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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE INTEREST OF:
CESAR ALEJANDRO L., Infant,

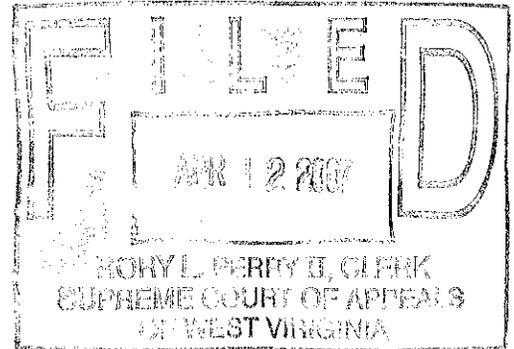
TAMEKA LYNETT M., Mother,
LUIS ALBERTO L., Father,

Docket No.: 063513
(Underlying Case No: 05-JA-10)
(Berkeley County Circuit Court)

Respondents.

TAMEKA LYNETT M., Respondent below/Appellant.

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES, Petitioner below/Appellee.



**BRIEF OF APPELLEE WEST VIRGINIA DEPARTMENT
OF HEALTH AND HUMAN RESOURCES**

State of West Virginia
Department of Health and Human Resources,
Appellee,
by counsel,

Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
State Bar No.: 4676
380 W. South Street Street
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304-264-1971

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.

This case is an abuse and neglect proceeding, filed pursuant to **W. Va. Code § 49-6-1**, *et seq.* The Petition alleged that the Infant was born to the Appellant who previously had her parental rights to three other children involuntarily terminated. Further, the Infant and Appellant tested positive for amphetamines and marijuana at the time of the Infant's birth. The Appellant admitted these allegations and was being considered for a post-adjudication Improvement Period when she was arrested and incarcerated for a felony in another state. She subsequently voluntarily relinquished parental rights to the Infant.

Pursuant to **W. Va. Code § 49-6-6**, the Appellant subsequently sought modification of the disposition that followed her voluntary relinquishment. The *guardian ad litem* argued that the Appellant must first demonstrate that the voluntary relinquishment was the product of fraud or duress before she can modify termination based on a voluntary relinquishment. The circuit court overruled the Appellant's and the Department of Health and Human Resources' (DHHR) objections to this procedure and ruled that the Appellant had no standing to move for modification of the disposition pursuant to **W. Va. Code § 49-6-6**, absent success in having her voluntary relinquishment set aside. [Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-6, 10/12/06.]

The Appellant then submitted an affidavit to support setting aside her voluntary relinquishment. The circuit court ruled that the Appellant made no sufficient allegation or showing of fraud or duress which would permit a revocation of her voluntary relinquishment. [Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 12/14/06.]

It is from these Orders that the Appellant appeals.

II. STATEMENT OF THE FACTS.

1. The Infant was born to the Appellant on February 23, 2005, testing positive for amphetamines and marijuana. The Appellant previously had her parental rights to three other children involuntarily terminated in Berkeley County, West Virginia. This proceeding was then initiated. [Petition, 03/03/05; Amended Petition, 03/17/05.]
2. The Appellant waived her preliminary hearing. [Preliminary Hearing Order, 03/17/05.]
3. The Appellant admitted her drug use and prior parental rights terminations. The Infant was then adjudicated an abused and neglected child and the Appellant was considered for a six-month post-adjudicatory Improvement Period. [Verified Answer of Respondent Mother, 5/25/05; Order of May 25, 2005, 6/6/05.]
4. Shortly thereafter, the Appellant was arrested and incarcerated for a felony offense in another state. The parties held the issues of the post-adjudicatory Improvement Period and Disposition open for months while awaiting word on the Appellant's future. [Order of June 30, 2005, 7/21/05; Order of July 20, 2005, 8/18/05; Order of August 25, 2005, 09/08/05; Order of September 29, 2005, 10/12/05.]
5. With the advice of counsel, the Appellant submitted a written voluntary relinquishment of her parental rights to the Infant. [Relinquishment of Parental Rights by Mother, 12/01/05.]
6. Based on the voluntary relinquishment, the circuit court terminated the Appellant's parental rights, but granted post-disposition visitation at the caregiver's discretion and consistent with the best interests of the Infant. [Order of November 30, 2005, 12/12/05.]¹

