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NO. 32788

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

JONATHAN D. and  
CHARLES B.,  
Infants/Petitioners

v.

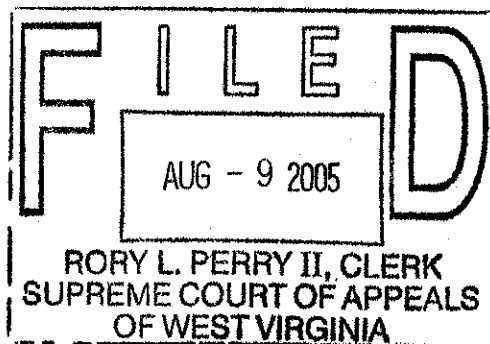
Appeal No. 32788

HONORABLE RUSSELL M. CLAWGES, JR.,  
Chief Judge of the Monongalia County Circuit Court, West Virginia, and  
EDWARD B., father, and  
ESTELLA B., (terminated) mother

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**RESPONSE TO PETITION FOR WRIT OF PROHIBITION AND  
RESPONDENTS SHOW CAUSE WHY OF A WRIT SHOULD NOT ISSUE**

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ESTELLA B., parents,  
Respondents.

**RESPONSE TO PETITION FOR WRIT OF PROHIBITION, AND  
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**I. STANDARD OF REVIEW**

This Court recently stated that, "[f]or appeals resulting from abuse and neglect proceedings, such as the case *sub judice*, we employ a compound standard of review: conclusions of law are subject to a *de novo* review, while findings of fact are weighed against a clearly erroneous standard." *In re Emily*, 208 W.Va. 325, 332, 540 S.E.2d 542, 549 (2000). Also in Syllabus Point 1 of *In the Interest of: Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996), this court held that:

"Although conclusions of law reached by a circuit court are subject to *de novo* review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected.... These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a

reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.”

## II. PRELIMINARY STATEMENT

Edward B. is the single parent of two special needs sons. He raised the boys on his own for over four years,<sup>1</sup> including appropriately attending to their extraordinary medical needs. On the way to pick up his son Jonathan at school due to a bruise on Jonathan's leg,<sup>2</sup> Edward had a beer and a half at a pub near the bus stop while he waited for the bus that goes past his sons' school. Edward works in an industrial laundry so enjoyed a cold beer after work. Immediately after Edward arrived at the school, a West Virginia Department of Health and Human Resources worker and a Morgantown police officer arrived at the school and promptly gave Edward B. an alcohol breathalyzer test. The test registered a .073, and the Department used that as the basis to instantly remove Edward's children from their home, and the children have not been returned to date.<sup>3</sup>

Edward B. got into the Department's system two years prior to this case and they have apparently continued to monitor him even after the prior case had been successfully dismissed. Edward assumes that the Department feels this need for super-diligence due to his sons' extraordinary medical needs. However, he does not feel that he is being treated fairly or justly. He has admitted that drinking could impair his ability to meet the children's special needs, though it never has, and Edward has taken significant steps to abstain and rehabilitate himself as far as drinking, including daily AA meetings and

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<sup>1</sup> The children's mother had abandoned the family more than four years prior to this case.

<sup>2</sup> Jonathan is a hemophiliac so any bruise is assumed serious enough for medical attention.

<sup>3</sup> Edward B. could have been legally driving on the roadways of West Virginia with a BAC reading of .073

weekly therapy sessions. However, every time it has looked like Edward was successfully complying with the requirements of the Family Case Plan for reunification, the bar was raised higher and new conditions were added, making Edward's goal of reunification impossible to attain. Edward has been left with the feeling that reunification was never a real goal of the Department, and that taking his sons away has always been the Department's true goal. Edward had to seek out an alcohol rehabilitation clinician on his own, the Department supplied him with a therapist that could only see him one or two times a month, and Edward never felt that those meetings were therapeutic. Edward also started AA long before it was recommended by the Department.

The Court in this case has been much more reasonable and realistic than the Department. The Court has recognized that regardless of how extraordinary the medical needs of Edward's sons, a father should be given a fair chance and realistic plan to care for those children. A family is sacred, and breaking up that family should be the last option, not the primary goal in these cases. Therefore, the lower Court deferred disposition of the current case twice so that Edward B. could have a fair, just and realistic opportunity to get his life in order enough that his sons would be returned to him. The Department and the Guardian Ad Litem in this case have brought us before you because they believe that the lower Court has over stepped its authority with these deferred dispositions. It is the Respondent's position that (1) the lower Court did not over step its authority, and (2) even if you would find that they did, there are exceptional cases where it is in the children's best interest that reunification continue to be the goal, even after statutory time limits have been exhausted. Addictions cases are the perfect example of

this. Facing addiction is a process that has to emerge before rehabilitation can be successful. That takes time.

