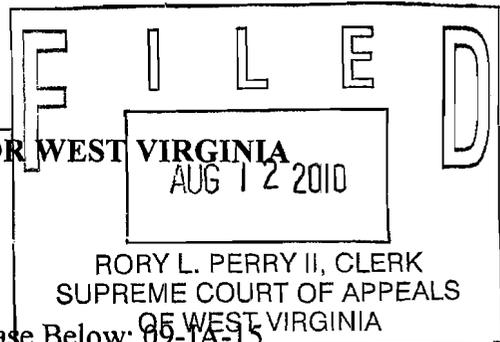


NO: \_\_\_\_\_  
IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA



LAWRENCE JAY A., INFANT  
PETITIONER

vs.

THE HONORABLE JOHN C. YODER,  
BERKELEY COUNTY CIRCUIT JUDGE,  
RESPONDENT

**PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION**

Comes now, Petitioner Lawrence Jay A., Infant, (hereinafter “Infant Lawrence”), by and through his duly appointed guardian *ad litem*, Tracy Weese, Esq., (hereinafter “GAL”), and files this Petition for Writ of Prohibition pursuant to Article 8, Section 3 of the West Virginia Constitution, West Virginia Code §53-1-1, of the West Virginia Rules of Appellate Procedure, Rule 14. Infant Lawrence requests a writ of prohibition against The Honorable John C. Yoder, (hereinafter “Judge Yoder”) from proceeding with reunification of Infant Lawrence with Mother Crystal W. (hereinafter “Crystal W.”) as directed in his Order entered on June 18, 2010 and the subsequent order of July 27, 2010, wherein Judge Yoder, *sua sponte*, placed Crystal W. on a dispositional improvement<sup>1</sup> period (an alternative disposition).

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<sup>1</sup>In the Twenty-third Judicial Circuit, an improvement period granted per West Virginia Code §49-6-12(c) is identified as a “dispositional” improvement period – as a way to delineate it from a pre-adjudicatory improvement period and a post-adjudicatory improvement period.

PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT OF  
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## STATEMENT OF FACTS

### Parties

West Virginia Department of Health and Human Resources (hereinafter "WVDHHR") is the petitioner below and is also seeking a separate Writ of Prohibition. Kimberley Crockett, Esq., is an assistant Prosecutor for Berkeley County and has represented the WVDHHR in Berkeley County Chapter 49 proceedings for at least the last five (5) years. Jennifer Foster is the long term case worker/manger for the WVDHHR who is directly responsible for the parties' case.

Infant Lawrence is a child born to Crystal W. and Father James A. (hereinafter "James A."); Infant Lawrence was born on January 22, 2009. Infant Lawrence is currently nineteen months (19) old and residing in foster care where he has resided for a total of fifteen (15) months. Infant Lawrence has at all times during the proceedings below and is currently represented by Tracy Weese, Esq.

Crystal W. is the natural mother of Infant Lawrence.

James A. is the natural father of Infant Lawrence.

Judge Yoder is a circuit court judge sitting in the 23<sup>rd</sup> Judicial Circuit which includes Berkeley County; Judge Yoder is assigned all juvenile cases in the 23<sup>rd</sup> Judicial Circuit and took the bench in January 2009.

### Proceedings Below

Child Protective Services ("CPS") received a referral on or about January 25, 2009 alleging that Lawrence A. was born having tested positive for amphetamines, cocaine and opiates. The WVDHHR entered into an in-home safety plan with James A. and Crystal W., on or about January

26, 2009. The parents agreed, *inter alia*, not to use drugs in the home, to submit to random drug screening, to complete substance abuse evaluations, and to attend NA meetings three (3) times per week.

The WVDHHR filed an imminent danger petition pursuant to W. Va. Code § 49-6-1, *et seq.*, on or about March 26, 2009 alleging Lawrence A. to be an abused and neglected child and seeking an order granting emergency custody to the WVDHHR. The petition was precipitated by Crystal W. and James A.'s failure to comply with the in-home safety plan and their testing positive for cocaine. The Circuit Court forthwith entered an Order finding that imminent danger to the child did exist, and that reasonable efforts had been made to keep the child in the home. As a result, the Court awarded temporary legal custody of the child to the WVDHHR.

