

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.  
WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES,

TRACY WEESE, GUARDIAN AD LITEM

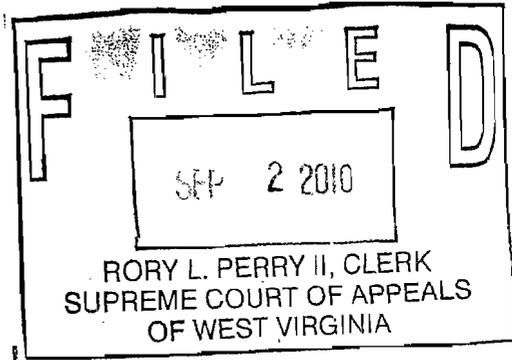
Petitioners

v.

DOCKET NO. \_\_\_\_\_  
(Berkeley County Case No.09-JA-15)

THE HONORABLE JOHN C. YODER  
CIRCUIT COURT JUDGE OF BERKELEY  
COUNTY, WEST VIRGINIA,

Respondent



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RESPONSE BRIEF OF CRYSTAL W. TO  
PETITIONS FOR WRIT OF PROHIBITION

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Dated: September 1, 2010

COMES NOW, the Respondent Mother, Crystal W. and for her response to the Petitions for a Writ of Prohibition says as follows:

STATEMENT OF THE CASE:

On or about January 25, 2009, Crystal W. gave birth to Lawrence A. Lawrence's meconium tested positive for drugs which was reported to the Department of Health and Human Resources. The Department left Lawrence in the custody of Crystal W. and James A., the father, under a safety plan, however, Ms. W and Mr. A. failed to comply with the safety plan by staying drug free and attending NA/AA meetings. Thereafter, on or about March 26, 2009, the Department filed an Abuse and Neglect petition as to Lawrence and his parents and took emergency custody of Lawrence. Ms. W. filed a verified answer to the petition admitting to illegal drug use while pregnant with Lawrence and failing to comply with the safety plan and filed a motion for a post-adjudicatory improvement period. *See Exhibit "A" attached hereto.*

As set forth in the motion for post-adjudicatory improvement period, Ms. W. was participating in drug treatment, individual counseling and NA/AA and was in a stable relationship with Mr. A. who was also willing to participate in services. The court granted Ms. W. and Mr. A. post-adjudicatory improvement periods upon terms and conditions agreed to by all parties on or about May 26, 2009. Ms. W. started working full time at Walgreens Pharmacy and Mr. A. bred pitbulls for sale out of the home he and Ms. W. shared. Both Ms. W. and Mr. A. complied with the terms of their improvement periods, including staying drug free, and in or about September, 2009 Lawrence was returned to their physical custody. On October 30, 2009, the home was raided by the drug task force and Mr. A. was arrested after cocaine was found hidden in a fire alarm in the kitchen of the home. Ms. W. was not arrested or charged. Money, televisions and a printer were confiscated from the home.

Ms. W. immediately called the CPS worker, Jennifer Foster, and, it being 2:00 a.m., left a message on her voice mail informing her of the raid and arrest. The next day Ms. W. spoke with Ms. Foster who did not immediately seek to take custody of Lawrence, but rather entered into an agreement with Ms. W. that she would increase her drug testing and not allow Mr. A. in the home or to have any contact with Lawrence. However, later that day of October 30, 2009, Ms. Foster asked Ms. W. to come to the Department to talk about options and when she arrived she was told that Lawrence was being taken back into the physical custody of the Department. Ms. W. cooperated in turning Lawrence over and went home and returned with his clothing.

On November 5, 2009, the guardian ad litem filed a Motion to Revoke the parents' improvement periods. On November 10, 2009, Ms. W. served a Motion for Return of Custody of the Child to Ms. W. *See Exhibit "B" attached hereto.* The Motion for Return of Custody was noticed for the next court date, November 16, 2010. At the November 16, 2009 hearing the court did not have time on the docket for an evidentiary hearing, however, and the Motions were set down for hearing at a later date. Prior to the hearing on the Motions, the assistant prosecutor and the guardian ad litem filed Motions to Disqualify Judge Yoder which was denied by the Supreme Court on or about January 5, 2010. Thereafter, the Motion to Revoke and the Motion for Return of Custody were set down for evidentiary hearing on February 18, 2010 and March 24, 2010. After submission of proposed findings of facts and conclusions of law by the parties, the court issued a decision on June 18, 2010 revoking the improvement period of Mr. A. but denying the motion to revoke Ms. W.'s improvement period and granting her motion for return of custody of Lawrence. In accordance with the court's order, an MDT was conducted to set out a plan for transitioning Lawrence back to Ms. W's custody and the terms and conditions of a post-dispositional improvement period for Ms. W.

