

32847

Docket No. 051677

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,**

PETITIONER,

v.

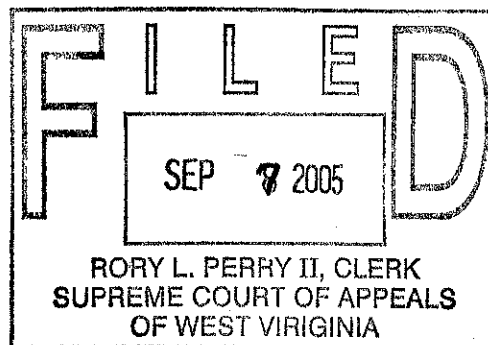
No. 051677

**THE HONORABLE FRED FOX,
JUDGE OF THE CIRCUIT COURT OF
MARION COUNTY, WEST VIRGINIA,**

and

**MIRANDA M. and
CHARLES M.,**

RESPONDENTS



**RESPONSE OF RESPONDENT MIRANDA M.
TO PETITION FOR A WRIT OF PROHIBITION**

NOW comes Respondent Miranda M. by counsel, and hereby responds to the West Virginia Department of Health and Human Resources Petition for a Writ of Prohibition. Specifically, Respondent Miranda M. hereby joins in the "Response of the Guardian ad Litem to Petition for Writ of Prohibition" previously filed with this Honorable Court, and further states her emphatic agreement with all facts and arguments contained therein. Respondent Miranda M. further states as follows:

The Respondent Mother, Miranda M. (hereinafter "Miranda M."), opposes the Petition filed by the West Virginia Department of Health and Human Resources (hereinafter "WVDHHR") seeking a writ of prohibition seeking a rule to show cause as to why the Circuit Court's Order entered August 8, 2005 returning legal and physical custody of the infant Sean M. to his parents

should not be voided.

I. STANDARD OF REVIEW

West Virginia Code §53-1-1 states that, “[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.” Furthermore, this Court has held that the standard of review in cases where a writ of prohibition is sought is to be directed by the following: “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, W.Va. ex rel. Billups v. Clawges, 2005 W.Va. Lexis 47, Docket No. 32513 (2005) (citing Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953)). Elaborating on this standard of review further in syllabus point four of State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court directed as follows:

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 [*10] 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.

However, this Court has clearly held that:

Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.

Kennedy v. State, Syl. 1, 176 W.Va. 284, 342 S.E.2d 251 (1986) (citing Syl. pt. 2, Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973)).

II. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER COURT

On April 8, 2003, WVDHHR filed a petition alleging abuse and/or neglect of Dominic M., now deceased, and Sean M. The Adjudicatory Hearing on the Petition was continued by joint agreement of the parties until August of 2004 pending the outcome of a related criminal proceeding against Charles M.¹ On August 9, 2004, Miranda M. filed a Motion for a Pre-Adjudicatory Improvement Period in this matter. On August 17, 2004, the Circuit Court of Marion County deferred ruling on said motion, and ultimately began hearing testimony on various dates thereafter to be considered in the Adjudication of this matter. On August 19, 2005, after hearing the testimony of various expert witnesses regarding the death of Dominic M., the Court granted the renewed motion for a Pre-Adjudicatory Improvement Period on behalf of Miranda M. and Charles M. On July 19, 2005, consistent with the recommendations of the Guardian ad Litem, CASA, and counsel for both Miranda M. and Charles M., the Court found that the respondent parents had successfully completed all the terms and conditions of the Pre-Adjudicatory Improvement Period, and returned physical and legal custody of Sean M. to the respondent parents at that time.

¹ Miranda M. was never charged in any criminal proceeding relating to the death of Dominic M. or relating to this matter in any way.

III. STATEMENT OF FACTS

On or about March 18, 2003, Dominic M., age eight (8) months, rolled off a bed at the home of his maternal grandparents in the short time that his mother had run to the restroom, ill. Although it was not clear where exactly he struck his head, or if he had struck his head on the way down as well as when he hit the floor, he appeared to be consolable and no medical intervention was sought at that time. Dominic's mother, Miranda M., had mentioned to her pediatrician, however, the concerns about Dominic having "fits" beginning at approximately three (3) to four (4) months of age where he would hold his head and cry unconsolably, causing red dots to appear on his forehead, as well as her concerns about Dominic's large head size in comparison to his body, but his pediatrician believed these to be of no concern.