It is the Respondent's position that it should be in the discretion of the Court that stands as trier-of-fact to extend the statutory time limits on Abuse and Neglect cases when the parent is substantially following the Family Case Plan and making significant steps toward rehabilitation and reunification. It is the Respondent's goal that the Very Honorable Justices of the West Virginia Supreme Court consider granting circuit courts the discretion to examine abuse and neglect cases on a case-by-case basis, and if addiction is involved, and if the efforts of the parent are substantial and significant, allow the circuit courts to make reasonable extensions to Improvement Periods so that reunification of the family can still occur after the statutory time limits have been exhausted.

Our Department of Health and Human Resources is supposed to be a support agency. The Respondent believes that if the Department knows that reunification can still be achieved after the statutory limitation they will work harder to support reunification, instead of spending so much of their energy on post-termination placement midway through a case. Additionally, with the possibility of more time, the Department will have more incentive to look for rehabilitative possibilities in parents who suffer from addiction problems, ultimately strengthening families that would be ripped apart under a strict reading of the current statutes.

One good analogy comes to mind: A woman had a very successful large company with many employees. When any of her employees had a drug or alcohol problem she supported them and helped them through the whole rehabilitation process.

When asked why she did not just fire the troubled employee, she said that if she fired the troubled employee and brought in a new employee, the new employee could be as bad as the fired employee, but that if she fixed the troubled employee, they become a much better employee, and the boss knows what she has. It is in children's best interest if we fix families. Strengthening an existing family has to be a better choice than forming a new family that may not be a healthier family.

The Respondent avers that a family is a terrible thing to waste, especially when a few months can be the difference between reunification and termination. The Respondent prays that this Very Honorable Court will allow the lower courts, who are the triers-of-fact in these cases, the discretion to save West Virginia families that otherwise would be destroyed by strict time limits.

### **III. STATUTES INVOLVED**

#### **WVC §45-6-5(a)**

The court shall give precedence to dispositions in the following sequence:

- 1) Dismiss the petition;
- 2) Refer the child, the abusing parent or other family members to a community agency for needed assistance and dismiss the petition;
- 3) Return the child to his or her own home under supervision of the department;
- 4) Order terms of supervision calculated to assist the child and any abusing parent or parents or custodian which prescribe the manner of supervision and care of the child which are within the ability of any parent or parents or custodian to perform;
- 5) Upon finding that the abusing parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or suitable person who may be appointed guardian by the court.
- 6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental rights.

Constitutional rights under the Fourth and Fourteenth Amendments that require that individuals enjoy security in their homes [including their families], and Due Process.

**W. Va. Code §49-6-12(c)(2)**

The court may grant an improvement period not to exceed six months as a disposition pursuant to section five [§49-6-5] of this article when the respondent demonstrates by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding on the record of the terms of the improvement period.

**W. Va. Code §49-6-12(c)(4)**

The court may grant an improvement period not to exceed six months as a disposition pursuant to section five [§49-6-5] of this article when...the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to the change in circumstances, the respondent is likely to fully participate in the improvement period.

**IV. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY**

Edward B. was called at his place of employment, an industrial laundry, on February 23<sup>rd</sup>, 2004, and informed that his son, Jonathan D., who is a hemophiliac, had a bruise that looked threatening and that Edward B. needed to come to Jonathan D.'s school to take him to the hospital. Edward B. left work and went to the bus stop, he had just missed the bus so had to wait for the next. Edward went to a pub close to the bus stop and drank 1 ½ beers while he waited for the next bus. Edward caught the next bus to the school. When Edward arrived at the school he decided to also pick up his other son, Charles B., since the school day was almost over. Edward called a cab to take him and his children to the hospital. The Department of Health and Human resources and a police officer arrived immediately after Edward arrived. When Edward's cab arrived, they waived it off and gave Edward a breathalyzer test. Edward followed the police officer's instructions and took the breathalyzer. It registered a .073. The Department of Health And Human Resources then took Jonathan to the hospital and he and Edward B.'s other son, Charles B., were taken from their father's custody based upon a Petition for Immediate Transfer of Minor Children.