The Adjudicatory hearing was held on May 21, 2009. Based upon admissions of the parties, Crystal W. and James A. were adjudicated to have abused and neglected Lawrence A. and both were granted post-adjudicatory improvement periods. The improvement periods included a term specifically prohibiting both parents from having any contact with anyone involved in illegal activities and directing that neither participate in any illegal activity. A trial reunification of the child with the parents was commenced at the end of September 2009 with the WVDHHR retaining legal custody.

On or about November 2, 2009 the GAL filed a Motion to revoke the improvement periods of both Crystal W. and James A. predicated upon a drug raid executed by law enforcement officials on Crystal W. and James A.'s home on or about October 30, 2009 resulting in a seizure of cocaine from the residence. At the evidentiary hearing on March 24, 2010, Jennifer Foster, the WVDHHR's

agent, during her testimony, advised the parties and the lower court that the WVDHHR joined in the GAL's motion to revoke the improvement periods.. The WVDHHR removed the child at this time and placed him back with the foster family that cared for him from March through September 2009. Crystal W. also filed a motion on or about November 16, 2009 requesting return of physical custody of Lawrence A.

Evidentiary hearings were held on February 28, 2010 and March 24, 2010 on the GAL's motion as well as the motion filed by Crystal W. for return of custody of her child. By Order entered on June 18, 2010 the Respondent Court denied the GAL's motion to revoke the mother's improvement period and granted the mother's motion for return of custody of the child.

The WVDHHR subsequently filed a Motion to Reconsider Ruling and Reverse Order Denying Motion to Revoke Improvement Period of Mother on or about June 30, 2010. The Circuit Court denied the WVDHHR's Motion to Reconsider by Order entered on July 22, 2010 and specifically ordered the WVDHHR to move forward the transition of the child to the mother's physical custody. By Order dated July 27, 2010, the Circuit Court denied the WVDHHR's request for a stay of the Court's June 18, 2010 Order directing transition of the child back to the mother's physical custody. The Court did grant the GAL's request staying unsupervised visits with Crystal W. for a limited period of twenty (20) days. The Court also granted Crystal W. a dispositional improvement period.

The limited stay order will expire in this matter on or about August 16, 2010.

### **Facts**

1. Lawrence A. was born on January 22, 2009. Test results from his meconium

were positive for amphetamines, cocaine and opiates. A referral was made to CPS on or about January 25, 2009. On January 26, 2009, CPS interviewed James A. and Crystal W. who both admitted to smoking crack cocaine and using heroin during the mother's pregnancy.

2. The WVDHHR initiated an in-home safety plan with Crystal W. and James A. on January 26, 2009 requiring them to: refrain from using drugs, submit to random drug screening, complete a substance abuse evaluation, attend NA meetings three (3) times per week, and for James A. to supervise the mother at all times with the infant. Crystal W. was also mandated to continue in drug therapy.

3. By early March 2009 both parents had tested positive for cocaine. Subsequently, CPS met with Crystal W. and discovered that neither parent had attended any NA meetings, that both parents were spending \$50.00 each time they bought cocaine, and that they used cocaine together. Crystal W. denied that she or the father had a drug problem. She also advised that she could not attend inpatient drug treatment because James A. has a suspended license and she had to drive him to work.

4. Consequently, the WVDHHR filed an abuse and neglect petition alleging imminent danger of the child on or about March 26, 2009. The Circuit Court forthwith entered an Order awarding the WVDHHR with temporary legal custody of the child and finding that the WVDHHR had made reasonable efforts in attempt to prevent removal of the child from the home.

5. On May 21, 2009, both Crystal W. and James A. made admissions to drug use/abuse and to failing to cooperate with the WVDHHR's monitoring case; both requested and

were granted post-adjudicatory improvement periods on that day. The improvement periods were memorialized in a May 20, 2009, letter from the CPS Worker, Jennifer Foster. The terms of the improvement period specifically included a provision that both parents “may not have contact with anyone involved in illegal activities and he/she may not participate in any illegal activity of any kind during his/her improvement period.” The terms also included a provision that Crystal W. and James A. would retain “safe housing” for the child.

6. Initially, based upon the reported progress of the parents on their respective improvement periods, the WVDHHR moved the Court for return of physical custody of the child to Crystal W. and James A. for a trial reunification while maintaining legal custody of the child. On or about September 28, 2009, the Court granted the request of the WVDHHR and ordered that physical custody of the child be returned to the parents for a trial reunification.

