STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN RE: EMILY G. AND KALEB D.

No. 35660 (Wood County 08-JA-64 & 10-JA-02)

MEMORANDUM DECISION

The petitioners below and appellants herein, John and Donna M.[1] (hereinafter "maternal grandparents" or "grandparents"), appeal from an order entered February 23, 2010, by the Circuit Court of Wood County, which dismissed their petition for abuse and neglect alleging that Emily G. (hereinafter "Emily") and Kaleb D. (hereinafter "Kaleb") were abused and neglected children due to the domestic violence between their mother, Sylvia G. (hereinafter "Sylvia" or "mother"), and Emily's father, Carl B.[2] (hereinafter "Carl" or "father"). On appeal to this Court, the maternal grandparents[3] argue that the circuit court erred in finding that "none of the domestic violence occurred in the presence of the children or in the home of the children" and, therefore, dismissed the abuse and neglect petition. Based on the parties' briefs and oral arguments, the record designated for our consideration, and the pertinent authorities, we affirm the rulings made by the circuit court. This Court further finds that this case presents no new or significant questions of law. Therefore, this case will be disposed of through a memorandum decision as contemplated under Rule 21 of the Revised Rules of Appellate Procedure.

The underlying facts of the case are relatively undisputed. This Court previously has reviewed this case, resulting in the opinion in *In re Emily G.*, 224 W. Va. 390, 686 S.E.2d

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[1]"We follow our past practice in juvenile and domestic relations cases which involve sensitive facts and do not utilize the last names of the parties." *State ex rel. West Virginia Dep't of Human Servs. v. Cheryl M.*, 177 W. Va. 688, 689 n.1, 356 S.E.2d 181, 182 n.1 (1987).

[2]It has been determined that Carl is Emily's biological father. As a result of DNA exclusionary tests, Kaleb's biological father remains unknown.

[3]Donna is Sylvia's biological mother. John is Sylvia's step-father.

41 (2009) (per curiam) (hereinafter referred to as "*Emily I*").[4] In *Emily I*, the circuit court dismissed the underlying petition filed by the grandparents, which alleged that their granddaughter, Emily, was an abused and/or neglected child. The circuit court failed to hold a hearing on the petition, and rendered its ruling based upon its belief that "the Petition does not allege sufficient facts to come within the statutory definition of abuse and neglect. For example, there are no allegations that any of the acts of domestic violence occurred in the presence of the child." From this adverse ruling, the grandparents appealed to this Court.

In *Emily I*, this Court vacated the circuit court's dismissal and reinstated the petition alleging abuse and neglect. However, this result was not predicated on the credibility or substantiality of the allegations of abuse and/or neglect proffered by the grandparents, but, rather, was based upon the statutory law that governs abuse and neglect petitions. We determined that, pursuant to W. Va. Code § 49-6-1(a) (2005) (Supp. 2009), the circuit court erred by dismissing the abuse and/or neglect petition without holding a hearing thereon. Accordingly, we remanded the case to the circuit court for the mandated hearing.

On remand, the grandparents filed an amended petition and a second amended petition to update the factual allegations and to include Kaleb, who was born after the lower court's first dismissal of the case.[5] Pursuant to this Court's remand directive in *Emily I*, the lower court held evidentiary hearings on January 14, 2010, and February 9, 2010. By order entered February 23, 2010, the trial court recognized that Sylvia and Carl have a history of domestic violence, but that none of the violence occurred in the home shared by the children[6] nor in the presence of the children. The lower court's order explained as follows:

> The Court does not believe, as counsel have argued, that you can make a finding of abuse and neglect based upon what is the best interest of the children or upon what is best in terms of permanency of the children because

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[4]There has been, and continues to be, a tumultuous and violent pattern of behavior between Sylvia and Carl. See *Emily I* for the underlying facts of such conduct.

[5]Emily was born on August 14, 2006. Kaleb's date of birth is July 3, 2009.

[6]When Emily was approximately two months old, Sylvia assigned temporary guardianship of Emily to Emily's maternal grandparents on October 25, 2006. Emily has resided with her grandparents since that time despite Carl's failed custody attempts. Emily's custody arrangement has been ratified by order of the family court. Kaleb also lives with his maternal grandparents. In the current order before this Court on appeal, the circuit court stated that Kaleb "shall remain in the custody of the maternal grandparents until they go before the Family Court Judge."

> a finding of abuse and neglect has to fit the statutory definition of abuse and neglect.