On March 2<sup>nd</sup>, 2004, a preliminary hearing was held on the Petition. The Court Granted the Petition, acknowledging during the hearing that the Grant of the Petition was largely based on the extreme special needs of the children, and the Court also noted that “[Edward B.] cannot control the fact that he is a single parent of two children with very special medical needs [Jonathan is a hemophiliac and Charles has a gravely serious congenital heart disorder] and limited financial resources, in spite of regular employment. All of those circumstances are essentially beyond his control. However, the Court also noted that Mr. Briese’s excessive use of alcohol, which was the primary presenting problem for the Petition, should be within his control. Accordingly, the Court urged that [Edward B.] participate in an alcohol/substance assessment and safety evaluation prior to adjudication, in order to reunify him with his children at the earliest possible time.”

Edward B. started attending AA meetings three times a week of his own volition, and participated in an alcohol assessment in March, 2004, arranged by the Department Of Health And Human Resources prior to the adjudication hearing in this matter. According to that assessment, it was recommended that Edward attend AA meetings regularly and meet with a therapist on a weekly basis. Because of Edward B.’s very limited income, it was arranged that therapy would be conducted in Edward’s home. The Department advised Edward B. and his attorney that they would like to see Edward not drink for ten days in a row before they would make arrangements for reunification.

At the May 21<sup>st</sup>, 2004, Edward B. entered a Stipulated Adjudication, admitted that he has an alcohol problem, and agreed to comply with recommendations of the Court so that he could be reunited with his sons. The Court Ordered that the children stay in the legal and physical custody of the State, but additionally, “the Court directed the

Department of Health And Human Resources, through the multi-disciplinary process, to work toward full or substantially full-time reunification shortly after the close of the school year, contingent upon [Edward B.'s] continued sobriety, in-home alcohol counseling being implemented, and Mary G. [Edward B.'s friend who had moved in with him] either participating in alcohol abuse treatment or moving out of the family home."

Edward continued regular attendance at AA meetings and informed Mary that she would have to find new housing arrangements, and Edward was more than willing to participate in alcohol counseling.

At a Disposition Hearing held on July 6<sup>th</sup>, 2004, Edward B. was Granted a six-month Post-Adjudication Improvement Period without an objection from any party.

At a review hearing of that Improvement Period that was held on September 27<sup>th</sup>, 2004, the Court considered the recommendations of all counsel that the Improvement Period continue. Although Edward B. had been compliant with his Family Case Plan by attending AA meetings at least five times a week, the DHHR also wanted the Respondent to receive in-home alcohol abuse counseling. Due to miscommunications between the counselor and Edward B., that were not Edward's fault, Edward had only been able to obtain a few of these sessions. At the September MDT, it was determined, upon Edward's request, that new weekly counseling sessions, instead of a bi-weekly schedule, would best serve the interest of making the case plan and reunification happen more quickly. At the September 27<sup>th</sup> Hearing, Edward B. did not seek the immediate physical return of his children because Edward had lost assistance with housing costs since he no longer had his children in his custody, thus Edward was unable to pay the rent and utilities at the house that he and his sons had been living in.

Also at the September 27<sup>th</sup> hearing the Court observed that reunification of the children with their father was still the goal of the Improvement Period. The Court thus "Ordered that the Improvement Period shall continue under the same conditions that were previously Ordered."

One of the conditions of the Improvement Period of July 6<sup>th</sup> was random drug screens, which had been conducted on a regular basis since that date. One of the drug screens taken September 14<sup>th</sup>, 2004, tested positive for .062 of alcohol. Edward explained that he had a horrible cold during that time and one of his co-workers gave him Robitussin DM that day but he was apparently not believed. Due to that one drug screen, the October 28<sup>th</sup> MDT gave Edward B. the ultimatum that he had to go into inpatient treatment by November 15<sup>th</sup> or they would Move for Termination of Parental Rights.

Edward had been out of work at that time due to a back injury that had already been reported to the MDT, and as noted above, he had no other means of producing income, therefore, Edward asked that he be allowed to compile enough money to put his belongings in storage before he be required to attend inpatient therapy. The MDT agreed to extend their request for admittance into inpatient therapy until November 30<sup>th</sup>. On November 27<sup>th</sup> Edward got in touch with Leonard Wolfe, a rehabilitation specialist, who told Edward that he would get him into an inpatient facility as soon as a bed opened up. The MDT was not satisfied with that, and demanded that Edward turn himself into an emergency room.