On April 7, 2003, Dominic M. was taken to Fairmont General Hospital by his father, Charles M., suffering from symptoms consistent with a significant subdural hematoma which WVDHHR believed to be the result of "shaken baby syndrome". On April 8, 2003, the Circuit Court of Marion County placed Sean M. in the temporary legal and physical custody of WVDHHR based on the Abuse and Neglect Petition that was filed in this matter. Dominic M. died in the hospital on April 9, 2003.

After passing a polygraph examination in July of 2003 at the request of the Marion County Prosecuting Attorney's Office, Miranda M. was no longer considered to be a suspect in the death of Dominic M. by the West Virginia State Trooper who administered the polygraph examination², the

² Trooper Karl Streyle, who administered the polygraph examination to Miranda M. at the request of the Marion County Prosecuting Attorney's Office, actually testified on behalf of Miranda M. during the Adjudicatory Hearing, confirming that in his opinion, she had nothing to do with the death of Dominic and that she further had no knowledge that her husband, Charles M., had anything to do with the death of Dominic.

investigating officer, or the Marion County Prosecuting Attorney's Office. Accordingly, the State declined to prosecute Miranda M. in connection with the death of Dominic M.³ However, the Circuit Court, adopting the recommendations of WVDHHR, would not return physical custody of Sean M. to Miranda M. pending further proceedings in this matter and pending the outcome of criminal proceedings against Charles M. Despite repeated attempts by the Respondent Parents to provide suggested appropriate relative placements for Sean, as well as a positive homestudy by Family Preservation Services of Alleghany County Department of Social Services in Maryland, WVDHHR was unwilling to utilize any of the suggested relative placements until the Circuit Court ultimately Ordered said placement in the home of Roberta and David Bosley, Ms. Morgan's parents in December of 2003.

From December of 2003 through August 9, 2004, the Adjudicatory Hearing was continued **upon joint agreement of the parties, including WVDHHR**, pending the outcome of the criminal charges pending against Charles Morgan relating to the death of Dominic M. On March 28, 2004, Charles M. was convicted of child abuse resulting in death regarding Dominic M., but said verdict was set aside and the case remanded for a new trial on May 4, 2004 because the Circuit Court found evidence of jury misconduct that materially affected the outcome of the trial. However, the criminal proceeding against Charles M. did give the Guardian ad Litem the opportunity to review the State's evidence in great detail over the course of the trial as part of her independent investigation into the facts alleged in this matter.

As the result of her independent investigation, including sitting through the criminal trial of

³ Charles M., who did not take a polygraph examination on the advice of his counsel, was charged with child abuse resulting in the death of Dominic M.

Charles Morgan, reviewing extensive medical literature and medical records concerning Dominic M., and personally interviewing and consulting with Dr. James Frost and Dr. Scott Nestor⁴, the Guardian ad Litem submitted a substantial brief to the Circuit Court detailing the results of her investigation and her conclusion that there could simply not be clear and convincing evidence that Dominic M. suffered from "shaken baby syndrome" at the hand of either of his parents. (A copy of the Guardian ad Litem's Summary to the Court, dated June 4, 2004, is attached hereto.)

On August 9, 2004, Miranda M. filed a Motion for a Pre-Adjudicatory Improvement Period in this matter. At that time, Sean had been out of her custody for over fifteen (15) months despite the fact that Miranda M. was not being considered as a suspect in Dominic's death. Nonetheless, although Adjudication had not yet occurred, both Miranda M. and Charles M. had fully cooperated with every request and recommendation made by WVDHHR and the Circuit Court in the fifteen (15) months since this case was filed, had fully participated in every service suggested, including individual counseling, and had complied with every rule set forth by WVDHHR regarding her very limited visitation with her son. Notably, WVDHHR was not forthcoming about providing any services to either Miranda M. or Charles M. with the exception of Court-Ordered supervised visitation, and both Miranda M. and Charles M. initiated counseling services on their own.

WVDHHR goes on at length in its Memorandum of Law providing testimony of the State's expert witnesses at the criminal trial of Charles M. However, WVDHHR failed to note that the majority of said expert witness testimony, although unconvincing to the Guardian ad Litem who heard said testimony, was not even presented in the Adjudicatory Hearing in this matter despite

⁴ WVDHHR was invited to attend these meetings and interview these medical professionals, but refused to attend.

