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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

IN RE: ISAIAH A.

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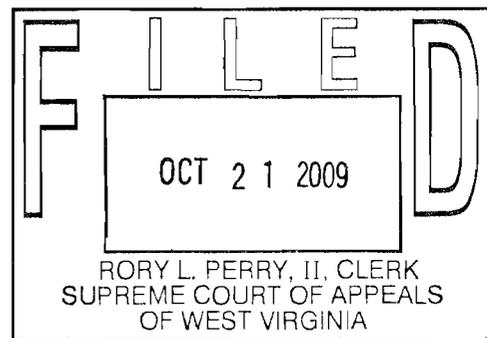
APPELLEE'S BRIEF OF THE RESPONDENT MOTHER ALICIA

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Dated: October 20, 2009



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**APPELLEE'S BRIEF OF THE RESPONDENT MOTHER ALICIA**

**I. KIND OF PROCEEDING AND RULING IN THE LOWER COURT**

This is the respondent mother's brief in response to the petition for appeal presented by the *Guardian ad Litem* in the above-captioned juvenile case in Wyoming County, West Virginia. The issue is to decide whether the Circuit Court of Wyoming County erred in not terminating the parental rights of the respondent mother, Alicia

This response follows the letter from the *Guardian ad Litem* dated September 18, 2009 adopting his petition for appeal as the Appellant's brief. This letter was received on September 21, 2009 and respondent mother now responds to said appeal.

A preliminary hearing was held in this matter on October 2, 2009. The petition was based on a referral of possible domestic violence and the minor child herein not being in a car seat. The court found probable cause and the respondent mother was granted a ninety (90) day pre-adjudicatory improvement period.

An adjudicatory hearing was held on January 4, 2007 but was continued upon the motion of counsel because of Ms.           inability to participate in the scheduled hearing because of transportation problems. This hearing was continued until March 5, 2007.

On March 5, 2007 the respondent mother stipulated that the child, Isaiah A., was neglected as defined in West Virginia Code § 49-6-2(c) and moved for a post-

adjudicatory improvement period. The court ordered the respondent mother be granted a ninety (90) day post-adjudicatory improvement period.

On May 3, 2007 the respondent mother executed a voluntary relinquishment of parental rights regarding Isaiah A., but due to circumstances surrounding its execution the court later set it aside. Also, one must interpret the State's willingness to continue working with the respondent mother as withdraw of such a permanent document.

A status hearing was scheduled for May 16, 2007 by the *Guardian ad Litem* to discuss the placement of the minor child. The child was placed at this time with a sibling in North Carolina and the scheduled visitation with the respondent mother was becoming nearly impossible due to the cooperation of the placement.

A dispositional hearing was scheduled for July 12, 2007. This hearing was re-scheduled until October 11, 2007. Although the WVDHHR requested leave to file a petition to terminate the rights of the respondent mother, the court extended her post-adjudicatory improvement period for ninety (90) additional days. The Department filed the petition on August 17, 2007.

At the October 11, 2007 hearing an MDT was held prior to the juvenile proceeding at which all parties agreed the goal was reunification of the family in this matter and the child should be placed closer to West Virginia to accomplish visitation and other contact with the mother. The mother's post-adjudicatory improvement period was extended an additional ninety (90) days.

A dispositional hearing was held on January 10, 2008 on the mother's motion to extend her post-adjudicatory improvement period. The court found the extension is in the best interests of the minor child.

On April 10, 2008 a dispositional hearing was held on the mother's motion to extend her post-adjudicatory improvement period. Once again the court found the extension was in the best interest of the minor child.

A dispositional hearing scheduled for July 10, 2008 was continued until September 25, 2008 on the State's motion. A hearing was held on this matter on September 17, 2008 but was held in recess until September 25, 2008. Testimony was taken at the September 25, 2008 hearing and again on September 30, 2008.

The lower court denied the petition for termination and also the respondent mother's motion for a dispositional period of improvement. The court also ordered continued visitation with the respondent mother and continued efforts in seeking to arrange for ultimate reunification of the child and respondent mother.

It is from this order that the appeal arises and the respondent mother now responds.

## **II. STATEMENT OF FACTS**

The Family Case Plan for respondent, Alicia , was admittedly consistent throughout this juvenile case. The mother was asked to 1) Drug screen; 2) Participate in In-Home Services; 3) Regular visitation; 4) Complete anger management; 5) Complete a psychological evaluation; 6) Refrain from criminal activity. The mother was successful with parts of this case plan and unsuccessful with others.

The respondent mother admittedly abused substances throughout this case. She also went through periods where she tested negative for controlled substances (11/13/2007; 1/9/2008; 1/24/2008). This limited success was accomplished despite the fact she had no offered assistance to remain drug and alcohol free. The respondent

mother was never ordered to inpatient rehabilitation nor was she ever offered this service by the WVDHHR.

Ms.            had several in-home service providers. Specifically, Jason McVey, testified on September 30, 2008 that he met with Alicia four times a month and he was satisfied upon his completion of services. Mr. McVey worked with the respondent mother from September 2007 until March 2008.

The respondent mother at one time was awarded two unsupervised weekend visits with the minor child in February 2008. Also, case aid, Dreama England, testified at the termination proceeding that Ms.            had visited with her child thirteen times at the WVDHHR in Wyoming County and six additional visits were cancelled due to illness of either the child or respondent mother. This does not include visitation that took place at the Oceana Visitation Center throughout the pendency of the case or visitation that occurred at scheduled hearings and MDTs.

Ms.            also attended and completed the anger management program requested by the WVDHHR. She completed these services with a KVC provider employed by the department. Also, Ms.            completed a psychological evaluation arranged by the WVDHHR. Ms.            criminal activity revolved around one particular paramour, Wendell Tolliver, who has since died.