7. Less than a month later, on or about October 30, 2009, the Eastern Panhandle Drug and Violent Crimes Task Force (“Task Force”) executed a raid on Crystal W. and James A.’s home at 226 Avondale Road, in Berkeley County, West Virginia.

8. The Task Force seized crack cocaine from inside a fire alarm in the kitchen. The Task Force also seized \$500.00 in cash. \$300.00 of this amount belonged to Crystal W. and was maintained in her jewelry box where it was retrieved by law enforcement officers. This \$300.00 in cash was identified by serial numbers as money previously provided by the Task Force to its confidential informant who performed a controlled buy of illegal drugs at Crystal W. and James A.’s home on 226 Avondale Road.

9. As a result of the raid upon the home, James A. was arrested and charged by the State

of West Virginia with the distribution of crack cocaine in violation of W. Va. Code § 60A-4-4-1. Those charges were later dismissed in anticipation of charging Mr. A. in Federal District Court with similar federal charges.

10. That on or about October 30, 2009 and subsequent to the aforementioned drug raid, the WVDHHR removed Lawrence A. (now nine (9) months old) from the home and placed physical custody of the child back with the foster family who had cared for him from March 2009 (upon initial removal) until the end of September 2009 (upon commencement of the trial reunification).

11. That on or about November 2, 2009, the GAL filed a motion to revoke the Crystal W. and James A.'s (post-adjudicatory) improvement periods based upon the illegal drug activity at the home.

12. That on or about November 16, 2009, Crystal W. filed a motion for return of physical custody of the child. Among the representations included in this motion were that the mother had complied with all of the terms of her improvement period, that she did not know that James A., was engaging in criminal activity in the home, and that she was no longer living with nor maintaining a relationship with James A.

13. Evidentiary hearings were held on February 18, 2010 and March 24, 2010 to consider the GAL's motion to revoke the improvement periods of the parents and Crystal W.'s motion for return of custody of the child.

14. During the presentation of evidence, West Virginia State Trooper Brian Bean testified regarding the Task Force's raid upon Crystal W. and James A.'s home. He testified that

the Task Force had information on Crystal W. prior to the date of executing a search warrant of her residence. March 24, 2010, Hearing Transcript (“Mar. Tr.”), p. 63, 75. At the conclusion of search, a list was made of the property seized by law enforcement; the list was presented to Crystal W. and she signed it. Mar. Tr., p. 65. Among the property seized was cash buy-money identified by the Task Force, TV’s, a printer and crack cocaine which had been concealed inside of a fire alarm. Mar. Tr., pp. 66-67. Trooper Bean testified that the crack cocaine seized was found to be in a form commonly used for sale or distribution. Mar. Tr., pp. 68-72. The cocaine was discovered in the common kitchen area of the home. Mar. Tr., p 73. The child, Lawrence A., was present and residing in the home during the time of the drug search.

15. Crystal W., testified at the hearing convened on February 18, 2010 that she had cut off contact and association with James A. as follows:

- A. That she had not seen James A. since his arrest except for their Court dates in this proceeding. February 18, 2009, Hearing Transcript (“Feb. Tr.”), p. 43.
- B. That she had no contact with James A. because it would not be safe for her son. Feb. Tr., p. 44.
- C. That she had no knowledge of James A.’s drug activities, and if she had she would have removed herself and her son from the situation. Feb. Tr., pp. 49-50.
- D. That being around drug use and dealing can be a dangerous activity, and it often involves law enforcement investigations. Feb. Tr., p. 54.
- E. That after talking with James A.’s bondsman the day of his arrest, she had no contact with James A. Feb. Tr., p. 56.
- F. That she had no occasion to even talk with him since his arrest. Feb. Tr., p. 56.
- G. That she decided that it would be better not to have James A. involved in

her life at this moment. Feb. Tr., p. 56

H. That she cut ties with all people involved in drug activity because she is vulnerable to relapse and it's dangerous for her son. Feb. Tr., p. 56.

16. At the commencement of the second day of testimony, March 24, 2010, Crystal W. was given the opportunity to clarify, change or otherwise correct any of her testimony from the February 18, 2010, hearing. At this time, she continued to represent that she had had no contact with James A. except for an encounter on March 3, 2010. She further testified regarding contact with James A. as follows:

A. That she did meet with James A. on March 3, 2010 at a gas station in Charles Town, West Virginia. Mar. Tr., pp. 16-17.