WVDHHR being given an opportunity to do so prior to the Court ruling on the outstanding motions for Pre-Adjudicatory Improvement Periods. The Circuit Court *did*, however, hear the testimony of several witnesses in the Adjudicatory Hearing phase of this matter prior to making a final ruling on the motions for pre-adjudicatory improvement periods. Although undersigned counsel will not belabor the issue by reproducing all said testimony, the following provides a brief summary of the testimony of the witnesses who did actually testify in the Adjudicatory Hearing in this matter.

Dr. Frost, medical examiner, testified on behalf of the Respondents in this matter. Dr. Frost examined the microscopic slides of the dura, the eyes, and the optic nerves of Dominic M. taken during the autopsy, and testified that there were really at least two separate incidents of bleeding involved, including an original event and a re-bleed. Dr. Frost opined that the injury that caused the subdural hematoma evident in Dominic M. could *not* have been caused by an event less than five (5) to seven (7) days prior to Dominic's admission to the hospital, and that the original trauma appeared to have been in excess of a week old. Dr. Frost further opined that the original injury may not have produced any ascertainable symptoms until the pressure became so high that it began to press on the brain tissue, that the microscopic evidence could be consistent with what could be expected from a short fall from a bed involving striking of the head in mid-March of 2003. Additionally, Dr. Frost explained that a re-bleed from this original injury could have been larger or more significant than the bleeding from the original injury, and that such a re-bleed could occur from a force or event as trivial as a child's head hitting a pillow when laid in his crib. Dr. Frost noted that Dominic *may* have been more susceptible than others to a re-bleed, based upon the fact that coagulation problems were suggested upon Dominic's admission testing at the hospital, but that possibility was apparently not explored by hospital staff.

The Circuit Court also heard the testimony of Tammy Hamner, psychologist, on behalf of WVDHHR. Ms. Hamner, Sean's therapist for the majority of this matter⁵, testified that in providing therapy to Sean for approximately thirteen (13) months, Sean had never disclosed anything suggestive of physical or emotional abuse of himself or of Dominic. Ms. Hamner further spoke with the foster parents who had the care of Sean from April 2003 through November 2003, and the foster parents reported that Sean said he loved both parents and that Sean had never reported or suggested that either parent had ever abused or shaken him or Dominic⁶.

The Court heard the testimony of Detective Chip Phillips, the investigating officer, who testified as to the interviews he did with Miranda M. and Charles M., which were consistent with the statement Miranda M. gave to Trooper Streyle and with her testimony at both the criminal trial and the Adjudicatory Hearing. Detective Phillips also recalled Miranda M. telling him during her initial interview that Dominic had fallen from a bed and hit his head some time prior to his admission, but had not appeared to be seriously injured at the time. Detective Phillips relied heavily upon the opinion of emergency room physician Dr. Mullett in reaching his decision that Charles M. was responsible for Dominic's death. Detective Phillips testified that he, "believes Miranda [M.] had nothing to do with the death of Dominic [M.]"

⁵ Sean's therapy was transferred to a counselor close to the home of his grandparents in Maryland in the last several months of the case to make it easier on Sean.

⁶ The fact that Sean's foster parents vehemently denied to Ms. Hamner any reports by Sean that his parents had shaken Dominic is significant in this matter, as the supervisor of the CPS caseworker for WVDHHR specifically reported to the Guardian ad Litem shortly before Adjudication commenced that Sean's foster parents reported that Sean told them he saw his parents shaking Dominic. When questioned about this by both Ms. Hamner and (separately) by the Guardian ad Litem, Sean's foster parents denied ever saying that, and were reportedly somewhat puzzled by the allegation. This issue led to a motion to disqualify the Marion County WVDHHR, which was ultimately denied by the Circuit Court.

Julia Starko of WVDHHR testified consistent with the position espoused in their Memorandum of Law to this Court. Ms. Starko, consistent with WVDHHR's stated position, refused to consider any possibility other than "shaken baby syndrome", and did not acknowledge (despite the testimony of Detective Chip Phillips, who WVDHHR worked with during the investigation) that Miranda M. had reported Dominic's fall from a few weeks earlier when asked if Dominic had any prior head injury.

