No. _____

In the Supreme Court of the United States

M.H.,

PETITIONER,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES, ET AL.,

RESPONDENTS.

On Petition for a Writ of Certiorari to the Supreme Court for the State of West Virginia

PETITION FOR A WRIT OF CERTIORARI

Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
robertsirianni@brownstonelaw.com
(o) 407-388-1900
(f) 407-622-1511
Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the Supreme Court of Appeals misinterpreted the Foster Child Bill of Rights under West Virginia statutory law to the detriment of the child in stark contrast with the best interest analysis, thereby violated the Due Process Clause.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

M.H., Petitioner-Intervenor

West Virginia Department of Health and Human Resources

Vickie L. Hylton, Esq., Guardian Ad Litem

B.L., Respondent-Intervenor

C.L., Respondent-Intervenor

Ray W. Toney, Assistant Prosecuting Attorney

LIST OF RELATED PROCEEDINGS

CIRCUIT COURT OF FAYETTE COUNTY
Case No. 18-JA-91
In re A.H., Case No. 18-JA-91 JUDGEMENT DATED December 21, 2020 (Pet. App. 44b).

WEST VIRGINIA SUPREME COURT OF APPEALS
Case Nos. 21-0052, 21-0055, 21-0056
In re A.H., Case Nos. 21-0052, 21-0055, 21-0056, JUDGMENT AFFIRMING CIRCUIT COURT DATED November 18, 2021 (Pet. App. 1a).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, M.H., respectfully prays that this Court issue a writ of certiorari to review the Supreme Court of Appeals of West Virginia's memorandum decision.

OPINIONS BELOW

On December 21, 2020, the Circuit Court of Fayette County, West Virginia entered a Permanency Order denying Petitioner custody of the child. (Pet. App. 44b).

On November 18, 2021, Supreme Court of West Virginia filed a memorandum decision denying Petitioner's case. See *In re A.H.*, Case Nos. 21-0053, 21-0055, 21-0056 (Pet. App. 1a).

BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Appeals of West Virginia's judgment and memorandum decision was dated and filed on November 18, 2021. Jurisdiction to review the Supreme Court of Appeals of West Virginia's judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257 (2022). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c) (2022), as computed in accordance with Rule 20.4 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause of the fourteenth amendment to the United States Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATUTORY PROVISIONS INVOLVED

The Foster Child Bill of Rights, codified at W. Va. Code § 49-2-126, provides, in pertinent part:

(a) Foster children and children in a kindship placement are active and participating members of the child welfare system and have the following rights:

(1) The right to live in a safe and healthy environment, and the least restrictive environment possible;

(2) The right to be free from physical, sexual, or psychological abuse or exploitation including being free from unwarranted physical restraint and isolation;

. . .

(5) The right to be placed in a kinship placement, when such placement meets the objectives set forth in this article;

(6) The right, when placed with a foster [or] kinship family, to be matched as closely as possible with a family meeting the child's needs including, when possible, the ability to remain with siblings

. . .

(11) The right to maintain contact with all previous caregivers and other important adults in his or her life, if desired, unless prohibited by court order or determined by the parent, according to the reasonable and prudent parent standard, not be in the best interests of the child

W. Va. Code § 49-4-114(a)(3), the grandparent preference statute, provides as follows:

> For purposes of any placement of a child for adoption by the department, the department shall first consider the suitability and willingness of any known grandparent or grandparents to adopt the child. Once grandparents who are interested in adopting the child have been identified, the department shall conduct a home study evaluation, including home visits and individual interviews by a licensed social worker. If the department determines, based on the home study evaluation, that the grandparents would be suitable adoptive parents, it shall assure that the grandparents are offered the placement of the child prior to the consideration of any other prospective adoptive parents.

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The child was born to mother L.J. and father H.H. in January 8, 2018. Petitioner and T.H are the paternal grandparents of the child, D.J is the maternal grandfather of the child, J.J. and K.J. are the maternal aunt and uncle of the child, all of which were present for the child's birth. The child was born drug dependent. The DHHR, however, did not file a petition alleging abuse and neglect in light of the extant "safety plan." By participating in medically assisted therapy (MAT) for her substance abuse disorder and living with Petitioner and T.H. in Fayette County, L.J complied with the plan before the child was born and continued to do so thereafter.