B. That she acknowledged that she and James A. were observed together at the Shell gas station by Kimberley Crockett, Counsel for the WVDHHR, and that evidence of said encounter was provided to her prior to the March 24, 2010, hearing. Mar. Tr., pp. 16-17.

C. That the aforesaid encounter on March 3, 2010 was the only time that she had had physical contact of any kind with James A. March Tr., p. 18.

D. That she had spoken with James A. on the phone to discuss their property, but had not seen him. Mar. Tr., pp. 18-19.

17. James A. testified at the March 24, 2010, hearing and invoked his Fifth Amendment right against self-incrimination on numerous occasions. Mar. Tr., pp. 4-5, 10, 53, 55. He also represented that the March 3, 2010, encounter was the only physical contact that he had had with Crystal W.

18. Berkeley County Deputy Sheriff Thomas Funk testified that on December, 11, 2009, he went to Crystal W. and James A.'s home on 226 Avondale Road to serve forfeiture papers on both of them. James A. answered the door and advised that Crystal W. was also

present in the home; he accepted service from Deputy Funk for himself and Crystal W. Mar. Tr., pp. 57-59. James A. also advised the Deputy on this date that Crystal W. was his girlfriend, and that he and Crystal W. lived together. Mar. Tr., p. 59.

19. Deputy Funk further testified that sometime in January 2010 he again went to the Crystal W. and James A.'s home on 226 Avondale Road to serve papers. At this time Crystal W. answered the door and called out to James A. to come and accept the paperwork. James A. appeared from within the home and accepted the paperwork. Mar. Tr., pp. 60-61.

20. Travis Luttrell, an acquaintance of James A. and Crystal W., testified that approximately a week or so before the 2010 Super Bowl he and his wife ran into Crystal W. and James A. in the K-mart parking lot where Crystal W. and James A. were together in a white Cadillac. Mar. Tr., pp. 82-83. Mr. Luttrell described an encounter with Crystal W. at this time whereby she got out of the car to argue with him about the drug raid and specifically blamed him for the removal of the child from her home. Mar. Tr., 84-86. She later returned to the Cadillac and she and James A. left. Mar. Tr., p. 86.

21. During the testimony of Crystal W., she initially questioned whether the contact with Mr. Luttrell ever took place, but in responding to another question posed she effectively confirmed Mr. Luttrell's description of the encounter. Mar. Tr., pp. 241-43.

22. Jimmie Williams, an employee of the Berkeley County Prosecuting Attorney's Office, testified that he conducted surveillance of Crystal W. and James A.'s home on 226 Avondale Road on two occasions, February 18, 2010 and March 24, 2010. On the morning of February 18, 2010, he saw two individuals whom he later identified as James A. and Crystal W.

both leave the home, separately in different vehicles, and travel to the Berkeley County Courthouse. Mar. Tr., pp. 92-97. Mr. Williams also performed surveillance on 226 Avondale Road, Crystal W. and James A.'s home, on the morning of March 24, 2010, and again observed James A. and Crystal W. leave the home at separate times taking separate transportation to the Berkeley County Courthouse. Mar. Tr., pp. 92, 110.

23. Although Crystal W. initially denied having contact with James A. (including on the days she appeared for the aforesaid evidentiary hearings), once confronted with the evidence that she had been with James A. at 226 Avondale Road she admitted that she had contact with James A. and that she lied about her contact with him during her sworn testimony provided on February 18, 2010 and earlier in the hearing on March 24, 2010. Mar. Tr., pp. 238-44.

24. At the conclusion of the evidentiary hearing held on March 24, 2010, the Circuit Court directed that the parties submit respective proposed findings of fact and conclusions of law related to the pending motions of the GAL and Crystal W. By Order dated June 18, 2010 the Court denied the GAL's motion to revoke the improvement period of Crystal W., and granted Crystal W.'s motion for return of the child. The Court further ordered the WVDHHR to present a transition plan for this purpose upon the convening of an MDT within fifteen (15) days.

25. On or about June 30, 2010, the WVDHHR filed a Motion to Reconsider the aforesaid ruling returning custody of the child to Crystal W. and denying the GAL's motion to revoke Crystal W.'s improvement period. The Circuit Court denied the WVDHHR's motion and directed that the reunification plan set forth in the Court's prior order move forward.