Dr. Charles Mullett of Ruby Hospital testified as to Dominic's condition upon arrival at Ruby Memorial Hospital after transfer from Fairmont General Hospital, as well as the treatment provided. Dr. Mullett was not informed of Dominic's fall from the bed until the date he testified before the Circuit Court, and based on the information he was given upon Dominic's transfer, he did not really consider any other diagnosis than "shaken baby impact syndrome". Dr. Mullett acknowledged the possibility of older bleeds in Dominic's head, noted that the CT showed both acute and chronic subdural hematoma, acknowledged that lucid intervals can occur between a head injury and excessive pressure from the resulting subdural hematoma, and noted that there were no external injuries to Dominic's head, ribcage, arms, legs, or neck. Dr. Mullett acknowledged that he was not familiar enough with the literature on "shaken baby syndrome" to cite even one study, nor did he review any individual studies on the issue, yet opined that the only thing that can cause both subdural hematoma and retinal hemorrhage is "shaken baby impact syndrome". Dr. Mullett further did not test to determine the origin of the coagulation disorder that was suggested in Dominic's initial testing upon admission to the hospital. When questioned about Dominic's head circumference, about which Miranda M. had asked Dominic's pediatrician prior to his hospitalization, Dr. Mullett characterized it as being "unusual", "concerning", and "merits investigation".

Dr. Terry Schwartz, a pediatric ophthalmologist, testified on behalf of WVDHHR. Dr. Schwartz testified that she observed hemorrhages in Dominic's retinas, as well as retinal folds on the posterior of the retina, and that such findings are "suggestive of and consistent with shaking impact syndrome". She found the retinal folds concerning when considered with no history of head trauma⁷, but testified that nobody knows experimentally what can cause retinal folds. Dr. Schwartz testified that she could not predict the age of Dominic's injury based upon the blood in or on his retinas.

After presenting the testimony of Dr. Schwartz, WVDHHR rested, and indicated its intent to not present any additional evidence. Thus, the testimony of Dr. Larry Carson and Dr. Joseph Hartzog referenced in the Memorandum of Law submitted by the Petitioner was never even presented to the Circuit Court in this matter, despite the Petitioner's having the ability to do so⁸.

Dr. Scott Nestor, a neuropathologist at West Virginia University, testified on behalf of the adult respondents. Dr. Nestor reviewed the microscopic slides provided to him by Dr. Frost⁹, and based his opinions upon said review. Dr. Nestor opined that it would have taken approximately fifteen (15) to seventeen (17) days after the original injury to Dominic's head for the capillary

⁷ Dominic's fall from the bed some weeks before his hospital admission was not brought to Dr. Schwartz's attention at the time she examined him and made her diagnosis. Dr. Schwartz is familiar with the Plunkett opinion that subdural hematomas can be caused by falls of less than three (3) feet.

⁸ As a practical matter, since the same Circuit Court heard this testimony in the original criminal trial against Charles M., the Circuit Court was fully aware of the opinions contained therein. Furthermore, the Guardian ad Litem witnessed all said testimony, summarized it in her Guardian ad Litem's Summary, and fully considered it when making her recommendations to the Circuit Court regarding this matter.

⁹ These are the same slides provided to Dr. Frost by the State.

formation in Dominic's subdural membrane observed at the time of his death to form. Likewise, the thickness of the subdural neomembrane and the presence of debris generated by the breakdown of the red blood cells from the original bleed in Dominic's head suggest that the original injury causing the subdural hematoma occurred at least fifteen (15) to seventeen (17) days prior to Dominic's death. In short, Dr. Nestor opined that Dominic's original injury causing his chronic subdural hematoma occurred *at least* fifteen (15) to seventeen (17) days prior to Dominic's death. Dr. Nestor further instructed the Circuit Court that a subdural hematoma will very commonly re-bleed, and such re-bleed could be caused by a very trivial trauma which could go unnoticed, even so trivial as crying or coughing.

David Bosley, Miranda M.'s father, testified about Dominic's fall from the bed in his home in mid-March, 2003. His testimony was consistent with that provided by Miranda M. with regard to the details of the fall.

Miranda M. testified at length regarding the events that led up to Dominic's hospitalization, including the events of his fall a few weeks before, as well as her continuing efforts to cooperate with and provide information to the physicians and law enforcement involved with Dominic.

Trooper Karl Streyle of the West Virginia State Police testified regarding his interview of and polygraph examination of Miranda M. Trooper Streyle testified he interviewed and administered a polygraph examination to Miranda M. at the request Detective Chip Phillips with the knowledge and consent of the Marion County Prosecuting Attorney's Office, with the understanding that if Miranda M. passed said examination, she would not be criminally charged in connection with the death of her son. Trooper Streyle testified that Miranda M. not only passed her polygraph examination, but that she passed it with an extremely high score indicating no deception. Trooper

Streyle opined that Miranda M. did not in any way contribute to the death of Dominic M., and further was not aware of her husband having in any way contributed to the death of Dominic M.