¹ Meanwhile, the Infant was also adjudicated as abused and neglected by his father, respondent Luis L., based on Mr. L.'s admissions to allegations in the Amended Petitions concerning him. Mr. L.'s subsequent failure to continue to visit the Infant led to his voluntarily

7. Pursuant to **W. Va. Code § 49-6-6**, the Appellant subsequently sought modification of the disposition that followed her voluntary relinquishment. The *guardian ad litem* argued that the Appellant must first demonstrate that the voluntary relinquishment was the product of fraud or duress before she can modify termination based on a voluntary relinquishment. The circuit court overruled the Appellant's and the DHHR's objections to this procedure and ruled that the Appellant had no standing to move for modification of the disposition pursuant to **W. Va. Code § 49-6-6**, absent success in having her voluntary relinquishment set aside. [Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 10/12/06.]

8. The Appellant then submitted an affidavit to support setting aside her voluntary relinquishment, which made no allegation of fraud or duress. The circuit court ruled that the Appellant made no sufficient allegation or showing of fraud or duress which would permit a revocation of her voluntary relinquishment. [Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 12/14/06.]

9. It is from these Orders that the Appellant appeals.

relinquishing his custodial and guardianship rights, but not parental rights. [Order of January 25, 2006, 02/14/06; Order of February 28, 2006, 04/07/06; Order of March 30, 2006, 04/07/06; Order of April 27, 2006, 05/12/06; Order of May 25, 2006, 08/30/06.] The Infant remains in a pre-adoptive status with a relative of the Appellant's. Based on the father's recent representation to the circuit court, the father is to provide his written consent to the adoption pursuant to **W. Va. Code § 48-22-301**.

III. ISSUES PRESENTED.

A. WHETHER THE CIRCUIT COURT ERRED IN HOLDING THAT A PERSON WHO VOLUNTARILY RELINQUISHES PARENTAL RIGHTS, PURSUANT TO W. VA. CODE § 49-6-7, LACKS STANDING TO LATER SEEK MODIFICATION OF THAT DISPOSITION, PURSUANT TO W. VA. CODE § 49-6-6, ABSENT PROOF THAT THE RELINQUISHMENT WAS INVOLUNTARY?

B. WHETHER THE CIRCUIT COURT PROPERLY HELD THAT THE APPELLANT FAILED TO OFFER SUFFICIENT PROOF THAT HER VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS, PURSUANT TO W. VA. CODE § 49-6-7, WAS THE PRODUCT OF FRAUD OR DURESS?

IV. AUTHORITIES RELIED UPON.

In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996).....5, 12.

Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).....5.

In re Tyler R., 213 W. Va. 725, 584 S.E.2d 581, 596 (2003).....7-8, 9, 11.

Elmer Jimmy S. v. Kenneth B., 199 W. Va. 263, 483 S.E.2d 846, 851 (1997).....10, 11.

In re Charity H., 599 S.E.2d 631, 215 W. Va. 208 (2004).....8.

State ex rel. Rose L. v. Pancake, 209 W. Va. 188, 544 S.E.2d 403 (2001).....12, 12-14, 15.

W. Va. Code § 49-6-6.....5, 6, 7, 8, 9, 10, 11, 12, 16.

W. Va. Code § 49-6-7.....5, 6, 10, 11, 12, 15, 16.

W. Va. Code § 49-1-3(b).....9.

W. Va. Code § 49-1-3(c).....9.

W. Va. Code § 48-10-101, et seq.....9.

W. Va. Code § 49-6-5(a)(6).....11.

Rules of Procedure for Child Abuse and Neglect Proceedings 46.....6.

Rules of Procedure for Child Abuse and Neglect Proceedings 1.....6.