26. A status hearing was held on July 27, 2010 following the convening of an MDT as

previously ordered by the Court. The WVDHHR submitted a July 23, 2010 letter outlining the proposed terms of the dispositional improvement period granted by the Court, though remaining opposed thereto. The WVDHHR requested a stay of the Court's June 18, 2010 Order which was denied. The GAL requested the Court to stay any unsupervised visits until such time as the GAL and/or WVDHHR could seek writs before this Honorable Court. The Circuit Court granted a limited stay of any unsupervised visits in this matter for a period of twenty (20) days.

**Facts since July 27, 2010<sup>2</sup>**

27. On July 27, 2010, James A. tested positive for cocaine.

28. On August 4, 2010, James A. appeared before the lower court and submitted a voluntary relinquishment of his parental rights to Infant Lawrence. James A. did request post-termination visitation; the GAL and WVDHHR opposed the motion and the lower court deferred ruling on same.<sup>3</sup> James A. tested presumptively positive for cocaine at the Berkeley County Probation office on an instant test following the August 4, 2010 hearing.

29. That on Monday, August 9, 2010, The Honorable Judge Gina Groh ruled in favor of the State of West Virginia on the forfeiture matter against Crystal W. All items seized during the drug raid on her home on/about October 30, 2009 where forfeited, along with the buy money

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<sup>2</sup>This GAL is aware that when abuse and neglect matters are being reviewed by this Court, the Court usually requests an update of where the case stands as of that time. The facts in nos. 27, 28, and 29, are provided solely for that purpose and this GAL does not intend to argue those facts; however, in the interest of full disclosure, the information is provided to this Court.

<sup>3</sup>This order is not yet entered..

found in Crystal W.'s jewelry box.<sup>4</sup>

## STATEMENTS OF LAW

### Writs of Prohibition

Article 8, Section 3 of the West Virginia Constitution, West Virginia Code §53-1-1, of the West Virginia Rules of Appellate Procedure, Rule 14 establish that this Court shall have original jurisdiction regarding writs of prohibition. This Court, in State ex rel. Amy M. V Kaufman, 196 W.Va. 251, 470 S.E.2d 205 (1996), *Syl. pt. 1*, stated the following:

[I]n determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, the Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers, and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be complete reversed if the error is not corrected in advance. Amy M., *supra*, *citing* *Syl. Pt. 1*, Hinkle v. Black, 116 W.Va. 112, 262 S.e.2d 744 (1979)

In the case where a petitioner is claiming that the inferior court does have jurisdiction but has exceeded that jurisdiction, this Court has delineated five factors which are compelling when

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<sup>4</sup>This order is not yet entered and will not be made part of the lower court's abuse and neglect file unless offered into evidence at a subsequent hearing.

determining whether to grant the writ. Although all five prongs do not have to be satisfied, these guidelines help the Court determine whether to issue the writ. The five factors are as follows:

- 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. State ex rel. Canterbury v. Blake, 213 W.Va. 656, 584 S.E.2d 512 (2003).

### **Infants May Use Writs of Prohibition to Restrain Court from Improperly Granting Improvement Periods**

This Court has also found that a writ of prohibition is available to the infants in Chapter 49 abuse and neglect cases challenging the granting of improvement periods. See Amy M., *supra*, Syl. Pt. 2.

### **Clearly Erroneous Findings of Facts and/or Conclusions of Law**

On appellate or other review, great deference is typically afforded to a trial court's findings of facts and conclusions of law, and in cases such as abuse and neglect actions when the matter is tried without a jury: "[T]hose 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.” *Syl. Pt. 1, In the Matter of B.B., K.B., T.B., P.B., J.B., and T.F.*, No. 34599 (WV October 9, 2009), *citing Syl. Pt. 1, In the Matter of Tiffany Marie S.*, 196 W.Va. 223, 470 S.E.2d 177 (1996).