Throughout the late spring and summer of 2018, L.J. moved with the child back and forth between her own families' homes in Wayne County and the paternal grandparents' home in Fayette County. Later in August, H.H. was released from jail and resided in Petitioner and T.H's home. Around the same time, L.J. relapsed and began using drugs again. As a result, the DHHR approved the child to stay in the paternal grandparents' home with H.H., allowing L.J. limited visitation rights with the child. Shortly thereafter, H.H. overdosed in his parent's basement, with L.J. present, Petitioner and T.H. in the home, as well as the child who was asleep at the time. H.H. survived the overdose.

On September 25, 2018, the DHHR filed a petition, to which it alleged that L.J. and H.H. had abused and neglected the child and Petitioner and M.H. presented an inappropriate home for the child. Then, on November 17, an adjudicatory hearing was held, where the court determined if the child would remain in Petitioner and T.H's home or be placed with foster parents. Neither the DHHR nor the guardian ad litem requested that the child be removed the home. In fact, the guardian ad litem stated that Petitioner and T.H's home was appropriate and verified her finding upon multiple visits to the home. Furthermore, it was discussed whether Petitioner and T.H. brought the child to this hearing in violation of a no-contact order. Petitioner stated, "you told us to bring her. You told us to bring her," to which the CPS worker responded, "I did not. No, I didn't." Despite this confusion, it was apparent then that Petitioner and T.H. reasonably believed that the child was required to be present. Indeed, the guardian ad litem later conceded that Petitioner and T.H. were trying to protect the child during the safety plan; that their home was appropriate for the child; and that the child should remain in Petitioner and T.H's home until allegations of inappropriate contact (involving L.J. as opposed to Petitioner) were proven. Yet, the court ordered the child removed and placed with foster parents. Following the hearing, L.J. and H.H. pursued drug treatment but unfortunately relapsed and were arrested in Virginia in January 2019 on felony drug charges.

While the child remained with the foster parents, the matter continued until a dispositional

hearing on January 31, 2019. There, counsel for the DHHR stated the court removed the child from the home of Petitioner and T.H. over the objections of the DHHR and guardian ad litem. Counsel further stated that Petitioner and T.H. had productive visits and updated the DHHR by email upon each. Indeed, the DHHR described the child as having a strong bond with Petitioner and T.H. Though the court permitted Petitioner and T.H supervised visitation with the child, it should be reiterated that, there were no allegations that Petitioner posed any problems to resolving this case, whether during hearings, visitations, or communications. Ultimately, the court continued disposition of the case.

The next hearing, held of March 4, 2019, addressed L.J. and H.H.'s motion for post-adjudicatory improvement periods filed. The court denied those motions. The court maintained the child's placement with the foster parents, B.L. and C.L., but also continued visitation between the child and Petitioner and T.H.. The DHHR and guardian ad litem were granted discretion to facilitate visitation between the child and other biological family members.

In June 2019, the DHHR moved to amend the abuse and neglect petition, seeking to add allegations of domestic violence on the part of T.H and, by extension Petitioner, and reopen the final adjudicatory hearing. Although the Court granted the motion, the DHHR later informed the court in November that it failed to substantiate the new allegations and sought to proceed on the original

grounds for adjudication. The court then held a dispositional hearing on January 10, 2020.

During the dispositional hearing, the court heard motions from parties to intervene in the case and seek to become the child's permanent placement, including the child's paternal aunt and uncle (T.M. and D.M.), maternal aunt and uncle (K.J. and J.J.), maternal grandmother (M.H.-1), foster parents (B.L. and C.L.), and Petitioner (M.H.). More importantly, the DHHR requested that visitation with Petitioner and T.H. continue, to which the guardian ad litem did not object. Yet, Sua Sponte, the court ceased the visitation rights of Petitioner and T.H. as well as any other family member that had exercised visitation. Again, at no point during the hearing was there any reference to Petitioner posing any problem in this proceeding.

At the next hearing on January 29, 2021, the court mentioned the rationale behind its Sua Sponte decision to cease visitation. More specifically, the court confessed that the ultimate reason was to "not to hurt anybody's feelings or anything." (Appendix 9 pg 44., line 2-3). Citing a parade of horribles dealing with favoritism between the child and respective parties, the court ostensibly said that the myriad of possibilities outweighed the visitation rights of Petitioner and the other intervenors. The judge reaffirmed his ruling, without cogent analysis, that no intervenors were allowed to visit the child for the time being. Moreover, H.H. relinquished his parental rights to the child and the court involuntarily terminated L.J. parental rights. L.J. did not appeal.

The child remained in her placement with B.L. and C.L.