V. ARGUMENT.

A. THE CIRCUIT COURT ERRED IN HOLDING THAT A PERSON WHO VOLUNTARILY RELINQUISHES PARENTAL RIGHTS, PURSUANT TO W. VA. CODE § 49-6-7, LACKS STANDING TO LATER SEEK MODIFICATION OF THAT DISPOSITION, PURSUANT TO W. VA. CODE § 49-6-6, ABSENT PROOF THAT THE RELINQUISHMENT WAS INVOLUNTARY.

The circuit court's conclusions of law in an abuse and neglect proceeding are reviewed *de novo*, though its findings shall be upheld unless clearly erroneous. In re Tiffany Marie S., 196 W. Va. 223, 470 S.E.2d 177 (1996). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syllabus Point 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

Accordingly, this Court is asked to apply a *de novo* review of the circuit court's interpretation of **W. Va. Code §§ 49-6-6² and 49-6-7³**.

The Appellee DHHR agrees with the circuit court that the Appellant made no sufficient allegation or showing of fraud or duress which would permit a revocation of her voluntary

² **W. Va. Code § 49-6-6** reads:

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.

³ **W. Va. Code § 49-6-7** reads:

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.

relinquishment. The Appellee DHHR respectfully requests that this Honorable Court affirm the circuit court's Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 12/14/06, as to that holding.

The Appellee DHHR also strongly believes that this Appellant cannot demonstrate a change in circumstances that would warrant a modification of the disposition of her parental rights to the Infant, pursuant to **W. Va. Code** § 49-6-6. However, the Appellee DHHR believes that the circuit court erred in its Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-6, 10/12/06, by holding that the Appellant *lacks standing* to bring a **W. Va. Code** § 49-6-6 Motion. By so holding, the circuit court erred by creating a procedural barrier to permanency, not contemplated by either **W. Va. Code** §§ 49-6-6 or 49-6-7, for that class of children whose parents were terminated by voluntary relinquishment. This procedural barrier requires such parents to prove that the relinquishment was involuntary before being allowed to petition the circuit court for a hearing seeking a disposition modification.

W. Va. Code § 49-6-6 expressly precludes modifications after adoption ⁴ in certain

⁴ **W. Va. Code** § 49-6-6 offers the following indeterminate time frame for filing for a modification of a disposition 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." *Rules of Procedure for Child Abuse and Neglect Proceedings* 46, addressing modification of court orders generally, does not provide that same indeterminate time frame but instead reads in significant part: "Parties may move to modify or supplement a current order of the court *at any time until the time period for appeal has expired*" (emphasis added).

Whether there is a conflict between **W. Va. Code** § 49-6-6 and Rule 46 was not addressed by the parties below or in the Petition for Appeal. *Rules of Procedure for Child Abuse and Neglect Proceedings* 1 establishes the primacy of these rules over conflicting rules and statutes. For the reasons set forth in this Brief, that options should be left open for children who have not achieved permanency by means of adoption, the Appellee DHHR urges this Court to hold that Rule 46 does not further limit the filing of a Motion for Modification of Disposition pursuant to **W. Va. Code** § 49-6-6 only "until the time period for appeal has expired."

circumstances and denies modifications where the circumstances are not proved changed sufficient to require modification. Children who have not achieved permanency by means of adoption—for whatever reason—whose terminated parent can demonstrate that he or she actually turned his or her life around should not be denied the possibility of reestablishing a relationship with the parent due to the technicality of termination of parental rights by voluntary relinquishment.

The Appellee DHHR respectfully requests this Honorable Court to hold that the circuit court erred by holding that the Appellant lacked standing to bring a **W. Va. Code § 49-6-6** motion for modification in its Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-6, 10/12/06. The Appellee DHHR respectfully requests that this Honorable Court reverse that ruling and remand the matter for further proceedings.