### **Very Young Children / Children Under the Age of Three Years**

This Court has found that children under the age of three (3) years old deserve the highest degree of care and consideration. A court is not required to explore every possible chance of parental improvement before terminating parental rights; this is especially true when it appears that the **welfare of the child will be seriously threatened** and “this is particularly applicable to children under the age of three. . . .” [Emphasis added], *In re: Lacey, Shanna and Nicholas P. And Michelle S.*, 189 W.Va. 580, 433 S.E.2d 518 (1993). In *State ex rel. WVDHHR and Anita D. Evans v. Pancake*, 224 W.Va. 39, 680 S.E.2d 54 (2009), this Court found that “[T]he early, most formative years of child’s life are crucial to his or her development.” Time and time again, this Court has held that child abuse and neglect cases are among the highest priority of cases and should be resolved without unjustified delays. This Court has made it clear that “children have a right to resolution of their life situations, to a basic level of nurturance, **protection and security**, and to a permanent placement.” [Emphasis added] *Amy M.*, 196 W.Va. 251, 257, 470 S.E.2d 205, 211 (1996).

### **Right of Advocacy for all Parties**

The role of a GAL has been addressed on numerous occasions by this Court in cases like

In re: Jeffrey R.L., 435 W.Va. 162, 190 S.E.2d 24 (1993); In re: Elizabeth A., 217 W. Va. 197, 617 S.E.2d 547 (2005) (*per curiam*); Amy K., *supra*; and countless other cases. Likewise, this Court has made it clear that **all parties** must be afforded the opportunity to fully present their cases and be heard, and “the circuit court may not impose unreasonable limitations” upon the function of the guardians ad litem in representing their client in accorded with the traditions of the adversarial fact-finding process.” [Emphasis added] Syl. Pt. 3, Amy M., *supra*.

### ARGUMENT

Clearly, this case is an appropriate case for a writ of prohibition. Judge Yoder’s June 18, 2010 denial of the GAL’s motion to revoke (or in the alternative, to find unsuccessful) Crystal W.’s improvement period and contemporaneous order to return custody of Infant Lawrence to Crystal W., with a transition to take place (possibly) during an additional improvement period must be reviewed immediately in order to prevent harm to Infant Lawrence. Despite the WVDHHR’s effort to have the lower court re-examine its June 18, 2010 Order – which provided an opportunity for the lower court to correct its findings – Judge Yoder simply affirmed his June 18, 2010 Order and appeared to claim that the WVDHHR had not joined in the motion to revoke (despite the clear fact that the WVDHHR and GAL submitted a joint proposed ORDER wherein the relief requested was revocation of the improvement period or in the alternative, a finding that the improvement period was unsuccessful and the testimony of the WVDHHR agent Jennifer Foster that the WVDHHR did join in the GAL’s motion (March 24, 2010 Tr., Vol. 2, p. 193)). Less than a week later, Judge Yoder, *sua sponte*, and over the objection WVDHHR and the

continuing objection of the GAL, granted Crystal W. a dispositional improvement period. Waiting to seek a direct appeal of a final order in this matter would be inadequate to protect Infant Lawrence, and other efforts to have the lower court reconsider his ruling have proven unsuccessful, i.e., the WVDHHR's motion asking the Court to reconsider and reverse the June 18, 2010 Order Denying Motion to Revoke Improvement Period of Mother. Further, this GAL states that the findings of facts set out by Judge Yoder in the June 18, 2010 Order to support both the denial of the GAL's motion and the granting of Crystal W.'s motion were clearly erroneous and not supported by the credible testimony or other evidence presented in the matter, and at times, appeared to be based upon the lower court's own investigation into matters which were not raised or even related to issues before the lower court (the GAL's motion to revoke the improvement period of both parents); in addition, it also appears that the lower court made (or justified) its findings in part due to his well documented bias towards the WVDHHR and dislike for this GAL. And finally, the GAL states that this matter appears to be, at least, partially, a matter first impression when looking at the lower court's findings of facts related to issues not before the court and which were never raised by any party, and which appear to be motivated by a personal animus towards this GAL. At the very least, four of the five prongs set forth in Cantebury, *supra*, have been met and therefore, this matter should be reviewed by this Court at this time, and by this writ (and the writ filed by the WVDHHR).

