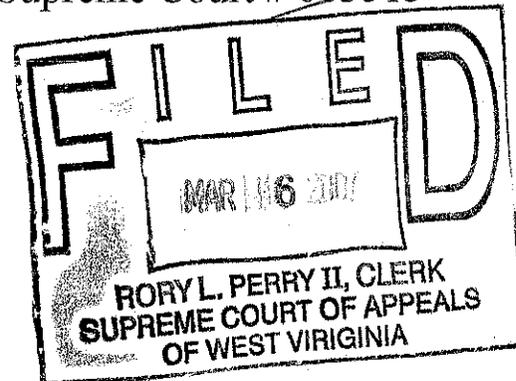


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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON**

In the Interest of
Cesar A.L. Infant
Tameka .L., Mother et al.
Respondents

33317
Supreme Court # 063513



Appellant Tameka L.'s Brief in Support of
Modification of Disposition of
Placement of her son, Cesar L.

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1. The kind of proceeding and nature of the ruling in the lower tribunal

This is an appeal of the rulings made by the Berkeley County Circuit Court, with the Hon. Judge Gray Silver III presiding in an abuse and neglect case. Contained within the Order from hearing held on the 28th of September 2006 and entered on the 12th of October 2006, the Hon. Judge Silver denied respondent/petitioner here Tameka [REDACTED] [REDACTED] (hereafter respondent Tameka L.)¹ motion for a modification of disposition pursuant W.Va. Code 49-6-6 based not upon a change in circumstances but rather upon her previous valid relinquishment as follows W.Va. Code 49-6-7. The Circuit Court also committed error in refusing to permit respondent to testify or to consider that her relinquishment was made under duress despite her incarceration and as she alleges her former counsel did not discuss the matter with her. The Order from that hearing was executed by Hon. Judge Silver on December 14, 2006. Appellant now submits her brief as follows W.Va. Rule of Appellate Procedure 10(a) and (d).

¹ The undersigned acknowledges the requirement of anonymity to refer to abuse and neglect clients.

2. A statement of the facts of the case.

A. This case is one of many abuse and neglect actions filed in Berkeley County Circuit Court, West Virginia, styled as Case number 05-JA-10.² The facts of this case have also been recited in several different Orders and memoranda contained within this case. The allegations against the respondent Tameka L. in this petition were primarily for drug use and also as she had previously relinquished other of her children. Heidi Myers, Esq. was appointed to represent the respondent Tameka L. in these proceedings.

B. The petition was amended twice in this action.³ The amended petition adds certain drug use allegations and the second amended petition speaks to the father's conduct.

C. Respondent Tameka L. was placed upon an improvement period however she was then arrested at FMRS rehabilitation center in Beckley, W.Va. during her improvement period and placed in jail in Virginia for check forgery. It was during her incarceration that respondent sent her relinquishment to her attorney for presentation to the Circuit Court.⁴

D. In June 2006 respondent sought this undersigned counsel to assist her in an

² See Order of Temporary Custody, dated the 3rd of March 2005, contained within the record.

³ See Amended Petition, dated March 17, 2005 and also Exhibit 3, Second Amended Petition, dated the 28th of September 2005.

⁴ See Relinquishment of Parental rights by Mother and Request for Post-Relinquishment Visitation, dated the 6th of October 2006.

attempt to regain custody of her son Cesar L., being dissatisfied with her former counsel. She filed her motions and proposed scheduling Order on the 15th of June 2006 with a hearing set for the 30th of August 2006.⁵ At the time of filing of the various motions the minor child Cesar L. had not been adopted. At that hearing held on the 30th of August 2006 the issue was raised by the *Guardian Ad Litem* Margaret Gordon, Esq. that the W.Va. Code 49-6-6 motion was barred by W.Va. Code 49-6-7, and the parties were then Ordered to submit memoranda on that issue.⁶ The Circuit Court at either this hearing or other recent hearing denied the respondent mother's request for a Stay of the adoption of Cesar L. The State and the GAL submitted their memoranda in a timely fashion on the 13th of September 2006.⁷ The mother submitted her memoranda on the 18th of September 2006.⁸

E. The hearing held on September 28, 2006 generated two Orders, attached hereto.⁹ See the Order Denying Tameka L.'s Motion Pursuant to West Virginia Code 49-6-6.

⁵ See Order Scheduling Hearing and Verified Motions of Respondent.

⁶ See Order of August 30, 2006.

⁷ See Letter of the GAL to the Hon. Judge Silver and Exhibit 8, Proposed Order submitted by the State with the concurrence of counsel for father Lois Lopez.

⁸ See Position of Tameka Melbourne.

⁹ See Order of September 28, 2006, and also, Order Denying Tameka M's Motion Pursuant to West Virginia Code 49-6-6. Order was entered on the 11th of October 2006 by the Court but not distributed by the Clerk until the 12th of October 2006 as noted on the front of the Order.