In applying rules of statutory construction this Court holds that:

When called upon to discern the meaning of a legislative enactment, this Court resorts to well-accepted rules of statutory construction. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W.Va. 108, 219 S.E.2d 361 (1975). In order to determine this legislative intent, we must consider the precise language employed by the Legislature in promulgating the statutory provision enactment at issue. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, State v. Elder, 152 W.Va. 571, 165 S.E.2d 108 (1968). Accord Syl. pt. 1, State v. Jarvis, 199 W.Va. 635, 487 S.E.2d 293 (1997) (" 'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. Pt. 2, State v. Epperly, 135 W.Va. 877, 65 S.E.2d 488 (1951)."); State ex rel. Roy Allen S. v. Stone, 196 W.Va. 624, 630, 474 S.E.2d 554, 560 (1996) ("We look first to the statute's language. If the text, given its plain meaning, answers the

interpretive question, the language must prevail and further inquiry is foreclosed.”)

In re Tyler R., 213 W.Va. 725, 584 S.E.2d 581, 596 (2003).

Applying these rules, the plain language of **W. Va. Code** § 49-6-6 makes evident its purpose is to provide a proceeding to determine an allegation of a change in circumstances requiring a modification of the disposition of an abused or neglected child. The Appellee DHHR maintains a responsibility to achieve permanency for abused and neglected children. Keeping timely options available for those children is the best way to achieve permanency. Motions filed by terminated parents pursuant to **W. Va. Code** § 49-6-6 may prove beneficial in the panoply of permanency options as parents’ circumstances may change, children’s circumstances may change and permanency may remain elusive.

Modification of disposition, like all other abuse and neglect matters, must only be determined by the best interests of the children: “Although parents have substantial rights that must be protected, the primary goal in cases involving allegations that child has been abused and neglected, as in all family law matters, must be the health and welfare of the children.” Syl. Pt. 7, In re Charity H., 599 S.E.2d 631, 215 W.Va. 208 (2004). Placing procedural barriers in the way of determining suitable and appropriate dispositions for children who have not achieved permanency cannot be in the best interests of the children.

W. Va. Code § 49-6-6 defines the classes of persons who may initiate a disposition modification hearing: “a child, a child's parent or custodian or the state department.” For purposes of this case, we are only concerned with the phrase “a child's parent,” which is

statutorily undefined.⁵ Lacking a statutory definition, the question is whether the plain language of the phrase “a child’s parent” is to be read as including a *terminated* parent? Then, if it includes a terminated parent, is there any distinction between a parent who voluntarily relinquished and one who was involuntarily terminated?

If **W. Va. Code § 49-6-6**'s purpose is to provide a hearing to determine whether a change of circumstances requires a change in disposition, it is an absurd result to *exclude* a terminated parent, whether voluntary or involuntary, from petitioning the circuit court to hear an allegation of change in circumstance. A terminated parent is a very likely candidate to want to establish that his or her circumstance has changed such that modification of the disposition to allow reunification or visitation with the child is required. This will be true whether the termination was voluntary or involuntary.

This Court, in Syllabus Point 8, In re Tyler R., *supra*, 213 W.Va. 725, 584 S.E.2d 581 (2003), clearly holds that an *involuntarily terminated* parent may utilize the procedures of **W. Va. Code § 49-6-6** to modify child support obligations ordered in an abuse and neglect case. If an involuntarily terminated parent may use **W. Va. Code § 49-6-6** to demonstrate a change in circumstance to modify (and reduce) financial obligations to their children, certainly a terminated parent should be provided the same opportunity to use the same procedure to have the circuit court hear whether an alleged change in circumstance requires a modification in disposition.⁶

⁵ The terms “abusing parent” and “battered parent” are the only “parent” definitions provided in **W. Va. Code Chapter 49**. **W. Va. Code § 49-1-3(b)** and (c).