This GAL believes that a dispassionate<sup>5</sup> reading and review of the February 18, 2010 and

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<sup>5</sup>While this GAL is aware that it is impossible not to be passionate about the welfare of children, the GAL believes that this Court can review the transcripts unimpeded by the lower

March 24, 2010 transcripts provides the best evidence that Judge Yoder's findings of fact and conclusions of law were clearly erroneous. In particular, the final cross-examination of Crystal W. by the WVDHHR and the GAL is the crux of the GAL's position that Crystal W. is simply not to be believed or trusted when it comes to putting the health, welfare, and safety of her son, Infant Lawrence, first. That this exchange took place before Judge Yoder after the compelling testimony of numerous witnesses and yet he still found that Crystal W. was by any measure credible, or that she had been successful in her improvement period and should have Infant Lawrence returned to her care is chilling to this GAL. Even granting the additional improvement period to effectuate the transition provides no comfort to this GAL that Infant Lawrence will be protected inasmuch as Crystal W. has been rewarded for her dishonesty and her failure to extricate herself from a drug life-style, whether that be using/abusing drugs, selling drugs, living with or associating with persons who are selling drugs including James A., clearly represents a danger to the child and is proof positive that the conditions of abuse and neglect have not been corrected.

The GAL does concede that there is some evidence to support the lower court's findings – however it is the quality of that evidence that is highly suspect and in contravention to the overwhelming evidence presented by this GAL on the motion to revoke Crystal W.'s improvement

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court's apparent animosity towards both the WVDHHR (the Department and its local counsel) and this GAL and thereby get a full flavor of nature of the proceedings, identify the disparate treatment and assessments of counsel, and the credibility of the witnesses, and in particular, Crystal W.

period. However, once the transcripts are reviewed, as well as the additional documentation provided in the appendix and the GAL's affidavit, it should be absolutely clear to this Court that a mistake has been committed. *Syl. Pt. 1, In the Matter of B.B., K.B., T.B., P.B., J.B., and T.F., No. 34599 (WV October 9, 2009)*, citing *Syl. Pt. 1, In the Matter of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996)*.

Probably one of the most troubling issues with the lower court's findings is Judge Yoder's finding that Crystal W. is a credible witness on any disputed issue. Specifically, Crystal W.'s testimony that she knew nothing about the drug activity in the home was not believable in light of the fact that it was established that Crystal W. was more than willing to lie about her actions in this case and did so repeatedly during her testimony, that is, until the GAL presented several witnesses to contradict her. Even more troubling is the lower court's apparent willingness to condone Crystal W.'s lying to the court as she did numerous times including during when she was cross-examined by Ms Crockett. Further, that despite overwhelming evidence of her willingness to lie, including her own admissions under oath, Judge Yoder ordered reunification of an infant of tender years to Crystal W. with suggestion that she might be awarded an additional improvement period (which the Court, *sua sponte*, did on July 27, 2010). This GAL wonders just how any court could monitor a parent's compliance with an improvement period where that parent has been shown to be willing to lie about her compliance, conduct, and behavior – under oath and to the court no less – until and unless caught “red handed.” No court, no CPS worker, and certainly not this GAL, has the capacity to monitor any parent 24/7 and therefore, granting an improvement period to a parent who is unabashed about

lying, is not in any child's best interest, least of all, a child of tender years like Infant Lawrence who cannot report.

The GAL would direct this Court to the following findings of facts set out in Judge Yoder's June 18, 2010 Order.

- 1-6. These findings essentially mirror the proposed findings in the WVDHHR and GAL's proposed order and are not alleged to be clearly erroneous.
7. *That Ms. W. testified marked bills were found in her jewelry box because she had asked Mr. A. to change out money for her – exchanging Ms W.'s smaller bills for Mr. A.'s larger ones – the night before the October 30 raid. Ms W. further testified that she normally kept her money separate from Mr. A.'s. Feb. 18, 2010 Tr., p. 34.* The GAL is concerned that even after the presentation of evidence where it is clearly demonstrated that Crystal W.'s credibility is suspect, if not non-existent – the lower court does not at least recognize that Crystal W.'s testimony here is self-serving and particularly convenient in that *just that very night before* the two parents exchanged money and that somehow fully explains why she had “buy money” in her jewelry box.
8. *That the Task Force also seized television sets and a printer from the parents' home during the raid. Ms W. presented into evidence her pay stubs showing extra money she received at her job and receipts for two television sets, identified at Crystal W.'s Exhibits 3, 4 and 5. Both parents*

*testified that Ms W. 's mother had given them a television set and printer.*

In fact, Crystal W. presented one singular pay stub (not stubs) and further she testified that she bought the 50 inch HD TV from Wal-Mart with cash and that her mother bought the other TV and printer; Crystal W. never offered her mother as a witness to corroborate this testimony and left with her word to support her claims<sup>6</sup>. Feb. 18, 2010 Tr., pp. 35-36, and March 24, 2010 Tr., Vol. 2, pp. 202-205.