F. A transcript of that hearing was prepared.¹⁰

G. At the hearing held on September 28 the respondent Tameka L. was directed to submit an affidavit concerning the circumstances surrounding her relinquishment.¹¹

H. After the affidavit was filed, the GAL, the State and respondent Tameka L. responded with proposed Orders.¹²

I. After some discussion at the hearing held on the 29th of November 2006, the Order was prepared by the GAL for signature by the Circuit Court Judge and executed by Hon. Judge Silver on the 14th day of December 2006.

¹⁰ Upon information that transcript has been placed in the Circuit Court file and the Transcript of Status Hearing is 45 pages in length.

¹¹ See Tameka L's Affidavit.

¹² See Letter from Margaret Gordon, dated the 12th of October 2006; Letter from Kimberley Crockett, Esq., APA, dated the 16th of October 2006, and proposed Order from respondent Tameka Lopez, submitted on the 29th of October 2006.

3. The assignments of error relied upon on appeal and the manner in which they were decided in the lower tribunal:

ISSUE ONE- It was error for the Circuit Court to have denied respondent Tameka L.'s Motion to reopen the case as pursuant to W.VA. Code 49-6-6 based upon the language of W.VA. Code 49-6-7.

ISSUE TWO- It was error for the Circuit Court to not have permitted respondent Tameka L. the opportunity to testify regarding the circumstances of her relinquishment, and the relinquishment should have been found to have been submitted under duress.

4. Points and authorities relied upon, a discussion of the law, and the relief prayed for.

ISSUE ONE- It was error for the Circuit Court to have denied respondent Tameka L.'s Motion to reopen the case as pursuant to W.VA. Code 49-6-6 based upon the language of W.VA. Code 49-6-7.

This matter has already been completely briefed by the parties at the Circuit Court level. The positions of the various parties on this issue presented are quite clear. The *Guardian ad litem* opposes any reconsideration of this matter as follows W.Va. Code 49-6-6 due to the fact that the mother relinquished and the GAL would now attempt to state it was a valid relinquishment and any relinquishment is a bar considering W.Va. Code 49-6-7. The State and counsel for the parents position is that a modification of dispositional Orders is separate and unaffected by a valid relinquishment. Please see memos of record for the complete position of the State. The respondent mother adopts the position of the State entirely except for Paragraph 22.

W.Va. Code §49-6-6, Modification of dispositional orders states:

Upon motion of a child, a child's parent or custodian or the state department alleging a change of circumstances requiring a different disposition, the court shall conduct a hearing pursuant to section two of this article and may modify a dispositional order: Provided, That a dispositional order pursuant to subdivision (6), subsection (a) of section five shall not be modified after the child has been adopted. Adequate

and timely notice of any motion for modification shall be given to the child's counsel, counsel for the child's parent or custodian and to the state department.

West Virginia Code §49-6-7, Consensual termination of parental rights, states:

An agreement of a natural parent in termination of parental rights shall be valid if made by a duly acknowledged writing, and entered into under circumstances free from duress and fraud.

The position taken by the GAL is not correct and alters the entire meaning and utility of W.Va. Code 49-6-6. It gives the Court and to an extent both the State and the GAL broad discretion in picking and choosing who may be considered to have their dispositional Order modified based on their permission: if that person is not one the State or GAL would favor, then those parties could simply state the relinquishment was valid and the motion to modify disposition cannot be considered. This ruling actually puts parties that were involuntarily terminated in a better position than those that voluntarily relinquish, an unjust result. Further, it is clear respondent Tameka L. remains the parent of the child, as defined by W.Va. Code 49-6-6.

W.Va. Code 49-6-6 should be read exclusively from W.Va. Code 49-6-7; even parties who validly relinquish should be considered for modification of dispositional Orders. It is not unheard of for a respondent to attend the various rehabilitation programs, seek help in correcting their problem(s) and then seek to have their child or children returned. At the very minimum respondent Tameka L. should have been granted a W.Va.

Code 49-6-6 hearing for her to explain to the Circuit Court why she should be permitted to seek a dispositional modification. In the action below she was never granted that opportunity. As W.Va. Code 49-6-7 is now being interpreted by the Circuit Court, W.Va. Code 49-6-6 has virtually no meaning and is rendered useless.

Subcarrier Communications Inc. v. Nield, September 2005 (No. 32752) in syllabus point three states:

3. "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syllabus point 2, Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970).

Subcarrier goes on further to state in discussion:

"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." Syl. pt. 3, Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975). See also Syl. pt. 5, Fruehauf Corp. v. Huntington Moving & Storage Co., 159 W.Va. 14, 217 S.E.2d 907 (1975) ("Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in pari materia to assure recognition and implementation of the

legislative intent. accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly."). However, "*a related statute cannot be utilized to create doubt in an otherwise clear statute.*" Berkeley County Pub. Serv. Sewer Dist. v. West Virginia Pub. Serv. Comm'n, 204 W.Va. 279, 287, 512 S.E.2d 201, 209 (1998) (citations omitted) (Italics added).