To assist the court's permanency determination, the guardian ad litem and the DHHR interviewed the intervenors over two days in March 2020. In her report submitted later that month, the guardian ad litem recommended that permanent placement with the foster parents, as opposed to any intervenor, was in the best interest of the child.

Also in March, the court held a hearing on multiple motions to continue the permanency hearing, including one by Petitioner. There, the parties discussed the DHHR's amended petition and substantiation of abuse and neglect against T.H. and, by extension, Petitioner. Though the allegations against T.H., at that time, had already been overturned, the parties had not yet received the ruling from another court, and Petitioner and T.H were not capable of being an approved placement until reversal was verified. Ultimately, the parties did not receive the order until June 23, 2020, which overturned the ruling of the Administrative Law Judge and reversed all substantiations of domestic violence. Moreover, the hearing, carried out during the onset of the COVID-19 pandemic, concluded with the court denying visitation rights to any party and permitted the child to remain with foster parents.

The court then conducted a series of evidentiary hearings at which the intervenors and others testified and were subject to cross examination. Notably, a DHHR representative testified to the full summary against Petitioner and T.H., stating that she

personally gave permission to L.J. to be present in Petitioner's home at the time of H.H.'s overdose; that it was her belief that L.J. brought the drugs to the home; that L.J. was removed from the home after the overdose; and that within days H.H. was in a rehabilitation program. She separately testified that she was against the removal of the child from Petitioner and T.H.'s home because the child had grown accustomed to that home since leaving the hospital and that Petitioner and T.H had taken wonderful care of her in that interim. Furthermore, multiple permanency hearings followed, where the court received significant testimony from Petitioner and other parties. The court issued its Permanency Order on December 21, 2020.

After reviewing the procedural history of the case, the court considered the permanency cases of each intervenor. For the purposes of this petition, the court's analysis of Petitioner and T.H is sufficient.

The court set forth a series of factual findings to support its final ruling, albeit with cursory analysis. Though recognizing that Petitioner and T.H "had the most extensive established relationship with the minor child," the court did not view the evidence in its entirely, focusing instead on disputed circumstances concerning H.H. and L.J., which were largely inapplicable to the court best interest analysis. As to the basis for the child's initial removal from Petitioner and T.H.'s home, the court claims it did not consider the prior substantiations in its ruling, but the mentioning of throughout its order suggests otherwise. The court mentions in passing that those substantiations were reversed, but the underlying

circumstances, though proved groundless by the Administrative Law Judge, appear throughout the court's analysis. Oddly, the court states, "The minor child should not have initially been placed with the paternal grandparents . . . due to two prior substantiations of child abuse within the home," but includes a footnote stating that these substantiations (reversed) were not considered. If so, then why deliberately include a verb, *should*, meaning to indicate obligation, duty, or correctness, typically when criticizing someone's actions," if this point was irrelevant to the court's determination?

The court referred to some of the favorable facts supporting Petitioner and T.H's permanency but focused primarily on minor disputes earlier in the proceeding. Without citing any direct evidence or testimony presented, the court found that T.H. fails to accept H.H.'s responsibility in this matter and that Petitioner was averse to H.H. seeking long-term in-patient treatment, both of which are not supported by the evidence in the record, particularly testimony and the MDT report.[1] Accepting these specious assertions, the Court was "of the impression" that Petitioner and T.H. continue to place the needs and desires of H.H. above the needs of the child, ignoring the fact that the

[1] Notably, state transcripts detail that the state judge placed heavy emphasis on the MDT reports. Most of the allegations against M.H. in the GAL report were not documented in the MDT reports. The substantiations against M.H. arise from conduct nearly 15 years before the start of the proceedings. It is M.H.'s position that MDT did not place the child back in his home because of these substantiations. The Judge mentions the substantiations would not be considered in his decision he mentions them in his placement decisions.

two had visiting the child 57 times (according to the court, this was "sporadic") since she was placed with foster parents; that C.L., a foster parent, had testified that Petitioner and T.H interacted with her as loving grandparents; and that the child both recognized and loved Petitioner and T.H even at such a young age.