On June 30, 2010 the guardian ad litem filed a Motion to Reconsider the June 18, 2010 ruling which was denied by order of July 22, 2010. On July 27, 2010 Ms. W. was granted a post-dispositional improvement period and the court granted the guardian ad litem's motion for a stay of unsupervised visitation for 20 days. On August 5, 2010, Mr. A. relinquished his parental rights to Lawrence. Thereafter, the Department of Health and Human Resources by the attorney general—not by the prosecuting attorney of Berkeley County who represented them in this matter—and the guardian ad litem filed the instant Writs of Prohibition.

STATEMENT OF THE FACTS:

1. As to her post-adjudicatory improvement period, Ms. W. was very motivated and communicative with the CPS worker. "She was really a model client in terms of her enthusiasm". Mar. 24 Tr. P 119-120

2. Up until October 30, 2010 the CPS worker saw the improvement periods as successful. Mar. 24 Tr. P. 120

3. The house where Mr. A and Ms. W lived together was raided by Drug Task Force, cocaine was found hidden in a fire alarm, and Mr. A. was arrested on October 30, 2009.

4. Ms. W. was never arrested or charged with a crime in relation to the drug raid.

5. Trooper Bean who executed the search warrant testified that, even though there were several controlled buys that were audio or video taped, the only direct evidence against Ms. W. would be that she also lived in the residence and had possession of the household. Mar. 24 Tr. Pp. 76-77

6. When the CPS worker talked to Ms. W. on Oct. 30, Ms. W. was "very, very angry" with Mr. A. and adamant that she was choosing her child (over Mr. A.) Mar. 24 Tr. P 129

7. All through their improvement period, Ms. W and Mr. A. tested negative for drugs. Mar. 24 Tr. P. 132

8. The CPS worker talked about safety planning with Ms. W. and where she was going to stay with Lawrence the day after the arrest. Mar. 24 Tr. P. 136

9. The CPS worker had worked out an agreeable safety plan with Ms. W. on October 30, 2010 before the guardian ad litem insisted on the removal of the child from Ms. W.'s custody. See e-mails attached to Exhibit "B" attached hereto and Mar. Tr. Pp. 141-142

10. The CPS worker lied to Ms. W. about coming to the Department to talk about options when the real purpose was to take custody of Lawrence. Mar. Tr. P. 161

11. The Department did not file a petition for emergency custody or for a hearing on imminent danger before or after taking custody of the child from Ms. W. Mar. Tr. P. 162

12. The Department denied Ms. W. visitation with Lawrence until court ordered two weeks later. Ms. Foster told Ms. W. that the only reason she was getting visitation was to help transition Lawrence into foster care which meant to Ms. W. that he was not going to be coming back to her. Mar. Tr. Pp. 210-213.

13. Mr. A. was released from jail and the drug charges against him were dismissed. Sometime thereafter, Ms. W. started having contact with him to settle up property with him and he came to the residence to get deal with his dog kennel business and get clothing he left there as he had no permanent residence. Mar. Tr. Pp. 214-217

14. No evidence was presented that after his arrest on October 30, 2009, Mr. A. was engaging in any illegal or criminal activity. Mar. 24 Tr. generally.

Facts Since July 27, 2010:

15. Ms. W. has moved from the home which she and Mr. A formerly shared and from which Mr. A. ran a dog kennel business and has moved into a home with her grandfather which is safe, appropriate and fully set up for Lawrence.

16. Ms. W. has provided all necessary information including name, address, birth date and social security number for her grandfather, Roy W. so a background check can be run by the Department and he is willing to be fully cooperative with the Department including inspection of his home and communication about Ms. W. and her activities if Lawrence is returned to her custody. See Information on Roy W. provided to the Department and the guardian attached hereto as Exhibit "C".

#### ARGUMENT OF LAW:

A writ of prohibition is an extraordinary remedy and should be granted in only the most extraordinary cases. Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.