⁶ On the other hand, this Court also holds, in the context of the grandparent visitation statute (formerly **W. Va. Code § 48-2B-1**, *et seq.*, now as modified at **W. Va. Code § 48-10-101**, *et seq.*), that “When an individual's parental rights have been terminated the law no longer recognizes such individual as a “parent” with regard to the child or children involved in the

This result is dictated not out of concern for the terminated parent but out of concern for the child. If the health and welfare of the child will benefit from a demonstrated change in the terminated parent's circumstance, the circuit court should not place a procedural barrier in the way of hearing such evidence. Children who have not achieved permanency—for whatever reason—whose terminated parent can demonstrate that he or she actually turned his or her life around should not be denied the possibility of reestablishing a relationship simply because the parent was terminated through a voluntary relinquishment.

The circuit court's ruling that the Appellant lacks standing to bring a **W. Va. Code** § 49-6-6 modification may not affect the outcome for the Infant in this case (for there is strong doubt that the Appellant's circumstances have either significantly or permanently changed) but if the circuit court's ruling is left to stand it will remain a procedural barrier in this judicial circuit for children whose terminated parent has actually turned his or her life around.

It may be argued that, if the interest in a disposition modification is the child's, then **W. Va. Code** § 49-6-6 already authorizes the child, the child's custodian or the Department to petition the circuit court for a hearing. Such an argument would ignore the plain language of **W. Va. Code** § 49-6-6, which includes "child's parent." Neither **W. Va. Code** § 49-6-6 nor **W. Va. Code** § 49-6-7 expressly require that they be read *in pari materia*. If the change in circumstance is the terminated parent's then the terminated parent is in the best position to advocate and present the evidence. If the evidence is favorable toward improving the child's

particular termination proceeding." Elmer Jimmy S. v. Kenneth B., 199 W. Va. 263, 483 S.E.2d 846, 851 (1997). Application of this reasoning to the case *sub judice* creates a hyper-technical barrier which defeats **W. Va. Code** § 49-6-6's purpose of providing a proceeding to determine whether an allegation of a change in circumstances requires a modification of the disposition of an abused or neglected child .

future health and welfare, then modification may be had; if not, modification will not be had.

The Appellee DHHR is not in favor of opening a floodgate of post-disposition litigation, but does not believe that permitting a terminated parent standing to bring a disposition modification will spawn any more such motions than those rarely brought now. **W. Va. Code** § 49-6-6 already imposes its own limitations on how such motions may be made. If disposition is pursuant to **W. Va. Code** § 49-6-5(a)(6) and the child is adopted, no modification may be sought. That is not the case here as the child is not yet adopted. If no change in circumstances is demonstrated, no modification will occur. If the change in circumstances is not sufficient to *require* modification, no modification will occur. Of these latter two limitations, the Appellant was not afforded standing to make her case.

To affirm the circuit court's ruling to deny standing, this Court must overrule its holding in In re Tyler R., *supra*, that a terminated parent may utilize the **W. Va. Code** § 49-6-6 procedure. To affirm the circuit court's ruling to prevent standing, this Court must also extend to **W. Va. Code** § 49-6-6 proceedings its holding in Elmer Jimmy S. v. Kenneth B., *supra*, that a terminated parent is not a parent. To affirm the circuit court is to maintain a procedural barrier to informed decisions regarding the health and welfare of an abused or neglected child, which barrier is not contemplated by either **W. Va. Code** §§ 49-6-6 or 49-6-7.

The Appellee DHHR respectfully requests that this Court reverse the circuit court's ruling that a parent whose parental rights are terminated by a voluntary relinquishment lacks standing to bring a **W. Va. Code** § 49-6-6 disposition modification.

B. THE CIRCUIT COURT PROPERLY HELD THAT THE APPELLANT FAILED TO OFFER SUFFICIENT PROOF THAT HER VOLUNTARY RELINQUISHMENT OF PARENTAL RIGHTS, PURSUANT TO W. VA. CODE § 49-6-7, WAS THE PRODUCT OF FRAUD OR DURESS.