The court, again without much analysis, expressed concern over future contact between the child and H.H., should it grant permanency rights to Petitioner and T.H. The Court stated that "[a]lthough continued contact with [H.H.] is clearly not in the best interest of the minor child, this [c]ourt has little doubt that situational contact, and potentially even facilitated contact, will occur should child the child be permanently placed." Notably, the court filed its order on December 21, 2020; the evidence shows that H.H. had not resided with Petitioner and T.H. since September 2018, and the contact between them has been quite minimal. With this questionable concern blinding its peripheral, the court found somewhat dispositive the fact that neither the DHHR nor the guardian ad litem supported permanent placement with Petitioner and T.H. The court, however, ignored that the testimony of the DHHR and guardian ad litem, which supported placement of the child with Petitioner and T.H before the court's Sua Sponte removal. Taking these two final findings together, again with the requisite analysis, the court then found permanent placement with Petitioner and T.H. not to be in the overall best interest of the child. Petitioner and others appealed.

On November 18, 2021, the Supreme Court of Appeals of West Virginia filed its memorandum

decision, affirming the lower court's ruling against permanency of the child to Petitioner or any other of the intervenors below. Similar to the above, the Supreme Court's analysis of Petitioner and T.H is sufficient for the purposes of this petition.

First, the Court addressed Petitioner and T.H.'s argument that the circuit court failed to properly consider the child's rights under the Foster Child Bill of Rights during the abuse and neglect proceedings below. The Court disagreed, finding that the Foster Child Bill of Rights was not applicable to the majority of episodes Petitioner and T.H. complained of, since the statute became effective thereafter.

Secondly, the Court addressed whether the circuit court violated the child's right under § 49-2-126(a)(5) in December 2020, when it granted permanency to the foster parents, rather than Petitioner and T.H. The Court agreed with the circuit court's decision that permanent placement with Petitioner and T.H. was not in the child's best interests based on factual findings (though disputed) in the record. While the Court mentioned the statutory preference for grandparent placement, it never mentioned explicitly how the presumption was rebutted by the circuit court's findings. As a result, it found that the circuit court's order granting permanency to the foster parents over Petitioner and T.H. to not be an abuse of discretion. To clarify, the Court affirmed an order that favored foster parent placement over numerous intervenors with an emotional bond with the child. To quote this Court, that decision was one of "startling breath" for reasons discussed further below. *Burwell v. Hobby Lobby*

Stores, Inc. 573 U.S. 682, 740 (2014) (Ginsburg, J., dissenting).

Finally, the Court addressed Petitioner and the other intervenor's challenge of the circuit court's Sua Sponte order suspending visitation with the child. Though addressed further below, Petitioner and T.H. argued that the circuit court was "hostile to a kinship placement" and ended visitation purposefully to ensure that any bond between Petitioner and the other intervenors would be diminished. The Court disagreed, finding these claims baseless and relying on procedural delays, including complications with COVID-19 and the number of intervenors, to affirm the circuit court's visitation decision.

Concurring and writing separately, Justice Wooton agreed that foster parent placement was in the child's best interest but considered the possibility that the circuit court's cessation of visitation "violated [the child's] right to continued association with individuals to whom she is emotionally bonded." Acknowledging that the right to continued association was long been protected in West Virginia, Justice Wooton noted that the "circuit court made no finding whatsoever that this cessation was in [the child's] best interests" no considered whether such cessation would be harmful to the child. When the circuit court "unceremoniously terminated visitation between [the child] and all of the intervenors, it simply relied on "inconvenience," according to the Justice. However, "nothing in the statute or our caselaw states that 'inconvenience' is a factor to be considered in determining whether to sever a child's emotional bond with prior caregivers or other important adults in his

or her life." This point, coupled with the fact that "cessation of visitation between [the child] and the paternal grandparents (Petitioner and T.H.) was unquestionably harmful" to the child, convinced Justice Wooton that the circuit court erred in this respect.

Justice Wooton also acknowledged the series of errors by the circuit court and their impact on the child. Though he agreed with the foster placement, he underscored the effect of the Sua Sponte decision on visitation, finding that it "effectively sever[ed] any bond [the child] may have had with" Petitioner and T.H. Summarizing his view, he stated that "the circuit court could have and should have made a stronger effort to preserve [the child's] emotional ties to her . . . grandparents with whom she had the strongest bond. Instead, the circuit court perfunctorily severed those emotional bonds in clear contravention of [the child's] right to continued association." Finally, he offered a note of caution to circuit courts, directing them to be more cogent in determining whether cessation of visitation is in the child's best interest or, alternatively, whether such cessation is harmful to the child.

REASONS TO GRANT THIS PETITION

I. The Supreme Court of Appeals misinterpreted the Foster Child Bill of Rights under West Virginia statutory law to the detriment of the child in stark contrast with the best interest analysis.