Ellen McBride, LPC, a counselor with Morgantown Pastoral Counseling, testified regarding Miranda M.'s ongoing counseling work with her. Nothing in Ms. McBride's work with Miranda M. suggested that Miranda M. harmed Dominic in any way, or that Miranda M. had any knowledge of Charles M. intentionally harming Dominic.

The Circuit Court also heard the testimony of James Stephens, Kevin Kuhn, Greg Ice, John DeMary, and Alison DeMary, friends and associates of Charles M. and Miranda M. All testified as to their belief that Charles M. and Miranda M. were model parents, that they had never witnessed either lose their temper or become violent with the children, and that they had never seen any indication of *any* physical or emotional abuse of either Sean M. or Dominic M. This testimony was consistent with the information gathered by Detective Chip Phillips when he interviewed personnel from Sean M.'s daycare center and the pediatrician who saw both Sean M. and Dominic M.

At this point, the Adjudicatory Hearing was continued, and the adult respondents were to consider whether or not to call additional expert witnesses¹⁰ when the hearing reconvened and to

¹⁰ The Respondents were considering calling Dr. Edward Willey, a pathologist who testified on behalf of Charles M. at the criminal trial, and who opined that the microscopic slides provided from Dominic's autopsy were consistent with trauma that would produce a hemorrhage that had occurred several weeks before, and were further consistent with trauma such as the fall that occurred on March 18, 2003. Dr. Willey further opined that there was a blood clot in the brain that was indicative of a more recent re-bleed which could have been caused by a trivial triggering movement, and that coagulopathy could explain both bleeds. Dr. Willey further opined at trial that retinal hemorrhages can be caused by a sudden increase in intracranial pressure.

The Respondents were further considering calling a biomechanical engineer, who would have been able to testify regarding the physics involved in traumatic injuries such as these. The main problem in calling these experts was one of obtaining funds with which to pay for their appearance at another proceeding, as there was still ostensibly the retrial of Charles M. to be

notify the Circuit Court and counsel of their decision.

As part of a plea agreement offered by the State, Charles M. entered an Alford Plea to Involuntary Manslaughter, a misdemeanor, in connection with the death of Dominic M., and was ultimately placed on probation.

On August 19, 2005, after hearing the testimony of various expert and lay witnesses regarding the death of Dominic M. but prior to the conclusion of the Adjudicatory Hearing, the Court granted the renewed motion for a Pre-Adjudicatory Improvement Period on behalf of Miranda M. and Charles M. by Order entered on that same date. (A copy of this Order has been attached hereto.) The Order notes that the Court had not yet entered an Adjudicatory Order in this matter because of the complexity of the issues being addressed and the need for careful consideration of conflicting expert witness testimony and opinion. In its Order, the Circuit Court noted that the respondent parents had previously moved for pre-adjudicatory improvement periods, and that in the intervening time, the Court has had "ample opportunity to consider all of the medical evidence presented in this case including a number of detailed memorandums addressing the medical literature related to this case, has heard and considered all of the factual testimony in this case, and is of the opinion that no further testimony and/or evidence will be required to make a ruling upon the adult respondents motions for a pre-adjudicatory improvement period". The Order furthermore notes that the Court had been presented with reports from both the Guardian ad Litem and CASA recommending reunification of Sean M. with Miranda M. and Charles M. Over the objection of WVDHHR, the Court then specifically found that granting the pre-adjudicatory improvement period is in the best interest of the child, and granted the requested improvement period with the following terms and

considered as well.

conditions:

1. Sean M. would remain in the legal custody of WVDHHR and in the physical custody of David and Roberta Bosley for the duration of the improvement period;
2. Physical custody of Sean M. shall be returned to Miranda M. and Charles M. At the end of the 90-day improvement period;
3. Miranda M. and Charles M. shall allow announced and unannounced visits and cooperate with all reasonable requests of WVDHHR;
4. Miranda M. and Charles M. shall notify WVDHHR of any change in address or living circumstances;
5. Miranda M. and Charles M. shall attend all multi-disciplinary team meetings; and
6. Miranda M. and Charles M. shall participate in family counseling.

