, 2022, hearing testified that compliance with the Court’s order was impossible. That is not an accurate assertion. One witness speculated that it might not be possible if they were thrown out of a hotel, although she did not address the possibility of simply going to another hotel, or seeking mental health treatment for the child, among other options. The following is the exchange between counsel for the Department and the social services coordinator.

Q. Okay. And although that has not happened, is that – is the order that prohibits children from staying overnight, is that something that it might not be possible to comply with 100 percent of the time due to the difficulties of placing a child that might take an overnight?

A. Correct. Since the order, we’ve actually had very few children that have needed overnight stay. As I said before, in December we’ve only had one child that had to stay in a hospital setting. There may be a time when we have a child in a hotel where

the hotel asks us to leave. Hopefully we would not run into that, but that might, that might happen.

Supp. App. 485.

The Petitioners had every opportunity to address the alleged issue of impossibility at the January 6, 2022, hearing, but failed to do so. The Kanawha County Community Services Manager did not address the issue of impossibility during his testimony. Supp. App. 437-462. The Commissioner for the Bureau of Social Services did not address the issue of impossibility during his testimony either. Supp. App. 493-516. It was only following the hearing, in the supplemental motion to stay, that the Department submitted a proffer of evidence, namely, an affidavit from the Commissioner claiming that it would be impossible to guarantee compliance with the Circuit Court's order. App. 418. This affidavit is an unfair attempt to bolster and supplement the record below.¹

"[M]andamus does not lie where performance of the thing sought to be compelled is an impossibility." *State ex rel. Philyaw v. Williams*, 438 S.E.2d 64, 66, 190 W. Va. 272 (1993). "A writ of mandamus will not be issued in any case when it is unnecessary or where, if used, it would prove unavailing, fruitless or nugatory." Syl. Pt. 6, *Delardus v. Morgantown Water Comm.*, 137 S.E.2d 426, 148 W. Va. 776 (1964). In *Philyaw*, a writ of mandamus was sought to compel a court reporter to provide a transcript. The evidence developed, however, revealed that, despite a comprehensive search, the court reporter's notes had been irretrievably lost, and it was physically impossible for her to complete the transcript.

¹ The Circuit Court did not have this affidavit before it when it made its rulings at the hearing, and the Respondent Guardians ad Litem were, of course, deprived of the opportunity to cross examine on this important issue.

The defense of impossibility is not applicable in the case at hand. Impossibility is claimed only in the self-serving statements of the Department and is not supported by the evidence. Any “impossibility” is self-inflicted.

The Petitioners cannot point to any damage or prejudice they would suffer if required to do what is mandated by both federal and state laws. To the contrary, the children in the custody of the Department will suffer various harms, ranging from risks to their physical safety if housed in CPS Division offices overnight or in hotels for long periods of time, to lacking in permanency because of the inefficient performance of poorly trained, or supervised, or overworked, CPS caseworkers.

There is no evidentiary or legal support for the fourth and fifth factors in the Court’s analysis. The Circuit Court’s orders requiring the Department to perform its legal duties and to develop a plan that properly establishes the staffing, training, and operation of CPS offices are not oft-repeated errors, nor do they manifest persistent disregard for procedural or substantive law. To the contrary, much like in the *Hartley* cases, the orders require the Petitioners to perform their legal duties to the children of this state. Since the Department cannot seem to accomplish these duties on its own, the oversight by the Circuit Court is a necessary requirement.

Finally, the orders of the Circuit Court do not raise new and important problems or issues of law of first impression. Unfortunately, as in *Hartley*, the mandamus action below simply reflects yet another failure on the part of the Department to perform its legal duties.

As such, the Petition for a Writ of Prohibition should be DENIED.

CONCLUSION

The Petitioners have not met the standard for obtaining a writ of prohibition. They have not shown that the Circuit Court exceeded its legitimate powers, nor shown any other clear legal error. At best, all that the Petitioners can show is that they disagree with the Circuit Court's decision. There has been no showing of an abuse of discretion, and no basis for an extraordinary writ of prohibition. The Petitioners are essentially seeking--through the guise of a petition for writ of prohibition--an appeal of the Circuit Court's clearly discretionary, interlocutory decision.