The West Virginia Legislature passed the Foster Child Bill of Rights and became effective on June 5, 2020. Thus, the Foster Child Bill of Rights is a relatively new statute, and as a result, West Virginia courts have not adequately interpreted its meaning. Newly enacted legislation, however, "must be considered in conjunction with our state's pre-existing . . . legislation. Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." *In re R.S.*, 244 W. Va. 564, 572 (2021) (quoting Syl. Pt. 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 (1975)).

As to statutory construction and interpretation of the statute, provisions W. Va. Code §§ 49-2-126(a)(5), (a)(6), (a)(11) are applicable with respect to this Petition and are addressed in turn. Firstly, the statute provides for "a right to be placed in a kinship placement, when such placement meets the objectives set forth in this article." W. Va. Code § 49-2-126(a)(5). Though the statute does not explicitly state such objectives, one could argue it is something to the effect of the best interests of the child. Secondly, the statute provides for a "right, when placed with a foster of

kinship family, to be matched as closely as possible with a family meeting the child's needs." W. Va. Code § 49-2-126(a)(6). According to Supreme Court of Appeals of West Virginia, the phrase "'to be matched as closely as possible with a family meeting the child's needs' is direct, plain, and should be applied as written." *In re R.S.*, 244 W. Va. 564 (2021) (quoting § 49-2-126(a)(6)). Thus, that phrase "requires the circuit court to conduct an analysis of the child's needs and foster family's ability to meet those needs. Id. In sum, "the circuit court's task is clear—it must consider whether placement with a particular family meets the child's needs, an analysis that is generally synonymous with consideration for what is in the child's best interest." *Id.*

Therefore, the Foster Child Bill of Rights and preexisting statutes, taken together, is the relevant framework, and the former must be considered in conjunction with the latter. Still, "the primary goal in cases involving abuse and neglect, as in all family law matters, must be the health and welfare of the children." *In re Katie S.*, 198 W. Va. 79 (1996). "Once a court exercising proper jurisdiction has made a determination upon sufficient proof that the child has been neglected and his natural parents were so derelict in their duties as to be unfit, the welfare of the infant is the polar star by which discretion of the court is to be guided in making its award of legal custody." Syl. pt. 8, in part, *In re Willis*, 157 W. Va. 225 (1973). Thus, at bottom, in abuse and neglect proceedings, such as this one, courts "have traditionally held paramount the best interests of the child. Syl. pt. 5, in part, *Carter v. Carter*, 196 W.Va. 239 (1996).

The applicable case law applying the statute is quite sparse, particularly the considerations under each newly enumerated right. However, "[t]he right to maintain contact with all previous caregivers and other important adults in his or her life, if desired, unless prohibited by court order or determined by the parent, . . . not be in the best interests of the child," codified in § 49-2-126(a)(11), has long been protected by the legislature and judiciary in West Virginia, in the form of a right to continued association. Justice Wooton's concurring opinion in the instant case underscored this point, stating "[i]n addition to our precedent on this matter, the Legislature has [now] codified a child's right to continued association. In adopting The Foster Child Bill of Rights, the Legislature rewrote West Virginia Code § 49-2-126 (2020) to specifically enumerate the basic rights afford to foster children, which includes" the right to continued association in § 49-2-126(a)(11). *In re A.H.*, 2021 WL 5371414 (W. Va. Nov. 18, 2021) (Wooton. J., concurring). To support his argument, Justice Wooton relied on an earlier West Virginia Supreme Court case, *In re Jonathan G.*, that clarified the right to continued association in the abuse and neglect proceeding context. There, the court noted "[t]he guiding principle relied upon by this Court in recommending consideration of continued contact with a child is whether a strong emotional bond exists between the child and an individual such that cessation in contact might be harmful to the child, both in its transitory period of adjusting to a new custodial arrangement and in its long-term emotional development." *In re Jonathan G.*, 198 W.Va. 716, 735 (1996). Ultimately, the court held that "[a] child has a

right to continued association with individuals with whom he [or she] has formed a close emotional bond . . . provided that a determination is made that such continued contact is in the best interests of the child. Syl. Pt. 11, in part, *In re Jonathan G.*, 198 W.V 716 (1996).