On November 29<sup>th</sup> Edward turned himself into Ruby Memorial Emergency Room and told them that he is an alcoholic and that he needs rehabilitation. Ruby Memorial said that he did not exhibit symptoms of alcoholism.(attached) They told him that he

needed to stick with Leonard Wolfe to get him into an inpatient program and dismissed him. Leonard Wolfe spoke with the Department and informed them that he was actively seeking an inpatient bed for Edward, but that the beds were full at that time.

At an MDT held on December 16<sup>th</sup>, the MDT informed Edward that they were going to move to terminate his parental rights because he had not been admitted to an inpatient program. Edward then asked the MDT for transportation to Fairmont General Hospital so that he could try to be admitted there for rehabilitation. Fairmont General said that he displayed no high blood pressure, tremors, or DT's normally present in alcoholism. Fairmont General rejected Ed's application for admittance and told him to stick with Leonard Wolfe. However, it was noted that Edward felt helpless and depressed over losing his children and the situation with DHHR.

However, through the above process, Edward did receive a referral to Charles Graham, a licensed addiction therapist and counselor for Valley Healthcare System. Edward has been meeting with Mr. Graham once a week since January, 2004, and has been attending AA at least once a day since May of 2004.

At the Review Hearing at the End of the Six Month Improvement Period, held the 20<sup>th</sup> of December, 2004, Edward B. Moved for, and the Court Granted, a ninety day extension to the Improvement Period. "The Court determined that [Edward's] efforts to be admitted to an inpatient treatment program were sufficient to justify an extension to the improvement period." However, the Court warned that Edward needed to enter an inpatient facility as soon as he could so that he would have time to finish the program before the end of the extension.

On January 31<sup>st</sup>, 2005, the Guardian Ad Litem in this matter, Terri Tichenor, filed a Motion to Revoke the ninety day extension. As a result of that Motion, a hearing was held on February 4<sup>th</sup>, 2005. Edward B. was not present at the hearing<sup>4</sup> and the Court Granted the G.A.L.'s Motion, however, deferred Final Disposition of the case until March 28<sup>th</sup>, 2005.

On March 28<sup>th</sup> and continued on March 31<sup>st</sup>, 2005, a Hearing was held on the disposition of the above-styled case. Charles Graham, Edward's alcohol rehabilitation therapist and witness for the Department, testified that Edward had been actively participating in therapy since January, 2005, and that Edward attended his weekly sessions faithfully. Mr. Graham testified that if Edward continued in that manner, he would successfully complete that part of rehabilitation within months.

The Department, by David Shaffer, and the children's psychologist, Jeffrey Collins, admitted during cross examination that they were not aware of any instance in which Edward B. failed to provide his sons with appropriate medical care for their extraordinary medical needs.

After both sides presented their arguments, it was determined by the Court that "because the need to ensure that a disposition decision is being made in the best interest of the children, the Court decided to defer ruling on disposition for ninety days." The Court reasoned that Edward B. had only recently begun seriously addressing his alcohol problem. The Court further "acknowledged that cases involving parental abuse of or dependence on alcohol or controlled substances do not easily fit within the framework

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<sup>4</sup> Edward B. was not present at the February 4<sup>th</sup> hearing because he had admitted himself to inpatient rehabilitation in Terra Alta, West Virginia, unbeknownst to all parties at the time.

contemplated by the statutes and rules. The Court also recognized that there is a strong bond between [Edward B.] and his sons.”

During the March hearing, the DHHR reported that one of Edward’s urine screens produced a very small amount of narcotic in his system. Drug abuse had never been suspected or alleged previously, and Valley Mental Health had started Edward on a regiment of medicines to treat his depression and aggravation brought on by this situation, so the Court did not address drugs as a problem.

Edward continued weekly counseling with Charles Graham and daily AA meetings throughout the ninety day deferred disposition period; however, even though he was actively seeking and applying for housing for himself and his sons, he was not able to secure adequate housing children during this ninety day period.

The Circuit Court reviewed the case again on June 27<sup>th</sup>, 2005. Edward had finally gotten the break he needed on housing, and he was contracted to take over a three bedroom trailer the first week in July.<sup>5</sup> The Court accepted documents submitted by Edward B. concerning his daily attendance at AA, his continued participation in substance therapy at Valley Health Care System, and an affidavit from the owner of the trailer pertaining to an agreement allowing Edward B. to move into the trailer.