On July 19, 2005, a hearing was held to assess the progress of the family at the end of the pre-adjudicatory improvement period. In the interim, Miranda M. had already been having unlimited visitation with Sean M. which had transitioned from supervised visitation by Mr. and Mrs. Bosley to unsupervised visitation, and Charles M. had more recently been granted unlimited visitation supervised by Mr. and Mrs. Bosley. At the time of the hearing, both the Guardian ad Litem and CASA reported to the Circuit Court that Miranda M. and Charles M. had fully complied with the terms of the pre-adjudicatory improvement period, and had successfully completed the same. Accordingly, both the Guardian ad Litem and CASA had made strong recommendations to the Circuit Court that Sean M. be immediately returned to the legal and physical custody Miranda M. and Charles M., and the case be dismissed from the Court's docket. WVDHHR objected, arguing that Miranda M. had not continued with individual counseling¹¹ (which was not a term or condition

¹¹ Miranda M. had provided WVDHHR with all relevant information about her individual counseling over a year beforehand, and had further signed all required releases of information to allow WVDHHR to obtain records and speak with her counselor, Ellen McBride.

of the improvement period), that Charles M. had not provided information regarding his own individual counseling to WVDHHR (which he, indeed, had provided, and which was also not a term or condition of the improvement period). In response, the Guardian ad Litem argued that, once again, WVDHHR was attempting to "place roadblocks" in the path of Miranda M. and Charles M., who have consistently complied with every single request, rule, term, or condition of WVDHHR and the Court since the case was filed. Upon hearing the proffers of counsel, the Circuit Court made an affirmative finding that Sean M. did not suffer abuse or neglect, and made a further affirmative finding that the Court agreed with the positions of the Guardian ad Litem and CASA. The Circuit Court then returned legal and physical custody of Sean M. to Miranda M. and Charles M. and dismissed the case from the docket.

IV. ISSUES

1. The Circuit Court did not exceed its legal authority by returning the physical and legal custody of Sean M. to his parents.
2. The Circuit Court did not err in granting a Pre-Adjudicatory Improvement Period to the adult respondents.

V. POINTS OF AUTHORITY AND DISCUSSION OF LAW

1. **The Circuit Court did not exceed its legal authority returning the physical and legal custody of Sean M. to his parents.**

The Petitioner goes on at great length as to why the Circuit Court of Marion County should

To the contrary of WVDHHR's insinuation that Miranda M. had simply ceased going to counseling, Ms. McBride submitted a report explaining that Miranda M. had participated in counseling for over a year, that she had dealt with most of the issues she had initially presented with, and that there was no need for Miranda M. to continue with additional individual counseling until and unless future grief or other related issues resurfaced.

not have returned physical and legal custody of Sean M. to his parents. Notably, every reason cited is based upon WVDHHR's view of the facts of the case which are markedly at odds with the actual totality of the expert and lay testimony presented to the Circuit Court during the hearings in **this** matter, as well as being markedly at odds with the findings of the Guardian ad Litem *and* CASA in their individual and exhaustive independent investigations in this matter. The Petitioner does not suggest in its Memorandum of Law exactly *how* the Circuit Court may have exceeded its legal authority, and instead attacks the Court's factual findings.

West Virginia Code §53-1-1 mandates that, "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." In interpreting this section, this Court has held that "[p]rohibition 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, W.Va. ex rel. Billups v. Clawges, 2005 W.Va. Lexis 47, Docket No. 32513 (2005) (citing Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953)) (emphasis added). The idea that use of a writ of prohibition may not be used if there is an adequate remedy on appeal has been repeated numerous times by this Court. See Billups v. Clawges, *supra*, Crawford v. Taylor, *supra*; State ex rel. W.Va. DOT v. Madden, 192 W.Va. 497, 453 S.E.2d 331 (1994); State ex rel. Paige v. Canady, 197 W.Va. 154, 475 S.E.2d. 154 (1996); Fisher v. Bouchelle, 134 W.Va. 333, 61 S.E.2d 305 (1950); State ex rel. Evans v. Robinson, 197 W.Va. 482, 475 S.E.2d 858 (1996), cert. Denied, 519 U.S. 1121, 117 S.Ct. 971, 136 L. Ed. 2d 855 (1997). A writ of prohibition cannot be allowed to usurp the functions of an appeal, writ of error, or certiorari. State ex rel. City of

Huntington v. Lombardo, 149 W.Va. 671, 143 S.E.2d 535 (1965).