Here, Petitioner argues that the Supreme Court of Appeals misinterpreted the Foster Child Bill of Rights under West Virginia statutory law. Though Petitioner concedes that the Foster Child Bill of Rights did not become effective until June 5, 2020, that does not relinquish a court from the paramount consideration of abuse and neglect proceedings—that is, the rights of foster children and children in a kindship placement, irrespective of whether such rights are enumerated in a statute. Only Justice Wooton, writing separately in a concurring opinion, recognized that this factuality, stating that the West Virginia legislature has long recognized and protected these newly codified rights. *In re A.H.*, 2021 WL 5371414 (W. Va. Nov. 18, 2021) (Wooton. J., concurring).

Petitioner requests a review of a decision by the State's highest court, where it misapplied and frankly ignored the objectives set forth in the Foster Child Bill of Rights and the welfare of the child, or the "polar star by which discretion of [that] court is to be guided in making its award of legal custody." Syl. pt. 8, in part, *In re Willis*, 157 W. Va. 225 (1973). Despite no objection from the DHHR nor the guardian ad litem, the circuit court, Sua Sponte, removed the child from Petitioner and T.H.'s home on November 15, 2018.

This began a series of unfortunate errors by the circuit, which were then countenanced by the Supreme Court of Appeals.

Upon removal, the DHHR commended the efforts of Petitioner and T.H with respect to caring for the child and discussed a home study and possible placement in the future. However, the child was never placed with kin following the removal in November 2018. The depositional hearing taken on July 6, 2020, sheds light on the violation of the child's rights and the court's clear disdain for the notion of kinship placement, whether temporary or permanent, and continued association with prior caregivers. Relying on unsubstantiated allegations of facilitated contact between the child, Petitioner, T.H., and the child's biological parents, the court stated, "You know and you keep using – kindship placement . . . Well, I didn't feel it was appropriate at that time; not know what these biological parents were up to and complicity [Petitioner] and T.H. may have had in it." As to why no kinship placement was initiated in the protracted interim, counsel for the DHHR claimed that, because of the court's orders, they lacked discretion to consider a kinship placement.

In its permanency order, the circuit court simply made cursory observations with respect to kinship and the right to continued association. In paragraph 12, the court stated that "as kinship placement was not successful, on November 15, 2018, the minor child was placed in a Pressley Ridge Foster home with foster parents, B.L. and C.L., immediately following the adjudicatory hearing." (Appendix 15, pg.

4, paragraph 12). In essence, this perfectly captures the circuit court's view on kinship placement, to which the Supreme Court of Appeals erroneously agreed. The presence of minor problems, which were remedied quickly thereafter, resulted in the child forfeiting her right to kinship placement and continued association with her paternal grandparents.

In affirming the circuit court's order, the Supreme Court of Appeals misinterpreted the Foster Child Bill of Rights under West Virginia statutory law in violation of the child rights. The Court held that, since the new bill did not become effective until June 5, 2020, the statute cannot apply in the context of the 2018 adjudicatory hearing. The reasoning falls on two separate grounds. As discussed above, the newly codified rights set forth in § 49-2-126 have long been protected in West Virginia. The enactment of a new statute does not relinquish a court from considering the legislative developments that came beforehand, particularly those relevant to the best interest analysis. Statutes relating to the foster children and children in a kinship placement together "should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments." *In re R.S.*, 244 W. Va. At 572. Even still, the Foster Child Bill of Rights was effective law during the July 2020 depositional hearing. There, the court demonstrated unequivocal animosity for the child's rights with respect to kinship placement and continued association, two violations that were ignored by the majority and only mentioned in passing by the concurrence.

The Supreme Court of Appeals was tasked with reviewing the circuit court's permanency order and the decision therein prohibiting visitation. Had the Supreme Court interpreted the Foster Child Bill of Rights under West Virginia statutory law correctly, it would have discerned that the child's rights were violated throughout the lower proceedings and granted relief accordingly. With respect to the right to kinship placement, the Supreme Court ignored the record, which discloses the circuit court's animosity toward this right. The enactment of the Foster Child Bill of Rights in June 5, 2020 does not negate the existence of the right to kinship placement that preceded this legislative effort. As discussed above, the statutes must be read in tandem, and the failure to do so here is in plain error.

Similar analysis is applied with respect to the right to continued association. Just as with the right to kinship placement, the right to continued association is well established in statutory authority and precedents in this State. In determining if continued association between a child and a particular party, here Petitioner, is warranted, the questions is "whether a strong emotional bond exists between the child and an individual such that cessation in contact might be harmful to the child." *In re Jonathan G.*, 198 W. Va. at 912. As the concurring justice correctly stated, "the circuit court unceremoniously terminated visitation . . ., despite [the child's] emotional bond with the paternal grandparents," Petitioner and T.H. *In re A.H.*, 2021 WL 5371414 (W. Va. Nov. 18, 2021). He further noted that the circuit court made "no findings whatsoever" that cessation was in the child's best

interest nor to whether such cessation would be harmful to the child, relying instead on "inconvenience" and a tenuous parade of horribles argument. We agree with Justice Wooton that the circuit court erred in justifying the elimination of this right on mere grounds of inconvenience.