Although testimony was given regarding the respondent mother's lack of motivation, criminal activity, and random participation in this case, her attitude must be put into perspective of that of a known drug abuser. Notwithstanding, she still managed to participate in the case plan.

### III. STANDARD OF REVIEW

The standard for review in abuse and neglect cases was previously as:

“Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make finds of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding in the circuit court’s account of the evidence is plausible in light of the record viewed in it’s entirety.

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

### IV. DISCUSSION OF LAW

For the court to terminate parental rights there must be a finding that there is no reasonable likelihood that the conditions of abuse and neglect can be substantially corrected in the near future, and that it is necessary for the welfare of the child that the parental rights be terminated. W.Va. Code § 49-6-5(a)(6).

The Code further defines “no reasonable likelihood that conditions of neglect or abuse can be substantially corrected” in W.Va. Code § 49-6-5(b) which states:

“(b) As used in this section, “no reasonable likelihood that conditions of neglect or abuse can be substantially corrected” shall mean that, based upon the evidence before the court, the abusing adult or adults have demonstrated an inadequate capacity to solve the problems of abuse or neglect on their own or with help.”

Evidence required for the court to make such a finding is also found in this section:

“Such conditions shall be considered to exist in the following circumstances, which shall not be exclusive:

(1) The abusing parent or parents have habitually abused or are addicted to alcohol, controlled substances or drugs, to the extent that proper parenting skills have been seriously impaired and such person or persons have not responded to or followed through the recommended and appropriate treatment which could have improved the capacity for adequate parental functioning...

(3) The abusing parent or parent have not requested to or followed through with a reasonable family case plan or other rehabilitative efforts of social, medical, mental health or other rehabilitative agencies designed to reduce or prevent the abuse or neglect of the child, as evidenced by the contribution or insubstantial diminution of conditions which threatened the health, welfare or life of the child.”

If such a finding is made we are directed to W.Va. Code § 49-6-5(a)(6),

which states:

“(6) Upon a finding that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future and, when necessary for the welfare of the child, terminate the parental, custodial and guardianship rights and responsibilities of the abusing parent and commit the child to the permanent sole custody of the nonabusing parent, if there be one, or, if not, to either the permanent guardianship of the department or a licensed child welfare agency.”

In the current case the following must be considered:

“A natural parent does not forfeit his or her parental rights to the custody of an infant child merely by reason of having been convicted of one or more charges of criminal offenses.” Although, even parental acts of selling drugs from home will not, alone, support a termination of parental rights unless it is shown that such activity impairs parenting abilities.

In Re. Brian James D., 209 W.Va. 537, 550 S.E.2d 73 (2001).

## V. ARGUMENT

This case must focus on Ms. [redacted] drug abuse and her conduct which is a direct product of said abuse. Ms. [redacted] participated in a designed case plan despite her

ongoing drug abuse problem. She was expected to remain drug and alcohol free without any meaningful assistance from the West Virginia Department of Health and Human Resources. The objective in the before-mentioned case plan being “reunification” the WVDHHR continually focused on Ms. [redacted] shortcomings without giving her significant assistance. Ms. [redacted] was never offered any drug rehabilitation nor was it ever mentioned in a case plan or ordered by the Court.

The WVDHHR and *Guardian ad Litem* continued to focus on her drug problem as the astounding reason for her failure and never offered viable assistance. The only action taken by the department was to offer a supervised visitation schedule with the respondent’s son and continue to drug screen an obvious drug addict. Ms. [redacted] was never provided the opportunity to enter and complete a drug rehabilitation program. This has been the standard procedure of the Court and department in cases involving drug or alcohol abuse. The Court and department seemingly contradicted themselves in naming “reunification” as a goal, continuing the case for (2) years, but never providing her with the tools necessary to accomplish the goal, despite the cause of her problem was obvious.

The respondent mother may have denied her drug dependency but this should not have prevented the WVDHHR from offering and the Court from ordering her into inpatient drug rehabilitation. Evidence compiled throughout the case would prompt the Court and the department to recommend such a treatment plan. Ms. [redacted] could not be expected to correct her behaviors without the necessary tools to do so.

The lower court found that this child would remain statutorily defined as “abused and/or neglected” so long as she remained associated with Wendell Tolliver. The

majority of Ms. criminal issues arose from this particular boyfriend, who has since the filing of this appeal, has passed away.

Termination of Ms. parental rights is not in the best interest of the minor child, Isaiah A. The child is in relative placement and continues to be a large part of Ms. direct family. Ms. has demonstrated the ability to be a mother to this child and if given the proper tools there is a reasonable likelihood of improvement in the near future.

## VI. CONCLUSION

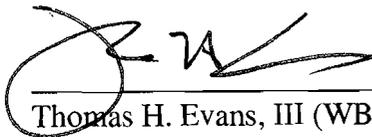
The lower court did not err in failing to terminate the respondent mother's parental rights. The court did not find that at this time that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future.

## VII. PRAYER FOR RELIEF

Wherefore, the respondent mother, Alicia, prays that this Court affirm the Circuit Court's ruling denying the WVDHHR's Petition for Termination her parental rights.

Respectfully submitted,

Alicia  
By Counsel



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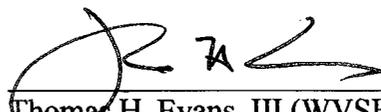
CERTIFICATE OF SERVICE

I, Thomas H. Evans, III, do hereby certify that on this 20 day of October, 2009, I served a true and accurate copy of “**APPELLEE’S BRIEF OF THE RESPONDENT MOTHER ALICIA**” on the following by first class mail, postage prepaid:

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