The Court again reasoned that Edward B. had only recently begun seriously addressing his alcohol problem.<sup>6</sup> The Court further “acknowledged that cases involving parental abuse of or dependence on alcohol or controlled substances do not easily fit

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<sup>5</sup> Edward is now in the trailer. He and some of his fellow employees from the laundry and fellow AA members are making repairs to get it ready for his sons to move into.

<sup>6</sup> Edward B. has been actively and successfully progressing in addressing his problem with alcohol since he entered therapy under Charles Graham of Valley Health Care Systems. (Attached: report of Charles Graham that was accepted by the Court at the June 27<sup>th</sup> Hearing.)

within the framework contemplated by the statutes and rules. The Court also recognized that there is a strong bond between [Edward B.] and his sons.”

“The Court found that Edward B. had taken significant steps to demonstrate that he can adequately parent the children. Accordingly, the Court ORDERED a conditional disposition with reintegration of the children into Mr. Briese’s custody within three months under the following conditions:

- 1) Respondent Edward Briese shall remain substance free as demonstrated by random alcohol and drug screening.
- 2) Mr. Briese shall continue his therapy sessions with Charles Graham of Valley Health Care System.
- 3) Edward Briese shall continue to attend Alcoholics Anonymous meetings daily and provide proof to the DHHR of his attendance.
- 4) Edward Briese shall establish suitable housing that is approved by the treatment team.
- 5) Edward Briese shall participate in family counseling with the children to prepare for family reunification.”

Edward B. has actively continued participation in his therapy with Charles Graham and Valley Health Care Systems; Edward continues to attend daily AA meetings; Edward has now taken possession of a trailer that he is fixing up for he and his sons; and Edward compliantly and cooperatively attends visitation, MDTs and other services and programs recommended by the Department, the Court and the Family Case Plan.

On July 26<sup>th</sup>, 2005, LabCorp, the laboratory that tests urine specimens for the Department, reported that Edward had a positive test for alcohol of .02, the minimum cut off point for even finding ethanol alcohol in the body.<sup>7</sup> Edward B.’s urine has been screened on a regular basis for over 18 months now. He tested positive for alcohol twice, once when he admitted using Robitussin DM to treat the flu, that reading was .062, and this .02 reading from July 2005. Edward vehemently denies using alcohol on July 26<sup>th</sup>

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<sup>7</sup> Because the sample contained such a low amount of ethanol, Edward’s counsel has a call in to LabCorp to ask what variables could cause the minimum reading, and asking the margin of error for those tests.

and was visibly shocked and upset with the news of that report at the August MDT in this matter.

**V. RESPONSES TO THE APPELLANTS ASSIGNMENTS OF ERROR**

**A. The Circuit Court was within its legal authority when it granted a ninety (90) day conditional disposition in this case**

Edward B. no longer has his sons in his custody because he is indigent and a single father. Edward's children were taken from him based on a .073 breathalyzer test and hearsay from a teenager. I am sure that there is a very strong Constitutional argument against the Due Process and Privacy violations that have been committed against Edward B. and his family, however, I will restrict my argument to responding to the allegations made by the Petitioner in her Petition.

The Circuit Court, as trier-of-fact in an abuse and neglect case, is in the best position to look at an overview of all of the actors and evidence that are presented in a case and determine on a case-by-case basis what is best for the family involved, using as his or her measuring gage the best interest of the children. That is why "clearly erroneous" is the standard used to review the lower court in abuse and neglect cases. "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 of a circuit court's account if the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, In re Emily and Amos B., 208 W. Va. 325 (2000); Syllabus

point 1, In re Tiffany Marie S., 196 W. Va. 223 (1996); Syllabus point 1, In re George Glen B., 205 W. Va. 435 (1999).

The lower court in the current case did not err when it made a decision to defer a Final Disposition in this matter based on all of the available evidence with which it had been presented. The Petitioner asserts that the lower court should not be able to grant a “de facto improvement period” or “conditional disposition”. The Respondent strongly disagrees. The circuit court has the authority to grant an extension to an Improvement Period pursuant to W. Va. Code §49-6-12(c)(2); W. Va. Code §49-6-12(c)(4); and W. Va. Code §49-6-12(g).