The circuit court's conclusions of law in an abuse and neglect proceeding are reviewed *de novo*, though its findings shall be upheld unless clearly erroneous. In re Tiffany Marie S., *supra*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

Having been denied standing to modify disposition under **W. Va. Code § 49-6-6**, absent a proper showing that duress or fraud begat the Appellant's **W. Va. Code § 49-6-7** voluntary relinquishment, the Appellant challenged the relinquishment. This Court holds that "Under the provisions of *W. Va. Code § 49-6-7*, a circuit court may conduct a hearing to determine whether the signing by a parent of an agreement relinquishing parental rights was free from duress or fraud." Syl. Pt. 3, State ex rel. Rose L. v. Pancake, 209 W. Va. 188, 544 S.E.2d 403 (2001). In the case *sub judice*, the circuit court exercised the discretion granted it by the Pancake decision and conducted a hearing on the Appellant's motion.

The majority opinion in Pancake did not address the standards for showing duress or fraud in a voluntary relinquishment under **W. Va. Code § 49-6-7**. However, in a separate concurring opinion Justice Davis provides very detailed guidance as to the heavy burden borne by a parent subsequently challenging a voluntary relinquishment on grounds of duress or fraud, the necessary standards to be shown and, even if shown, the ultimate controlling significance of the best interests of the child. Justice Davis writes:

Consistent with this consideration for the best interests of the child and the importance of timely and finally resolving custody issues so that a child may attain the stability and security that is so crucial to a young life, it should be pointed out that, obviously, a

relinquishment agreement that is made in writing and entered into under circumstances free from duress and fraud *is valid*. A parent attempting to show otherwise is faced with a challenging task. Indeed, the threshold for establishing duress and fraud in the context of the relinquishment of parental rights is extremely high. As to duress, this Court has held that, in the context of an adoption, duress “means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child. Mere ‘duress of circumstance’ does not constitute duress[.]” Syl. pt 2, in part, *Wooten v. Wallace*, 177 W.Va. 159, 351 S.E.2d 72 (1986). *See also Baby Boy R. v. Velas*, 182 W.Va. 182, 185, 386 S.E.2d 839, 842 (1989) (“[Duress] means a condition that exists when a natural parent is induced by the unlawful or unconscionable act of another to consent to the adoption of his or her child.”). With respect to fraud, we have held:

The essential elements in an action for fraud are: (1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.

Syl. pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981). *Accord* Syl. pt. 3, *Cordial v. Ernst & Young*, 199 W.Va. 119, 483 S.E.2d 248 (1996); Syl. pt. 2, *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W.Va. 468, 425 S.E.2d 144 (1992); Syl. pt. 2, *Muzelak v. King Chevrolet, Inc.*, 179 W.Va. 340, 368 S.E.2d 710 (1988).

Finally, I wish to emphasize that a parent challenging a relinquishment of his or her parental rights on the grounds of duress and fraud has the difficult responsibility of establishing the elements outlined above by *clear and convincing* evidence. *See, e.g.*, 48-4-5(a)(2) (1997) (Repl. Vol. 1999) (allowing revocation of adoption due to fraud or duress only where “[t]he person who executed the consent or relinquishment proves *by clear and convincing evidence* ... that the consent or relinquishment was obtained by *fraud or duress*” (emphasis added)); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W.Va. 468, 472, 425 S.E.2d 144, 148 (1992) (“[The] elements [of *fraud*] must be proved by *clear and convincing evidence*.” (emphasis added)); Syl. pt. 2, *Cardinal State Bank, Nat'l Ass'n v. Crook*, 184 W.Va. 152, 399 S.E.2d 863 (1990)