For the foregoing reasons, Respondent Guardians ad Litem respectfully request that this Honorable Court deny the Petitioners' Writ for Prohibition.

RESPECTFULLY SUBMITTED,



Jennifer R. Victor, WVSB 7601

Victor & Victor LLP

1319 Quarrier Street

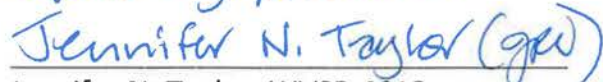
Charleston, WV 25301

Telephone 304.346.5638

Fax 304.346.0451

vvhlaw@suddenlinkmail.com

signed by permission



Jennifer N. Taylor, WVSB 4612

1118 Kanawha Blvd., East

Charleston, WV 25301

Telephone: 304.342.1887

Fax: 304.343.7450

jennifer@jtaylor-law.com

Respondent Guardians ad Litem

In the Supreme Court of Appeals of West Virginia
No. 22-0027

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,
BILL CROUCH, SECRETARY, and
KANAWHA COUNTY CHILD PROTECTIVE
SERVICES DIVISION,

Petitioners,

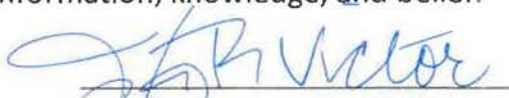
v.

THE HONORABLE LOUIS H. BLOOM,
Judge of the Circuit Court of Kanawha County,
JENNIFER R. VICTOR, and
JENNIFER N. TAYLOR,
Guardians ad Litem for the
Circuit Court of Kanawha County,
Respondents.

VERIFICATION

STATE OF WEST VIRGINIA;
COUNTY OF KANAWHA, to-wit:

I, Jennifer R. Victor, Respondent Guardian ad Litem, being duly sworn, depose and say that I have reviewed the foregoing "Verified Response to Petition for Writ of Prohibition of Respondent Guardians ad Litem" and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.


Jennifer R. Victor, WVSB 7601

Taken, subscribed, and sworn to before me, the undersigned Notary Public in and for the county and state aforesaid, by Jennifer R. Victor on this 23rd day of February, 2022.


Notary Public

My Commission Expires: Oct 13, 2025

[NOTARY SEAL]



CERTIFICATE OF SERVICE

I, Jennifer R. Victor, Respondent Guardian ad Litem, do hereby certify that I served a true copy of the foregoing "Verified Response to Petition for Writ of Prohibition of Respondent Guardians ad Litem" upon each of the following:

The Honorable Louis H. Bloom
Circuit Court of Kanawha County
111 Court Street, Fifth Floor
Charleston, West Virginia 25301

Steven R. Compton
Deputy Attorney General
Director, Health and Human Resources Division
812 Quarrier Street, Sixth Floor
Charleston, West Virginia 25301

Lou Ann S. Cyrus
Shuman McCuskey & Slicer PLLC
1411 Virginia Street, East
Suite 200
Charleston, West Virginia 25339

Emily L. Lilly
Shuman McCuskey & Slicer PLLC
1411 Virginia Street, East
Suite 200
Charleston, West Virginia 25339

by hand delivery, facsimile transmission, electronic delivery, or by first-class United States Mail,

postage prepaid, on this 23rd day of February, 2022.



Jennifer R. Victor, WVSB 7601
Victor & Victor LLP
1319 Quarrier Street
Charleston, WV 25301
Telephone 304.346.5638
Fax 304.346.0451
vvhlaw@suddenlinkmail.com

Jennifer N. Taylor, WVSB 4612
1118 Kanawha Blvd., East
Charleston, WV 25301
Telephone: 304.342.1887
Fax: 304.343.7450
jennifer@jtaylor-law.com

Respondent Guardians ad Litem