Speaking to *exactly* the issue raised by the Petitioner's Memorandum, this Court has firmly held that, "[p]rohibition does not lie to correct errors committed by a court which is acting within its jurisdiction, or where the existence of jurisdiction depends on controverted facts which such court is competent to determine." State ex rel. Zirk . Muntzing, 146 W.Va. 878, 122 S.E.2d 851 (1961).

In this matter, the Circuit Court considered all of the evidence presented, including hours of expert and lay testimony regarding Dominic M., prior to ruling on the parents' motions for a pre-adjudicatory improvement period, and prior to evaluating the parents' progress in said improvement period. The Circuit Court further had the benefit of the results independent investigations of both the Guardian ad Litem and CASA prior to making its final decision, both of which were incredibly exhaustive and extensive investigations resulting in detailed findings and recommendations.

It is beyond dispute that the Circuit Court had the authority to grant Miranda M. and Charles M. Pre-Adjudicatory Improvement periods pursuant to W.Va. Code §49-6-12 if they met the criteria of said code section. Likewise, the Court had the authority to dismiss the Petition and return legal and physical custody of Sean M. to his parents upon making a finding that the parents had successfully completed the Pre-Adjudicatory Improvement period and that it was in Sean M.'s best interest to reunify the family.

The Circuit Court found, and the record demonstrates, that Miranda M. and Charles M. did indeed fully comply with each and every term and condition of their improvement period to the satisfaction of the Court, the Guardian ad Litem, and CASA. The Court made an affirmative finding based upon *all* of WVDHHR's evidence at the Adjudicatory Hearing and the majority of the Respondents' evidence at said hearing, as well as the information it heard during the course of

Charles M.'s criminal trial, and the results of the exhaustive investigations by the Guardian ad Litem and CASA, that Sean M. was not abused. The Circuit Court did *not* make the finding, as the Petitioner would suggest, that Dominic M. *was* abused but Sean M. was not, so it was simply acceptable to return Sean M. to the home of abusive parents. On the contrary, the Circuit Court simply made a finding that there was not child abuse in this matter, and made that finding in the context of the only remaining case on the docket, that of Sean M. The Respondent respectfully submits that the Circuit Court ostensibly has full knowledge of the statutory definition of "abuse", fully understands that if one child in a home is abused the risk of abuse to other children in the home would constitute "child abuse" as defined under West Virginia law, and made its factual finding based upon all of the evidence presented with these definitions in mind. The fact that WVDHHR did not agree with the Court's findings is not a basis to argue that the Court exceeded its authority in making those findings.

In State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court directed as follows:

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.

In examining these factors, it is clear that this is not a case where a writ of prohibition is appropriate, and that the Petitioner is merely attempting to manipulate this procedural mechanism to get requested relief while avoiding a full appeal. Consistent with the first of the Hoover factors, this Court has directed that “[w]here prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner’s rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.” Kennedy v. State, Syl. 1, 176 W.Va. 284, 342 S.E.2d 251 (1986) (citing Syl. pt. 2, Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973)). The Petitioner has not suggested that the Circuit Court’s alleged abuse of power is so flagrant as to make an appeal inadequate in this matter. In fact, the Petitioner certainly has available and adequate means to obtain its desired relief in the form of not only an appeal, but an *expedited* appeal as permitted by the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings.

With regard to the second Hoover factor, again, the relief sought could certainly be obtained via direct appeal if this Court ultimately agreed with the position of the Petitioner, and the Petitioner has not even suggested how it might be damaged or prejudiced if required to seek appeal rather than a writ of prohibition.

Examining the third Hoover factor, it does not appear that the Circuit Court’s Order is clearly erroneous as a matter of law; on the contrary, the Order is consistent with the statutory and case law authority and requirements placed upon the Circuit Court in these matters.

As to the fourth Hoover factor, there is absolutely nothing to suggest that the Circuit Court’s

Order is an “oft repeated error” or “manifests persistent disregard for either procedural or substantive law”. On the contrary, it was an Order issued by a Circuit Court Judge who has many years’ experience on the Bench, who has decided hundreds if not thousands of these types of cases, and who was respected and seasoned enough to have shared the Bench of this Honorable Court for a period of time.

Finally, as contemplated by the fifth Hoover factor, the Circuit Court’s Order certainly does not raise any new and important problems or issues of law of first impression, but instead merely represents a difference of opinion of the facts of the case from that espoused by the Petitioner, a circumstance that is necessarily seen every day in every court in this State.