Pursuant to W. Va. Code §49-6-12(c)(2): “The court may grant an improvement period not to exceed six months as a disposition pursuant to section five [§49-6-5] of this article when the respondent demonstrates by clear and convincing evidence, that the respondent is likely to fully participate in the improvement period and the court further makes a finding on the record of the terms of the improvement period.” That is exactly what the court did in the current case. The circuit court, as trier-of-fact, and looking at the parties, and all available evidence and information, decided at the February 4<sup>th</sup>, 2005, termination hearing that there were factors there that warranted a deferred disposition that included firm terms and conditions that were to be used as a barometer during this continuation of the improvement period pursuant to §49-6-12(c)(2), to measure the respondents continued compliance with the improvement period.

Additionally, the circuit court was within its jurisdiction according to W. Va. Code §49-6-12(c)(4), which states: “The court may grant an improvement period not to exceed six months as a disposition pursuant to section five [§49-6-5] of this article

when...the respondent demonstrates that since the initial improvement period, the respondent has experienced a substantial change in circumstances. Further, the respondent shall demonstrate that due to the change in circumstances, the respondent is likely to fully participate in the improvement period.” The lower Court was aware that Edward B. had twice tried to have himself admitted to rehabilitation by turning himself into hospital emergency rooms;<sup>8</sup> that Edward had finally admitted his alcoholism problem to his new therapist, Charles Graham; that Edward continued to attend AA meetings; and most importantly, that there was a very close bond between Edward and his sons, and therefore, it was in the best interest of the children to give their father a chance for reunification through a deferred disposition. The lower Court apparently felt that the recent steps that Edward had been taking were a substantial change in circumstance, and thereon, the court decided the respondent was likely to participate in the extended improvement period.”

Regardless of whether it calls it “deferred disposition”, “conditional disposition”, or whatever, as long as the extension “is not for a period to exceed three months when the court finds that the respondent has substantially complied with the terms of the Improvement Period; the continuation of the Improvement Period will not substantially impair the ability of the department to permanently place the child[ren]; and the extension is otherwise in the best interest of the child[ren].” Apparently the circuit court in the current case, in view of all of the facts, believed an extension of the Improvement Period was in the best interest of the children, regardless of what semantics were used to

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<sup>8</sup> He was turned away because the hospitals said that he did not present enough of the symptoms of alcoholism to require emergency admittance.

describe the extension. Again, when the court made its decision, it was looking at all parties, evidence and information.

The Petitioner argues that the lower Court terminated Edward B.'s Improvement Period in February of 2005, ending Edward's entitlement to any additional time in an Improvement Period under W. Va. §49-6-12(h). However, there are a few very important facts missing from the Petitioner's argument:

1) The lower Court made the decision to Grant the Motion to Terminate largely based on Edward's failure to show up at the February hearing. No one, not even Edward's counsel, was aware on the day of the hearing that Edward had turned himself in to an inpatient rehabilitation facility in Terra Alta, West Virginia, and that is why he did not attend. However, even with Edward not showing up at the hearing, the lower court felt that there were enough mitigating factors [as listed above] that it was not willing to make the termination of Edward's parental rights a Final Disposition.

2) Though the Department, and eventually the Guardian Ad Litem, felt that Edward should be in an inpatient facility, his therapist, who has a Masters Degree in addictions counseling, felt that out-patient was the appropriate treatment for Edward (attached).<sup>9</sup>

3) The Guardian Ad Litem's Motion to Terminate that was addressed by the lower Court at the February hearing was largely based on Edward not entering an inpatient facility, and as stated above, that was not the treatment prescribed by his therapist, plus prior to that hearing Edward had turned himself into the emergency rooms at both Fairmont General Hospital and Ruby Memorial Hospital. Edward told them both

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<sup>9</sup> Edward's therapist continues to recommend out-patient therapy for Edward, and that Edward is doing well in his program.

that he had a drinking problem and wanted to be admitted for rehabilitation, but was refused admittance by both. Fairmont General specifically said that Edward did not present the high blood pressure and tremors necessary for emergency admittance for rehabilitation.(attached) Additionally, to get a non-emergency bed in a facility takes a minimum of six to eight weeks, and Edward had been trying until his therapist told him that inpatient was not necessary.