In the action *sub judice*, it appears the latter statute is being used to not only create doubt but completely eviscerate the former statute. W.Va. Code 49-6-7 now has been interpreted to cancel and mitigate any relief respondent may have had under W.Va. Code 49-6-6; alternatively the respondent Tameka L. should have received some consideration by the Circuit Court of her motion to modify disposition. Under this interpretation, any valid relinquishment can be arbitrarily asserted to bar any modification of disposition motion, regardless of how appropriate or suitable the petitioning respondent may be.

An improper interpretation of the two statutes together has occurred in circuit court. Respondent Tameka L. should at a very minimum be permitted to present reasons why she is now suitable and why the disposition of her son should be modified.

ISSUE TWO- It was error for the Circuit Court to not have permitted respondent Tameka L. the opportunity to testify regarding the circumstances of her relinquishment, and the relinquishment should have been found to have been submitted under duress and set aside.

In respondent Tameka L.'s Affidavit she stated she did not receive the advice of counsel prior to execution of the relinquishment while she was incarcerated in the State of Virginia. Heidi Myers, Esq., was her then counsel of record in the abuse and neglect proceeding. While respondent was incarcerated she was under a legal disability and at the least should have had an attorney visit her or a *guardian ad litem* appointed for her. It is at best unclear if she spoke with her counsel concerning this; respondent states in her affidavit she did not do so.¹³

The positions of the parties in this issue have also been well briefed and discussed below. See generally the memos submitted for the respective positions of the GAL and the State. Respondent Tameka L. should have received the benefit of counsel as follows
W.Va. Rule of Civil Procedure 17, PARTIES PLAINTIFF AND DEFENDANT:

CAPACITY

(c) Infants, Incompetent Persons, or Convicts. Although Heidi Myers, Esq. was appointed at the time for respondent Tameka L., it is again unclear at best what discussion or communications the attorney and incarcerated client had at the time of execution of the

¹³ See Affidavit of Tameka L.

relinquishment document.

The Order dated December 12, 2005 in this case is also problematic. It states an inquiry was made upon the mother however she remained incarcerated in the State of Virginia. She does not have any recollection of telephonic appearance and none is noted in that order.¹⁴ Respondent states in her affidavit she only spoke with her former counsel's secretary and then calls were blocked. See her affidavit. The respondent did not appear in Court to testify concerning her volition at the time of relinquishment; she was then incarcerated in the neighboring State of Virginia.

Respondent Tameka L. at no time in her relinquishment waived the right for a Guardian, required by Quesinberry v. Quesinberry, 443 S.E.2d 222 (1994), WVARCP 17 (c). Also see W.Va. Code 28-5-36- requirements for a committee. For further consideration, this respondent was attending rehabilitation at the time of her incarceration for substance abuse. Respondent has made a *prima facie* case her relinquishment was made under duress which exceeds the duress of circumstance definition as discussed in State Ex. Rel. L. v. Pancake, 544 S.E.2d 403 (2001). At the very least respondent Tameka L. should have been permitted to testify and state her circumstances at a Circuit Court hearing rather than only submit an affidavit. Here appellant was incarcerated, did not communicate with her attorney, and did not enter any dialogue with the Court concerning her relinquishment. Respondent would go further to state the relinquishment

¹⁴See affidavit of Tameka L.

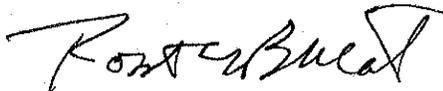
was made under duress and should be set aside and not considered by the Circuit Court.

Considering her relinquishment, Tameka L. was at least found suitable by the State and GAL to exercise post- termination visitation with Cesar L., as reflected in the Order dated December 12, 2005. Respondent Tameka L. is now living a productive life, being fully employed and maintaining her own apartment in Martinsburg, W.Va. She has conquered her drug problems and now a drug free and responsible 25 year old.¹⁵ To permit respondent Tameka L. the opportunity to regain custody of Cesar L., would benefit them both. See generally W.Va. Code 49-6-6, also see In Re: Brian James D., 550 S.E.2d 73, (2001).

¹⁵ From personal communication with Tameka L.

WHEREFORE, respondent/appellant here Tameka L. respectfully requests this matter be reversed and remanded to the Circuit Court with instructions to hear the Motion to Modify Disposition and hear evidence that she has turned her life around, and that this motion be permitted despite her previous relinquishment. Additionally respondent Tameka L. would request that a hearing be Ordered held in Circuit Court concerning the circumstances surrounding her relinquishment. Respondent/appellant Tameka L. for the respectfully requests permission to present an oral argument on these issues to the West Virginia Supreme Court of Appeals, as follows W.Va. Rules of Appellate Procedure 11 and 12.

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CERTIFICATE OF SERVICE

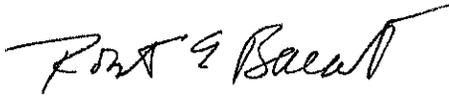
A true and correct copy of this Appellants Brief was delivered to the following addresses on this the 15th of March 2007 by either first class mail, postage prepaid, or by hand delivery:

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