The grandparents, on appeal, assert that the circuit court's dismissal of the petition alleging abuse and neglect was in error. They contend that, where there is an ongoing pattern of domestic violence between parents that prevents the parents from having physical custody of the children and from performing any parental duties or obligations, then the pattern of domestic violence constitutes child abuse notwithstanding the fact that the children have not been exposed to the domestic violence.

Conversely, Sylvia and Carl separately contend that the circuit court was correct in its ruling that the children were not victims of abuse and neglect. The Department of Health and Human Resources (hereinafter "DHHR") avers that, under the statutory definition of child abuse, domestic violence can only be characterized as child abuse if there is evidence that the domestic violence has harmed or threatened the child's health or welfare. The guardian ad litem (hereinafter "guardian") for Emily and Kaleb argues that "[a]lthough it is undisputed that [Sylvia and Carl] have committed Domestic Violence, the [grandparents] failed to prove by clear and convincing evidence that the health or welfare of either child had been harmed or threatened by the Domestic Violence." Both the DHHR and the guardian recommend that the lower court's dismissal be affirmed because Emily and Kaleb were not harmed or threatened by domestic violence, albeit due to their placement with the maternal grandparents since shortly following their respective births.

Upon review by this Court, we find that the evidence is undisputed that domestic violence occurred between Sylvia and Carl. However, we agree with the lower court that there is no evidence that the children were harmed or threatened by the domestic violence as they never were living in the home where the acts occurred nor were they ever present for instances of domestic violence between Sylvia and Carl.[7] Allegations of child abuse must

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[7]Pursuant to W. Va. Code § 49-1-3 (2007) (Repl. Vol. 2009),

> (a) "Abused child" means a child whose health or welfare is harmed or threatened by: . . . (4) Domestic violence[.]

Moreover, according to W. Va. Code § 48-27-202 (2001) (Repl. Vol.2009), in relevant part,

> "[d]omestic violence" or "abuse" means the occurrence of one or more of the following acts between family or household members . . . :
>
> (1) Attempting to cause or intentionally, knowingly or recklessly causing

be shown by clear and convincing proof. *See* Syl. pt. 3, in part, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995) ("W. Va. Code, 49-6-2(c) . . . requires . . . in a child abuse or neglect case, [the petitioner] to prove 'conditions existing at the time of the filing of the petition . . . by clear and convincing proof.'" (internal citations omitted)). To constitute abuse, W. Va. Code § 49-1-3 directs, and our case law requires, that there must be clear and convincing evidence that the child's "health or welfare is harmed or threatened."[8]

The record in this case lacks clear and convincing proof that the children were harmed or threatened with harm through the domestic violence committed by and between Sylvia and Carl. No evidence demonstrated that either of the children was ever in the proximity of, or living in the home, where the domestic violence occurred. Therefore, we agree with the lower court that Emily and Kaleb are not abused children under the applicable statutory

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physical harm to another with or without dangerous or deadly weapons;

(2) Placing another in reasonable apprehension of physical harm;

(3) Creating fear of physical harm by harassment, stalking, psychological abuse or threatening acts[.]

[8]In the *Christina L.* case, this Court had occasion to discuss the requirement that a child's health or welfare must be harmed or threatened before abuse can be found. *Christina L.* involved a child who was the victim of sexual abuse by her mother and her mother's boyfriend. The issue before this Court was the adjudication of the child victim's sibling, who also lived in the home but who had not experienced direct abuse. In that case, we recognized that a child may be the victim of abuse even when no direct acts have been perpetrated on that child, when the child resides in the same home as a child who experiences direct abuse. Such children can be determined to be "abused children" under W. Va. Code § 49-1-3(a). *See* Syl. pt. 2, *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995).

The *Christina L.* case was replete with egregious facts of sexual abuse perpetrated on one child; however, this fact alone was not enough evidence to determine the adjudication of the sibling who was not directly victimized. Therefore, this Court remanded the case for specific findings regarding the victim's sibling and reiterated that, even in a case where one child is abused, there is no blanket rule that parental rights must be terminated to all the children residing in the home. Even in the face of repugnant facts of sexual abuse as to the exploited child, this Court still concluded that, to deem the sibling to be abused, "there still must be sufficient record evidence demonstrating that his 'health or welfare is harmed or threatened' by the conditions existing in the home." *Christina L.*, 194 W. Va. at 452 n.6, 460 S.E.2d at 698 n.6.

scheme because there is no evidence that their health or welfare was harmed or threatened by the domestic violence.[9]

For the foregoing reasons, we find no reversible error in the circuit court's decision dismissing the abuse and neglect petition. Therefore, the February 23, 2010, order is affirmed.