4) When the lower Court made the decision to Grant the Motion to Terminate in February, it reserved Final Disposition of the case until March 28<sup>th</sup>, 2005, because the lower Court was aware of all of the above extraneous information, and the lower Court was not anxious to take the drastic last step of termination as a Final Disposition unless there was no other alternative. Though "courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened..." Syllabus point 2, In re Emily and Amos B., 208 W. Va. 325 (2000), ...the children in this case were not threatened at all, least of all, seriously. They had been in the same foster care for over a year, and likely will remain there at least until the end of this case.

It is the Respondent's position that the lower Court was following the true purpose of West Virginia Code §45-6-5(a) as it applies to this particular case, by deferring termination until all other measures were exhausted. More specifically, §45-6-5(a) states:

- The court shall give precedence to dispositions in the following sequence:
- 1) Dismiss the petition;
  - 2) Refer the child, the abusing parent or other family members to a community agency for needed assistance and dismiss the petition;
  - 3) Return the child to his or her own home under supervision of the department;

4) Order terms of supervision calculated to assist the child and any abusing parent or parents or custodian which prescribe the manner of supervision and care of the child which are within the ability of any parent or parents or custodian to perform;

5) Upon finding that the abusing parent or parents are presently unwilling or unable to provide adequately for the child's needs, commit the child temporarily to the custody of the state department, a licensed private child welfare agency or suitable person who may be appointed guardian by the court.

6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental rights.

The lower Court, knowing all of the facts of the case, except for the whereabouts of Edward on the day of the hearing, decided not to choose the most drastic of dispositions on that day. The lower Court decided that it was in Jonathan D. and Charles B.'s best interest to defer any ultimate verdict on Edward and his sons fate to a future date. The lower Court's decision was in line with this Honorable Court's holdings in In re R. J. M., 164 W. Va. 496 (1980) and In the Interest of Carlita, 185 W. Va. 613 (1991), which held "As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code §49-6-5 will be employed."

Therefore, I pray that this Very Honorable Court will Dismiss the Petition for Writ of Prohibition in this matter, and in so doing, will allow the Monongalia County Circuit Court's Order of June 27<sup>th</sup>, 2005, to be Entered.

**B. Though there are strict time limits in abuse and neglect cases, circuit courts, as triers-of-fact in these cases, should be given discretion to grant additional extensions to Improvement Periods, on a case-by-case basis, in cases where a parent is taking significant steps to overcome an addiction, where the circuit court finds that additional extensions to an Improvement Period are in the best interest of the children, and will likely result in reunification of the family**

The current case is a perfect example of when a circuit court should be authorized to use its discretion in deciding whether an abuse and neglect case should be allowed to continue past the current statutory limits. Edward now admits that he is an alcoholic, and he is taken all prescribed steps to deal with his problem, but as is general knowledge, admitting to yourself that there is a problem is the biggest hurdle. It took Edward almost ten months to face the fact that to care for his special needs sons he needed to quit drinking. And according to the American Medical Association, it takes a life shattering circumstance for an alcoholic to admit their problem. Edward B.'s life shattering circumstance was when the Court announced in December that it did not feel that a termination that allowed for visitation would be in the boys best interest because it would lack the quality of permanency for the boys. Edward's eyes welled up like never before and tears starting streaming down his cheeks. He got it. He realized that he was on the brink of losing his sons forever. Who had the best view of Edward's outward pouring of his soul? The circuit judge who sat above him, and who was looking directly at him, whose words evoked Edward's reaction. Not the State, the Department, nor the Guardian Ad Litem could see the traumatic reaction in Edward B.'s face and body when the lower court spoke those words "termination without any further visitation." The respondent argues that the above is why great deference should be given to the circuit courts, as triers-of-fact, in these abuse and neglect proceedings, including giving deference to the Monongalia County Circuit Court in the current case. The circuit court is the judge and jury in these matters.

Additionally, there was no evidence presented in this particular case of harm caused by Edward B. to his children, only the possibility of harm if he were intoxicated

and unable to attend to a medical emergency should one arise. And with children with medical disorders like Edward's sons', a medical emergency is always a possibility.<sup>10</sup> The circuit court stated on more than one occasion, including the Preliminary Hearing, that the extraordinary special needs of the children in this case required the Court to use a heightened diligence in protecting them. Does this Very Honorable Court believe that if Edward B. went to pick up his healthy children by taxicab with a blood-alcohol content of .073 that we would be before you today? The Respondent thinks not. Edward B.'s unacceptable behavior in this case would not have been anywhere near the bar for possible termination if he had two healthy children.