In sum, Petitioner prays on this Court to review the decision of the Supreme Court of Appeals of West Virginia. Petitioner argues that this State's highest court misinterpreted Foster Child Bill of Rights under West Virginia statutory law. If the "welfare of the infant is the polar star by which discretion of the court is to be guided," then the Supreme Court of Appeals should have found that the child's right to kinship placement and continued association were violated throughout the proceedings below. Syl. pt. 8, in part, *In re Willis*, 157 W. Va. 225.

II. The Supreme Court of Appeals improperly granted permanency to the child's foster parents, when it ignored the statutory preference afforded to grandparents in conjunction with the best interests of the child.

The West Virginia Legislature had previously enacted a state addressing the grandparent preference, codified at W.Va. Code § 49-4-114(a)(3). This statutory preference "govern[s] the adoption of children whose parents' parental rights have been terminated through abuse and neglect proceedings. *In re P.F.*, 243 W. Va. 569, 574 (2020) (quoiting *In re Elizabeth F.*, 225 W. Va. 780, 786 (2010)). Before the

instant case began, the Supreme Court of Appeals of West Virginia addressed the grandparent preference statute in *Napoleon S.*, stating:

> W. Va. Code § 49-4-114(a)(3) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated and also incorporates a best interests analysis within that determination by including the requirement that the DHHR find that the grandparents would be suitable adoptive parents prior to granting custody to the grandparents. The statute contemplates that placement with grandparents is presumptively in the best interests of the child, and the preference for grandparent placement may be overcome only where the record reviewed in its entirely establishes that such placement is not in the best interests of the child. Syl. Pt. 4, *Napoleon S.*, 217 W. Va. 254 (2005).

Thus, the statute provides for rebuttable presumption, but "[t]he grandparent preference must be considered in conjunction with [this Court's] long standing jurisprudence that the primary goal in cases involving abuse and neglect . . . must be the health and welfare of the children." *In re Hunter H.*, 227 W. Va. 699, 703 (2011) (internal quotation omitted). *In re P.F.*, 243 W. Va. at 576 (quoting *In re K.E.*, 240 W. Va. 220, 225 (2018)). Still, "[t]he preference is just that—a preference. It is not absolute." Still, however, "[t]he

grandparent preference articulated in West Virginia Code . . . must be recognized as essential in the guidance in the determination of child placement." *Napoleon S.*, 217 W. Va. At 261. The statute's "presumption may only be overcome when the record reviewed in its entirety demonstrates that placement with a grandparent is not in the child's best interest." Id. More specifically, to rebut the presumption, "the State and guardians ad litem must show by clear and convincing evidence that it would be in the best interest of the children to prevent the placement of the children with the grand[parents]." *In re Elizabeth F.*, 225 W. Va. 780, 784 (2010). Application of the statutory preference gives rise to a legal, reversible error when, viewing the record in its entirety, "the placement options (e.g., grandparents, foster parents) presented to the circuit court were not evenly balanced." *In re K.E.*, 240 W.Va. at 228.

One relevant case applying the grandparent preference is *In re J.P. In re J.P.*, 243 W. Va. 394 (2020). Similar to the instant action, the Supreme Court of Appeals of West Virginia was "faced with a situation where multiple families [were] fighting for the opportunity to provide [the child] with a safe, secure, and loving home." *Id.* at 400. The Court held that the circuit court erred in placing the child with foster parents rather than with the paternal grandparent in contravention of the West Virginia Code. *Id.* at 401–02. Acknowledging the difficulty of the case, "it must be noted that being presented with a difficult decision does not excuse a circuit court from examining all of the evidence required to be considered by the governing statutory law and the

applicable decisions of this Court," the court continued. *Id*. at 402. Because the circuit judge "focused almost exclusively" on facts supporting the foster parents' claim for permanency, coupled with procedural delays, the Court found that the statutory preference was ignored to the detriment of the paternal grandparent. *Id*. Reversing, the court remanded for entry of an order permanently placing the child with the paternal grandparent. *Id*. at 404.