Affirmed.

ISSUED: May 2, 2011

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret L. Workman

[9]We recognize and reiterate that domestic violence can be used as a factor to determine parental fitness for custody purposes. *See Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987). *Accord West Virginia Dep't of Health & Human Resources v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997) (per curiam). However, custody is not an issue currently before this Court.

Workman, C. J., dissenting**:**

Emily will be five years old in August, and Kaleb[10] will be two years old in July. They have lived the entirety of their young lives with their maternal grandparents, John and Donna, by virtue of a final order of the Family Court of Wood County. That order, which was entered on July 8, 2008, provided that the grandparents be awarded Emily's "sole care, custody and control" to the grandparents as the child's designated "primary residential custodians." This arrangement was originally the result of a temporary guardianship agreement by which Emily's mother, Sylvia, had assigned temporary custody of Emily to her parents; however, Emily's father, Carl, opposed the arrangement and pursued custody of Emily. The order adopted and incorporated the recommendations of the guardian ad litem**,** which was established a roadmap of steps the parents needed to take in order to resume their full custodial care of the children.[11] The children's mother has longstanding emotional and mental health problems as well as only one kidney. The record indicates that while there is

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[10]After the order was entered regarding Emily, Sylvia had another child, Kaleb, by a different father, who remains unknown after DNA testing. Per order of the Circuit Court of Wood County, West Virginia, entered on January 20, 2010, the grandparents were officially given temporary custody of Kaleb.

[11]According to the allegations in the Second Amended Petition filed in the abuse and neglect proceeding below, the guardian ad litem recommended and the family court adopted a number of steps that each parent take in order to rectify the conditions of abuse and neglect caused by the ongoing domestic violence, including supervised visits at Kids First; a prohibition on the parents residing in the same home where Emily lives; completion of a Batterer's Intervention Program; participation and completion of a program geared towards eliminating domestic violence; abiding by the protective orders in effect; completion of parenting classes; and most importantly, maintaining a home environment that is stable, safe, nurturing, free of domestic violence, and otherwise appropriate for Emily.

The guardian ad litem further concluded that "'Abuse and Neglect Proceedings should be commenced as soon as it becomes evident that either party is failing to comply fully with the conditions set forth herein so that parental rights can be terminated and visitation ended." The guardian ad litem reasoned that

> "if the parents do not take the appropriate steps as outlined herein to become adults upon whom Emily is able to depend on to help nurture her to maturity as a healthy adult, then steps should be taken to have their parental rights terminated and to protect Emily from further exposure to these individuals and any knowledge of their self-destructive ways of life that will be a constant emotional burden to Emily when she is of an age to care and worry about the safety of her parents."

some visitation between the children and their mother, there was no indication regarding how frequently the children's mother visits. The mother indicated that visitation was "once in a while[;]" however, she does talk to her children on the phone a lot. Although Emily's father sought custody, it was argued that he receives Social Security disability due to a bad back and some type of mental deficiency, has anger management issues, and has an extensive criminal record of perpetuating domestic violence against the mother.

Because the grandparents obviously seek to bring some degree of certainty to the children's lives, they filed a petition alleging abuse and neglect in the Circuit Court of Wood County on September 8, 2008, based on the long and aggravated history of domestic violence[12] between the mother and father. The circuit court dismissed this initial petition,

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[12]The history of domestic violence proceedings and criminal charges were summarized in the Second Amended Petition as follows:

> 1. March 20, 2006 - Donna . . . filed a *Domestic Violence Petition* on behalf of her daughter, Sylvia . . . , 06-D-132 (06-DV-118). An *Order* was issued for 180 days by Judge Annette L. Fantasia. . . .
> 2. March 21, 2006 - Carl filed a *Domestic Violence Petition* 06-D-133 (06-DV-120) alleging that Sylvia . . . threatened to kill him and his family.
> 3. April 5, 2006 - Petition 06-D-133 (06-DV-120) was dismissed at the request of Carl. . . .
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> . . .
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> 7. November 28, 2006 - Carl . . . charged with Violating of a Domestic Violence Protective Order in case 06-M-5750. He eventually pled guilty and received unsupervised probation for six months. . . .
> 8. November 29, 2006 - Donna . . . filed a *Domestic Violence Petition* on behalf of her daughter, Sylvia . . . (still a minor at the time) and against Carl . . . (06- DV-5B6). A six month protective *Order* was issued prohibiting Carl . . . from having contact with Sylvia . . . , Donna and John . . . and Emily . . . until June 8, 2007.
> 9. December 6, 2006 - Josephine . . . , Carl'[s] . . . mother and paternal grandmother of Emily . . . filed a *Domestic Violence Petition* against Sylvia . . . alleging phone threats in case 06 -D-694; (06-DV-204). This Petition was dismissed on December 21, 2006.
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> . . .
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> 15. July 28, 2007 - Sylvia . . . filed a *Domestic Violence Petition* in case 07-D-441; (07-DV-3B1) alleging that Carl . . . had abused her, kicked her

and punched her. An *Order* was granted. . . .

. . .

17. August 24, 2007 - Sylvia . . . filed a *Domestic Violence Protection Order* against Carl . . . in case 07-D-503 (07-DV-430) alleging that she had been kicked and punched. An *Order* was granted and was subsequently terminated at the request of the parties on February 4, 2008.
18. September 28, 2007 - Carl . . . is charged with violating a *Domestic Violence Protective Order* in case 07-M-4540. This charge was ultimately dismissed. . . .

. . .

20. October 24, 2007 - Carl . . . is charged with violating a *Domestic Violence Protective Order* in case 07-M-4976. This charge was ultimately dismissed. . . .

. . .

22. April 9, 2008 - Carl . . . filed a *Domestic Violence Petition* in case 08-D-197; (08-DV-180) alleging that Sylvia . . . cut him, and threatened him. An *Order* was entered on April 16, 2008 to last for six months.
23. April 9, 2008 - Sylvia filed a Domestic Violence Petition in case 08-D-199; (08-DV-1B2) alleging that Carl held her against her will. An Order was entered on April16, 2008[,] for. six months. . . .

. . .

26. August 4, 2008 - Carl . . . was charged with Domestic Battery of Sylvia . . . in case 08-M-4329. The charge was ultimately dismissed in a plea agreement.
27. October 9,2008 - Carl . . . was charged with telephone harassment and stal[k]ing of Fallon G. in cases 08-M-3698 and 3699. He ultimately pled guilty to telephone harassment.

. . .

29. January 21, 2009 - Sylvia . . . filed a *Domestic Violence Protection Order* against Carl. . . in case 09-D-21; (09-DV-18) alleging that he was calling and harassing her. An Order was issued for 180 days. . . .
30. April 29, 2009 - Carl . . . was charged with violating a *Domestic Violence*

without holding a hearing, based upon the court's determination that "the Petition does not allege sufficient facts to come within the statutory definition of abuse and neglect For example, there are no allegations that any of the acts of domestic violence occurred in the presence of the child." The grandparents appealed to this Court, which accepted the appeal. This Court reversed and remanded the case,

> not upon the credibility or substantiality of the allegations of abuse and/or neglect proffered by Donna and John, but rather based upon the statutory law that governs abuse and neglect petitions. Pursuant to this authority, the circuit court erred by dismissing Donna and John's abuse and/or neglect petition without holding a hearing thereon.

In re Emily, 224 W. Va. 390, 395, 686 S.E.2d 41, 46 (2009). The Court also directed that the circuit court reinstate the grandparents' abuse and neglect petition and to conduct a hearing on the petition.[13] *Id*. at 397, 686 S.E.2d at 43.

Upon remand, the maternal grandparents filed a Second Amended Petition. In that petition, in addition to the allegations of domestic violence set forth *supra*, the grandparents also alleged that there had been a number of steps recommended by the guardian ad litem that each parent take "in order to rectify the conditions of abuse and neglect caused by the domestic violence." The grandparents further averred that it was recommended that if these steps were not met by the parents, then abuse and neglect proceedings should be commenced to protect the children "'from further exposure to these individuals and any knowledge of their self-destructive ways of life that will be a constant emotional burden to . . . [the children]. . . .'" The grandparents then allege that "[t]he Respondent-parents have not taken steps to rectify the conditions outlined herein."

Once again, the maternal grandparents in this case are before the Court continuing their resolve to give their grandchildren a permanent placement in their lives, arguing in their brief on appeal that their grandchildren "should not be required to remain in limbo for their entire childhood while waiting for their parents (or parent) to remediate the abhorrent conditions in which they live." Based upon the Second Amended Petition, the

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> *Protective Order* in case 09-M-1796. He pled guilty and was sentenced to 30 days, which was suspended for one year unsupervised probation. . . .