*State of West Virginia ex. rel. Rose L. v. Pancake*, 209 W.Va. 188, 544 S.E. 2d 403, 405

In determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the supreme court is to examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of

law of first impression. While all five factors do not have to be satisfied, the third factor, error as a matter of law should be given considerable weight. *Id.* at 405-406 The petitioner for a writ of prohibition “has the burden of showing that the lower court’s usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy” *Id.* at 406

In an evidentiary hearing in an abuse and neglect case tried upon the facts without a jury, the circuit court shall make findings of fact and conclusions of law. These findings shall not be set aside by a reviewing court unless clearly erroneous. A reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court’s account of the evidence is plausible in light of the record viewed in its entirety. Conclusions of law reached by the circuit court are subject to de novo review by the reviewing court. *In Re: Isaiah A.* No. 35031 9 (W.Va 4/15/2010) (W.Va. 2010) at page 4.

A. Petition for Writ of Prohibition Should be Denied

The petitioners, Department of Health and Human Resources and the guardian ad litem have failed to meet their burden of showing that the lower court’s usurpation of power was clear and indisputable and, that because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy. The circuit court clearly had jurisdiction to entertain the abuse and neglect petition and to conduct proceedings in accordance therewith as provided by W. Va. Code § 49-6-1 *et seq.* *State ex rel. Paul B. v. Hill*, 201 W.Va. 248, 496 S.E.2d 198 (1997). The Department’s argument for issuance of a writ appears to be two-fold: (1) that the court’s order denying the Motion to Revoke Ms. W.’s improvement period and granting Ms. W.’s Motion to Return Custody of the Child is not a final and, therefore, appealable order, and (2) that the court granted Ms. W. a post-dispositional improvement period without a written

motion for one having been filed by Ms. W. The Department appears to request that this court find that as to the first argument, the circuit court erred in its finding of fact, and that as to its second argument, that the circuit erred in its application of the law. The guardian ad litem's argument for a granting the writ is clearly based on her belief that the circuit court's findings of fact were erroneous. Neither the Department nor the guardian ad litem provide any substantive argument on the issues raised in Ms. W.'s Motion for Return of Custody attached hereto as Exhibit "B" and incorporated herein in its entirety, and on which Ms. W. relies as argument on that issue. The guardian ad litem argues on that issue that Ms. W. *voluntarily* turned the child over to the Department and therefore was not entitled to an imminent danger hearing. Surely, this argument is made tongue in cheek. Ms. W. was asked to come to the Department under false pretenses and then told that she was not going to be allowed to leave with the child. What was she to do in the best interest of her child at that point? Have a tug-of-war with the Department workers over the child or have the police called and be arrested in front of the child who had just gone through such a scenario the night before with his father? Ms. W. did the appropriate and mature thing: she called her attorney who filed a Motion for Return of Custody with the court. The fact that she filed such motion is proof that she did not agree with the action of the Department in taking custody of the child. In *Miller v. Locke*, 162 W.Va 946, 253 S.E. 2d 540 (1979) this court held that "any taking and holding of a child from his natural parent by the State is an unwarranted and unjustified intrusion into the family relationship if it continues beyond any period necessary to serve the legitimate interests of the State. The unreasonable holding of a child away from his family and in disregard of their rights, without adjudication of those rights, offends due process." WV Code § 49-6-9(f) provides that a taking any taking without appropriate process "shall be void by operation of law"

When Ms. W. filed her Motion for Return of Custody and the guardian ad litem filed her Motion to Revoke the Improvement Period, Ms. W.'s improvement period had not expired, therefore, there was no reason to file a motion for a post-dispositional improvement period. Ms. W. set her motion for return of custody for November 16, 2009 which was before the expiration of her improvement period. Due to circumstances beyond her control but occasioned by the motions to disqualify Judge Yoder filed by the Department and the guardian, the motions to revoke and for return of custody were not heard until the improvement period had exceeded the six month period. However, Ms. W. was still complying with the terms of the improvement period by continuing to test negative for drugs, continuing to work, continuing to attend NA/AA meetings and continuing to visit with Lawrence under the supervision of the Department. While, Ms. W. argues, as set forth in her motion, that the child should have been returned to her custody as a matter of law due to the failure of the Department to apply to the court within a reasonable time for a hearing and order on imminent danger, she does not appeal or object to the court's order that the return should take place under a period of transition or that she be placed on another period of improvement, her post-adjudicatory improvement period having been interrupted, albeit within just a couple of weeks before it was to expire. However, because the court has ordered the child returned under a transition plan and under monitoring of Ms. W. under the terms and conditions of a post-adjudicatory improvement period a writ of prohibition is unnecessary to protect the child. The Department will still be able to take the child if an emergency arises and it satisfies the requirements of imminent danger analysis and the guardian ad litem will still have the ability to ask for emergency protection of the child or to move to revoke or modify the improvement period. The court did not order the case dismissed and has provided for adequate protection of the child in its order. The evidence adduced at the hearing

was that Ms. W. was a model client doing everything she was suppose to do and when told to return the child to the Department she did so without hesitation or incident. There is simply no reason to believe that the court's order places the child at risk any more than any order granting a parent an improvement period and supports a conclusion that Ms. W. substantially complied with her post-adjudicatory improvement period and is likely to succeed at a post-dispositional improvement period.