(per curiam) (“ ‘Allegations of *fraud*, when denied by proper pleading, must be established by *clear and convincing proof*.’ Syllabus Point 5, *Calhoun County Bank v. Ellison*, 133 W.Va. 9, 54 S.E.2d 182 (1949).” (emphasis added)); Syl. pt. 2, *Warner v. Warner*, 183 W.Va. 90, 394 S.E.2d 74 (1990) (“Since property settlement agreements, when properly executed, are legal and binding, this Court will not set aside such agreements on allegations of *duress* and undue influence absent *clear and convincing proof* of such claims.” (emphasis added)); Syl. pt. 3, *Allegheny Dev. Corp., Inc. v. Barati*, 166 W.Va. 218, 273 S.E.2d 384 (1980) (per curiam) (“ ‘The *onus probandi* is on him who alleges fraud, and, if the *fraud* is not *strictly and clearly proved* as it is alleged, relief cannot be granted.’ Pt. 1, Syl., *Board of Trustees v. Blair*, 45 W.Va. 812, 32 S.E. 203 (1898).” (second and third emphases added)); Syl. pt. 3, *Carroll v. Fetty*, 121 W.Va. 215, 2 S.E.2d 521 (1939) (“In an action for wrongful death, a written release, signed by the beneficiaries entitled to recovery, may be set aside where it was obtained by *duress* exercised by a third party with the participation or knowledge of the releasee. However, such duress must be proved by *clear and convincing evidence* and generally presents a question of fact for the jury.” (emphasis added)).

Based upon the foregoing authority, it is clear that a parent has a heavy burden to establish duress or fraud once he or she has relinquished parental rights. Importantly, the inquiry does not end even if a parent satisfies that burden. Ultimately, lower courts must always return to the polar star principle: the best interests of the child. Consequently, even when a parent has successfully proven that fraud or duress played a role in the relinquishment of parental rights, trial courts must *still* consider the best interests of the child before finally resolving custody issues. This critical point must be clearly understood. As we have consistently stated: “the natural right of parents to the custody of their children is always tempered with the courts’ overriding concern for the well-being of the children involved.” *Kessel*, 204 W.Va. 95, 174, 511 S.E.2d 720, 799.

Id., 544 S.E.2d 403, 407-408 (Davis, J., concurring).

Applying the standards delineated by Justice Davis in her concurrence to Pancake, the circuit court properly found the evidence set forth in the Appellant’s affidavit insufficient to

support an allegation of duress or fraud and denied the motion. The circuit court considered the Appellant's sworn affidavit in support of her allegation of duress or fraud. The circuit court found the allegations to contradict the contents of the Appellant's previously filed and sworn-to relinquishment. [Relinquishment of Parental Rights by Mother, 12/01/05.] The circuit court also considered the representations made at the relinquishment hearing by the Appellant's then-counsel, Heidi Myers. Ms. Myers represented to the circuit court at that hearing that she discussed the relinquishment with the Appellant and was convinced that the Appellant understood her rights, understood the consequences of the relinquishment of those rights and that she believed that the Appellant's relinquishment was knowing and voluntary. Without sufficient evidence provided by the Appellant's affidavit to support the allegation, the circuit court properly denied the motion and properly exercised its discretion to not hear further evidence on the motion. [Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 12/14/06.]

The Appellee DHHR respectfully requests that this Honorable Court to affirm the circuit court's Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 12/14/06, denying the Appellant's challenge to her voluntary relinquishment under **W. Va. Code § 49-6-7** as the product of duress or fraud. State ex rel. Rose L. v. Pancake, supra.

VI. CONCLUSION.

Based on the foregoing, the Appellee DHHR respectfully requests this Honorable Court to reverse the circuit court's ruling in its Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-6, 10/12/06, that a parent whose parental rights are terminated by a voluntary relinquishment lacks standing to bring a **W. Va. Code § 49-6-6** disposition modification.

The Appellee DHHR also respectfully requests that this Honorable Court to affirm the circuit court's Order Denying Tameka M.'s Motion Pursuant to W. Va. Code Sec. 49-6-7, 12/14/06, denying the Appellant's challenge to her voluntary relinquishment under **W. Va. Code § 49-6-7** as the product of duress or fraud.

State of West Virginia
Department of Health and Human Resources,

Appellee,
by counsel,



Christopher C. Quasebarth
Chief Deputy Prosecuting Attorney
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380 W. South Street
Martinsburg, West Virginia 25401
304-264-1971

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **BRIEF OF APPELLEE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES** on this the ___ day of April, 2007, by ___ hand-delivery, x first-class mail, postage prepaid, ___ facsimile to:

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