(footnote omitted).

[13]Upon remand, the grandparents filed an amended petition and a second amended petition to update the factual allegations and to include Kaleb, who was born after the lower court's first dismissal of the case.

lower court concluded that because the domestic violence did not occur in the presence of the children, it cannot serve as a basis for termination of parental rights. No findings or conclusions were made with regard to the contention that neither parent had ever complied with the steps recommended by the guardian ad litem.

Certainly, the simpler and more direct means for the grandparents to have pursued permanency through abuse and neglect proceedings would have been on the basis of abandonment, due to the parents basically leaving the children for periods of almost five years for Emily and almost two years for Kaleb, rather than relying upon the domestic violence allegations. However, their allegations that the parents have failed to engage in any meaningful way in the lives of their children or even to attempt to follow the roadmap outlined by the guardian ad litem and the family court in an effort to re-establish a parental relationship with the children clearly would constitute an abandonment. All of the requirements recommended by the guardian ad litem and the family court centered on the ongoing domestic violence between the parties. Thus, the allegations of domestic violence should not be considered in isolation; but rather in the context of their failure to take any of the steps necessary in connection therewith to regain custody.

Rather than resolving this case, however, the majority requires these grandparents to jump through more legal hoops in order to obtain the permanency to which the children are entitled. These grandparents (and more importantly, the children) have already been the recipients of the legal runaround by having to hire a private attorney to pursue two separate abuse and neglect proceedings against the parents in an effort to do what is in the best interests of their grandchildren, something that no other party or agency has attempted to do for these children.[14]

With the exception of the maternal grandparents and the family court, every party, agency and other court involved in this case have turned a blind eye to the most basic and fundamental goal in abuse and neglect proceedings that is the importance of permanence in children's lives**.** This Court has spoken on many occasions about a child's right to have permanency in his care, custody, nurturance and security as well as the importance of the child's best interests. To that end, the Court has a well-established precedent that

> "A fundamental mandate, recognized consistently by this Court, is that the ultimate determination of child placement must be premised upon an analysis of the best interests of the child. As this Court has repeatedly stated,.

[14]It is of concern that there seems to be no involvement by the West Virginia Department of Health and Human Resources ("DHHR") in this case. The DHHR should be involved and should not require the grandparents to retain private counsel to seek permanency for the children.

> 'Although parents have substantial rights that must be protected, the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children.'"

Napoleon S. v. Walker, 217 W. Va. 254, 259, 617 S.E.2d 801, 806 (2005) (quoting Syl. Pt. 3, *In re Katie S.*, 198 W. Va. 79, 479 S.E.2d 589 (1996)). Further, "the best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T. v. Tina L.T.*, 182 W. Va. 399, 405, 387 S.E.2d 866, 872 (1989) (citation omitted). Lastly, in *State ex rel. West Virginia Department of Health and Human Resources v. Pancake*, 224 W. Va. 39, 680 S.E.2d 54 (2009), the Court reiterated the following fundamental principle concerning the securing of a permanent placement for children:

> The early, most formative years of a child's life are crucial to his or her development. *In re Carlita B.*, 185 W. Va. 613, 623, 408 S.E.2d 365, 375 (1991). We have repeatedly emphasized that "children have a right to resolution of their life situations, to a basic level of nurturance, protection, and security, and to a permanent placement." *State ex rel. Amy M. v. Kaufman*, 196 W. Va. 251, 257, 470 S.E.2d 205, 211 (1996).

Pancake, 224 W. Va. at 43, 680 S.E.2d at 58. Yet, the majority completely fails to discuss either what is in the children's best interest, or the children's right to have a permanent placement. *Id*.

Instead, the majority upholds the circuit court's determination that because the domestic violence did not occur in the presence of the children or in the home where the children were residing, the children were not abused under the pertinent statutory scheme. In so holding, the majority focuses on the decision in *In re Christina L.*, 194 W. Va. 446, 460 S.E.2d 692 (1995), wherein the Court held that West Virginia Code 49-6-2(c) not only requires the petition in a child abuse or neglect case to prove "'conditions existing at the time of the filing of the petition . . . by clear and convincing proof[,]'" but further recognized that under West Virginia Code §49-1-3(a), the petitioner also must present clear and convincing evidence that the child's "health or welfare is harmed or threatened." 194 W. Va. at 442-43, 460 S.E.2d at 698-99. Thus, the majority in the instant case found that "[t]he record in this case lacks clear and convincing proof that the children were harmed or threatened with harm through the domestic violence committed by and between Sylvia and Carl."