Here, Petitioner argues that the Supreme Court of Appeals erred in granting permanency to the foster parents when it failed to consider the grandparent preference as part of its best interest of the child analysis. Petitioner underscores the Supreme Court of Appeals' statements in In Interest of Carlita B., stating: "Child abuse and neglect cases must be recognized as being among the highest priority for the court's attention." Syl. pt. 1, in part, *In Interest of Carlita B.*, 185 W. Va. 613 (1991). Petitioner's argument rests on two grounds: the circuit court's Sua Sponte cessation of visitation rights and the Supreme Court of Appeals cursory analysis of the best interests of the child in tandem with the grandparent preference.

Firstly, Petitioner reiterates that the circuit court was hostile to a kinship placement, and as a result, it purposefully ended visitation to intentionally damage the cases of all family members for permanent placement and ensure that any emotional bond formed between the child and the intervenors, including Petitioner, would be eviscerated. Stated differently, the circuit court ostensibly manufactured the foster

family bond by virtue of its own Sua Sponte order, and "then in turn used that bond as a hammer on the blood relatives in reaching its conclusion to award permanency to the foster family over every other blood relative" including Petitioner.

The majority opinion disagreed, arguing that the circuit court correctly suspended visitation in anticipation of resolving permanency questions quickly thereafter. That did not happen nor a reconsideration of visitation rights between Petitioner, T.H. and the child. The Supreme Court held that "[t]he judicial emergency declared in response to the COVID-19 pandemic, counsels' requests for continuances, the number of intervenors and the need to afford them all the opportunity to present their cases extended the duration of the permanency proceeding." From this view, the Court found In re J.P. distinguishable. Simply put, the Court saw that the procedural delays in that case on the part of the state agencies involved were dissimilar to the instant action. Though Petitioner concedes that the COVID-19 pandemic is novel issue, "lengthy delays and missteps are unacceptable particularly when a young child is awaiting permanency." Syl. pt. 1, in part, *In Interest of Carlita B.*, 185 W. Va. 613 (1991). By suspending visitation for such a protracted interim, the circuit court failed to adequately and timely allow for consistent and family kinship interactions with the child when [she] needed it most." *In re J.P.*, 243 W. Va. at 400. Yet, the Court found no abuse of discretion, again countenancing the series of errors by the circuit court.

Secondly, the Court erred in affirming the circuit court's decision to place the child with foster parents rather than with Petitioner in view of the statutory preference for grandparent placement. The circuit court manufactured a relationship with the child and foster parents through the protracted interim between the suspension of visitation and the permanency determination, to the detriment of the child and Petitioner. Thereafter, it was presented with a difficult permanency question, one that did not excuse it "from examining all of the evidence required to be considered by the governing statutory law." *In re J.P.*, 243 W. Va. at 402. Yet, that is what occurred, and the Supreme Court followed in suit. Petitioner does not challenge the Court's credibility determinations, but rather the lack of equipoise between the grandparent preference and the best interests of child analysis. Petitioner reiterates that such equipoise is statutorily required, and the Court's analysis demonstrates that it largely ignored the preference and relied on disputed evidence as grounds to rebut the presumption, all of which is reversible error. In addition, the majority arguably smuggled the circuit court's visitation concerns in the permanent placement analysis, which the concurrence acknowledged. Had the Court reviewed the record in its entirety as required by law, it would have discerned that it was relying on piecemeal testimony and subsuming evidence in violation of the statute, in addition to the fact that the best interests of the child would be promoted by placing her with Petitioner. Instead, the Court deferred to the circuit court's decision, again without much analysis, where speculations of facilitated contact and

unsubstantiated allegations of abuse outweighed the preference afforded to Petitioner. At bottom, on a clear and convincing standard, the evidence was insufficient to show that it would be in the child's best interest to prevent placement to her grandparents, Petitioner and T.H. Deciding otherwise, Petitioner concludes that the Supreme Court's decision was made in error.

In sum, the Supreme Court of Appeals failed to equably balance the grandparent preference statute together with the best interest of the child analysis. Therefore, the Court improperly granted permanency rights to the foster parents, and Petitioner requests that it reviews the decision and reverse accordingly.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari in this case to review the decision of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

Robert L. Sirianni, Jr., Esq.
Counsel of Record
BROWNSTONE, P.A.
P.O. Box 2047
Winter Park, Florida 32790-2047
(o) 407-388-1900
robertsirianni@brownstonelaw.com
Counsel for Petitioner

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