The circuit court judge in this case understood that there were mitigating factors that needed to be considered in this unique case. The circuit court judge in this case understood that Edward B. was put under extreme scrutiny during these proceedings. The circuit court judge in this case was able to watch Edward B. evolve from an angry father who felt his paternal rights were being trampled, to a scared and conscientious father who realized that he must do whatever is necessary to retain custody of his sons, including addressing his alcohol addiction. The circuit court judge in this case was able to examine all evidence, motives, and information available in this case before making a decision to extend this extraordinary case with the extraordinary special needs of these children in mind. The circuit court judge's decision should stand, and the Order of June 27<sup>th</sup>, 2005, should be allowed to be Entered to reflect such.

With absolute reverence and respect to this Very Honorable Court, the Respondent prays that you will decide that in extraordinary cases circuit courts may use

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<sup>10</sup> The department testified that to their knowledge, during the past four years while a single parent, Edward B. had appropriately attended to his sons' medical needs and that Edward's sons had attended school regularly unless there was a medical problem.

their discretion, on a case-by-case basis, to extend an abuse and neglect case while a parent grasps, then addresses, an addiction problem. Accepting, grasping or realizing that there is a problem sometimes uses up a large percentage of the current statutory time limit for abuse and neglect cases. Then there is changing lifestyle, habits, acquaintances, sometimes even location. As the trier-of-fact, the lower court will be able to observe and examine all available evidence and information to determine the sincerity of effort being put forth by the addicted parent before granting an extension of time to an Improvement period. Therefore, the Respondent realizes that the lower court would only be permitted to use this discretion when the parent was taking significant steps toward overcoming their addiction and reprioritizing their life, with the children's best interest remaining the main goal.

#### **VI. RELIEF REQUESTED**

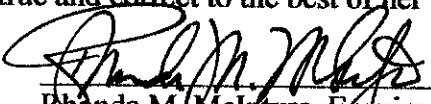
The respondent in the above-titled action requests that this Very Honorable Court **DISMISS** the Petition for Writ of Prohibition against the Circuit Court of Monongalia County, West Virginia, concerning the Order from a hearing held on June 27<sup>th</sup>, 2005; that this Very Honorable Court give deference to the lower court's decision in this matter; and that this Very Honorable Court consider granting circuit courts the discretion to examine abuse and neglect cases on a case-by-case basis, and if addiction is involved, and if the efforts of the parent are substantial and significant, allow the circuit courts to make reasonable extensions to Improvement Periods so that reunification of the family can still occur after the statutory time limits have been exhausted, and still keeping the best interests of the children as a priority.

Respectfully Submitted by,  
Edward B., Father, Respondent,  
By counsel.

  
Rhonda M. McIntyre, Esquire  
235 High Street, Suite 322  
Morgantown, WV 26505  
(304) 288-9860  
W. Va. Bar No. 8827

**RULE 4A VERIFICATION**

The undersigned counsel verifies that all information contained in the foregoing  
"Response to Petition for Writ of Prohibition" is true and correct to the best of her  
information and belief.

  
Rhonda M. McIntyre, Esquire  
235 High Street, Suite 322  
Morgantown, WV 26505  
(304) 288-9860  
W. Va. Bar No. 8827

**CERTIFICATE OF SERVICE**

I, Rhonda McIntyre, hereby certify that on the 8<sup>th</sup> day of August, 2005, I have served the foregoing RESPONSE TO PETITION FOR WRIT OF PROHIBITION, AND RESPONDENT'S SHOW CAUSE OF WHY A WRIT SHOULD NOT ISSUE upon the following counsel:

Monongalia County Prosecuting Attorney's Office  
243 High Street  
Morgantown, WV 26505

Michael J. Sharley, Esq.  
422 Holland Avenue  
Westover, WV 26505

CASA for Kids  
440 Elmer Prince Drive  
Morgantown, WV 26505

Honorable Russell M. Clawges, Jr.  
Judge, 17<sup>th</sup> Judicial Circuit  
243 High Street  
Morgantown, WV 26505

Terri Tichenor, Guardian Ad Litem  
P. O. Box 2798  
Fairmont, WV 26555-2798

The original and 7 copies of the same via Federal Express:  
To the West Virginian Supreme Court of Appeals  
Office of the Clerk  
1900 Kanawha Boulevard, East, State Capitol  
Charleston, WV 25305

  
Rhonda M. McIntyre