I disagree with the majority's determination that the children are not harmed or threatened with harm as a result of the very lengthy record of domestic violence that has transpired between Sylvia and Carl throughout both children's entire lives. Such a conclusion utterly disregards the fact that the family court established requirements relating to correcting the domestic violence that needed to be met in order for the parent(s) to regain

custody. The word "harm" is defined as "[p]hysical or mental damage." Merriam-Webster's Collegiate Dictionary 569 (11th ed. 2005). It is unequivocal that these children's emotional and/or mental health, at a minimum, has been threatened with harm as a result of the repeated and continued domestic violence between Sylvia and Carl, and the fact that their refusal to address these issues continues to result in their young lives being in limbo.

Further, the Court has repeatedly recognized the impact that domestic violence and spousal abuse plays in these cases without limiting the discussion to whether the domestic violence occurred in the presence of children. For instance, in *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 356 S.E.2d 464 (1987), the Court recognized that

> spousal abuse is a factor to be considered in determining parental fitness for child custody. *Collins v. Collins*, 171W.Va. 126, 297 S.E.2d 901 (1982). In *Collins*, we upheld the trial court's determination that the appellant had demonstrated violent tendencies that rendered her unfit for custody. The trial court concluded that the appellant had "'demonstrated [a] tendency to be violent as evidenced by her willingness to threaten with and to actually shoot a deadly weapon at human beings when she was upset, but not in any way threatened.'" *Id.* at 902.
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> Other courts also regard spousal abuse as an important consideration in child custody cases. *See, e.g., In re Marriage of Cline*, 433 N.E.2d 51, 54 (Ind. Ct. App.1982); *In re Marriage of Ballinger*, 222 N.W.2d 738, 739 (Iowa 1974); *Hosey v. Myers*, 240 So.2d 252, 253 (Miss. 1970); *Schiele v. Sager*, 174 Mont. 533, 540, 571 P.2d 1142, 1146 (1977).

Nancy Viola R., 177 W. Va. at 714, 356 S.E.2d at 468. Thus, the Court found that

> Clearly, the many acts of violence by Randolph W. toward his wife, Alesha, culminating in her death, are directly relevant to the determination of his parental fitness and should have resulted in a finding of unfitness. Undoubtedly, the most convincing evidence of the appellee's unfitness is his conviction of the first degree murder of his wife, Alesha.

Id.

Likewise , in *West Virginia Department of Health and Human Resources ex rel. Mills v. Billy Lee C.*, 199 W. Va. 541, 485 S.E.2d 710 (1997), the Court noted domestic

violence between the parents during the recitation of facts. The Court then stated in upholding termination that

> Even in view of the appellant's denial of the incident of December, 1994, however, the record contains significant evidence of other circumstances of abuse and neglect of the children. As stated above, the appellant acknowledged the regular use of alcohol and marijuana, *and the appellant engaged in domestic violence against Margaret Ann C.* As this Court recognized in *Nancy Viola R. v. Randolph W.*, 177 W. Va. 710, 713-14, 356 S.E.2d 464, 467-68 (1987), such problems are relevant considerations with regard to the welfare of children in the home. *See* W. Va. Code, 49-6-5(b)(1) [1992].

Billy Lee C., 199 W. Va. at 547, 485 S.E.2d at 716 (emphasis added).

The instant case is distinguishable from these cases in one important respect: the petition seeks removal not based just on the immediate impact that domestic violence has when done in the presence of children. Here we have the additional overlay of what a long pattern of unaddressed domestic violence has done to deprive the children of a permanent home. As a result, these grandparents will once again have to pay a lawyer to continue jumping through hoops to acquire for these children what the law requires and what both the DHHR and the court system should be seeking - - - a permanent home.

"[T]he best interests of the child is the polar star by which decisions must be made which affect children." *Michael K.T.*, 182 W. Va. at 405, 387 S.E.2d at 872. The decision reached by the majority today, however, is not in the best interests of the children. Rather, as a result of the decision today, these children remain in a continued state of limbo with no sense of permanent placement in their future.

Based upon the foregoing, I respectfully dissent.