B. The Findings of Fact Made by the Circuit Court are not Clearly Erroneous

A reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety. The guardian has taken the position from the day of Mr. A's arrest that Ms. W. "had to have known" that he was dealing drugs out the shared residence. See the e-mails of October 30, 2009 attached to the Motion for Return of Custody attached hereto as Exhibit "B". She appears to file this petition for a writ of prohibition to have this court retry the evidence on the record and vindicate that position. However, the circuit court in its well reasoned and well supported decision of June 18, 2010 and its denial of reconsideration of its decision on June 30, 2010, found that the evidence taken as a whole at the evidentiary hearing did not support that position.

The fact that Ms. W. was not charged in relation to any drug activity at the home although controlled buys were made and recorded, that she worked full time and attended numerous NA/AA meetings a week while Mr. A was in the home running a home-based business, the fact that the drugs were found hidden (not out in the open where Ms. W. could observe them), the fact that she remained drug-free and was very motivated and cooperative in her improvement period, the fact that she immediately informed the Department of the drug

arrest of Mr. A all support the finding that she did not know of or permit any illegal activity in the home or knowingly associate with anyone involved in criminal activity. The court was in the best position to observe the witnesses and rule on credibility and the court thoughtfully considered Ms. W.'s lack of candor in regard to her contact with Mr. A. after Lawrence was removed and after Mr. A.'s charges had been dropped and fully explained his reasons for finding her testimony otherwise credible and reliable and that the contact under the circumstances was not a violation of the terms of her post-adjudicatory improvement period which he explained in both his June 18 and June 30 decisions.

#### CONCLUSION

Based on the arguments set forth herein the petition for a Writ of Prohibition should be denied. Since the issue was raised by the guardian in her Petition for Writ of Prohibition, undersigned counsel feels compelled to address the issue of alleged bias toward the guardian by the court/judge in this matter to the extent that it has and may still affect Ms. W. This counsel's observation in this case and others with the same guardian is that the judge has at all times appeared to conduct cases before him fairly and impartially regardless of who counsel or the guardian is that is appearing before him. While this counsel silently questioned the propriety, and possible conflict of interest with her clients, of the guardian filing motions to disqualify the court based on a perceived bias against the Department (not the guardian) and has observed the guardian to attempt to intimidate the tribunal by immediately on the record telling the court reporter that she wants a transcript when the judge rules against her or disagrees with her position, this counsel has been most concerned about the time this behavior has consumed from an already cramped court schedule and the amount of time the court has been unable to provide the timeliness required of Abuse and Neglect cases because he is precluded from acting due to

the motions of the guardian to the supreme court. Ms. W. was without the ability to prosecute her Motion for Return of Custody for at least three months due the Motion to Disqualify which predictably was denied by this court. She and Lawrence, the guardian's client, lost valuable time in achieving disposition, stability and permanence in this matter. Ms. W. would ask this court to take into consideration the considerable loss she has suffered in not being able to have meaningful time with her child during this very important stage of his life and the anxiety she has experienced due to lack of disposition of the issues in this matter as it considers the issues before it.

Respectfully submitted,



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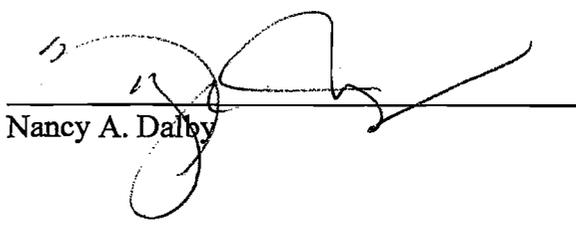
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I, Nancy A. Dalby, do hereby certify that I served a true copy of the attached RESPONSE OF CRYSTAL W. TO PETITIONS FOR WRIT OF PROHIBITION on the following by first class United States mail, postage pre-paid on the 18<sup>th</sup> day of September, 2010:

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