In summary, the Circuit Court of Marion County was well within its statutory authority when it made the decision to grant Miranda M. and Charles M. Pre-Adjudicatory Improvement Periods, and was furthermore acting in a manner consistent with the reasoned recommendations of the Guardian ad Litem and CASA when it entered said Order. The Circuit Court did not clearly exceed its authority. The Petitioner has an adequate remedy at law, specifically an expedited appeal, in which to seek alternative relief based upon its dispute about the facts of this matter. Therefore, a writ of prohibition is not appropriate in this circumstances.

2. The Circuit Court did not err in granting a Pre-Adjudicatory Improvement Period to the adult respondents.

In this matter, the Circuit Court considered all of the evidence presented, including hours of expert and lay testimony regarding Dominic M., prior to ruling on the parents’ motions for a pre-adjudicatory improvement period. The Circuit Court further had the benefit of the results independent investigations of both the Guardian ad Litem and CASA prior to making its decision,

both of which were incredibly exhaustive and extensive investigations resulting in detailed findings and recommendations. Finally, the Circuit Court had the authority to grant Miranda M. and Charles M. Pre-Adjudicatory Improvement periods pursuant to W.Va. Code §49-6-12 if they met the following conditions:

1. A written motion was filed requesting said improvement period;
2. The respondent proves by clear and convincing evidence that he or she is likely to fully participate in said improvement period, and the Circuit Court makes a finding on the record of the terms of said improvement period;
3. The improvement period is reviewed within sixty (60) days, or within ninety (90) days with a report by WVDHHR after the first sixty (60) days; and
4. The Court Orders WVDHHR to complete and submit a family case plan.

The Circuit Court found, and the record demonstrates, that Miranda M. and Charles M. did indeed meet all of the above criteria which related to them, and the Court made the appropriate Orders consistent with the statute. Although WVDHHR objected to the Court's Order, WVDHHR made no attempt to seek a writ of prohibition before this Court during the actual 90 days of the Improvement Period, which calls into question the appropriateness of attempting to use this extraordinary legal remedy now, when an appeal would be more appropriate. Regardless of when the Petition seeking this writ was filed, the sole fact that WVDHHR did not agree with the Circuit Court's findings is not a basis to argue that the Court exceeded its authority in making those findings. Accordingly, for the same reasons and based upon the same legal authorities referenced *supra*, a writ of prohibition is not appropriate in this matter.

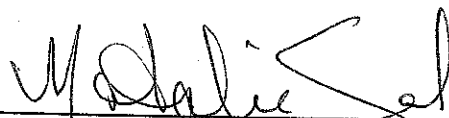
VI. CONCLUSION

For the foregoing reasons, Respondent Miranda M. respectfully requests that WVDHHR's Petition for a Writ of Prohibition be denied.

Dated: September 6, 2005

Respectfully submitted,

MIRANDA M.,
Respondent,
By counsel.



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES,

PETITIONER,

v.

No. 051677

THE HONORABLE FRED FOX,
JUDGE OF THE CIRCUIT COURT OF
MARION COUNTY, WEST VIRGINIA,

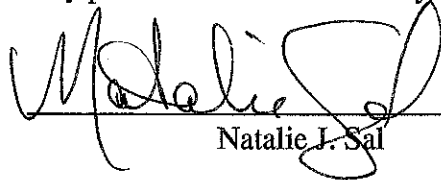
and

MIRANDA M. and
CHARLES M.,

RESPONDENTS.

CERTIFICATE OF RESPONDENT'S ATTORNEY

I, Natalie J. Sal, pursuant to Rule 4A(c) of the West Virginia Rules of Appellate Procedure, hereby certify that the facts alleged in this Response to Petition for a Writ of Prohibition are faithfully represented and that they are accurately presented to the best of my ability.



Natalie J. Sal

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE WEST VIRGINIA DEPARTMENT
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THE HONORABLE FRED FOX,
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MARION COUNTY, WEST VIRGINIA,

and

MIRANDA M. and
CHARLES M.,

RESPONDENTS.

CERTIFICATE OF SERVICE

I, Natalie J. Sal, hereby certify that I served the foregoing "Response of Respondent Miranda M. To Petition for a Writ of Prohibition" upon the parties, this 7th day of September, 2005, by first class mail, postage prepaid:

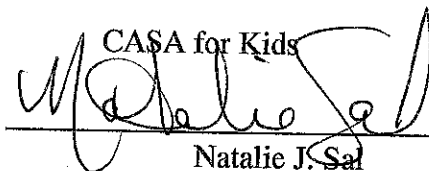
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