- 9-11. These findings are not alleged to be clearly erroneous.
12. *That Jennifer Foster had Ms W. come to the Department, at which time Ms Foster informed Ms W. that she could not leave the Department with the infant. Ms W. voluntarily gave custody of the infant to the Department. No hearing on imminent danger was had within a reasonable time of the removal. (Emphasis added)* First, the GAL argues that if, as the lower court found, Ms W. voluntarily surrendered the child – no hearing of any kind was required. Second, Judge Yoder became aware of the removal and of Crystal W.'s motion for return of custody on or about November 10, 2009, but at least by November 16, 2009, when the parties appeared

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<sup>6</sup>And while not evidence before Judge Yoder, the forfeiture trial took place on Monday, August 9, 2010, at which time The Honorable Judge Gina Groh granted the State of West Virginia's request for forfeiture of all three items and the "buy money" found in Crystal W.'s jewelry box.

for the regular status hearing; even at that time, knowing Crystal W.'s position that there had been a illegal/improper removal, Judge Yoder failed to address the issue and instead, set the matter out until December 9, 2009 – twenty-three (23) days later. Therefore, even if this Court were to find that a hearing was necessary in this case, any delay in addressing this issue falls squarely on the lower court and not the WVDHHR or GAL (as claimed by Judge Yoder #34 of his June 18, 2010 Order).<sup>7</sup>

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<sup>7</sup>This GAL does not deny that on or about December 8, 2009, she filed a motion to disqualify the lower court; in fact, this GAL filed motions to disqualify Judge Yoder in all abuse and neglect case in which she represented any party in the Twenty-third Judicial Circuit. Likewise, the WVDHHR filed motions to disqualify Judge Yoder in abuse and neglect cases in the Twenty-third Judicial Circuit as well. As this Court is fully aware, having reviewed the matter at the end of 2009 and beginning of 2010, Judge Yoder made comments on the record in another abuse and neglect matter in early December which this GAL and the WVDHHR had a good faith belief the comments suggested bias against WVDHHR – it was because of this announced bias that the subsequent motions to disqualify were filed. And despite the fact that this Court ruled there was insufficient evidence to grant the motions to disqualify, this Court never ruled that the motions were frivolous. Therefore, the WVDHHR and GAL's actions have not been determined, nor should they be considered, as efforts to delay in this (or any other case). The same cannot be said for the delay occasioned by the lower court in holding a hearing on the removal – there were at least twenty-three days before the motions to disqualify were filed to

13-16. These findings are not alleged to be clearly erroneous.

17-18. *(17) That this Court heard the testimony of West Virginia State Trooper Brian Bean regarding the Task Force's raid upon the home of the parents, and the Court finds Trooper Bean's testimony to be credible. (18) That based upon the testimony of Trooper Bean, this Court finds that Mr. A. Was selling crack cocaine.* The GAL would ask this Court to review these findings by the lower court and then consider the proposed findings by the WVDHHR and GAL in #13 and 15 – as she believes the latter proposed findings more accurately reflect the testimony and the activity at the home shared by Crystal W. and James A. than the lower court's finding set forth herein. In particular, it appears that the lower court either overlooked or completely disregarded Crystal W.'s own drug dealing history and her familiarity with drug dealing, drug dealers, and the criminal behavior conducted in her own home. The fact that Trooper Bean and other task force<sup>8</sup> members were acquainted with Crystal W. and

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have the hearing, and there were any number of days after this Court ruled on those motions in early January 2010, excepting approximately one week in February when courts were closed due to severe winter weather. Instead, the lower court chose to have that hearing simultaneously with the motion to revoke and further chose to rule on that motion in June 2010 – more than eight (8) months after Infant Lawrence was returned to WVDHHR's physical custody.

<sup>8</sup>The GAL reminds this Court that the task force's full designation is The Eastern Panhandle Drug and Violent Crimes Task Force (March 24, 2010 Tr., Vol. 2, p. 63) – drugs and

had at one time investigated and arrested her for dealing crack is probative to the issue of whether she knew or should have know about the drug dealing in her home. February 18, 2010 Tr., p 26-33; and March 24, 2010 Tr., Vol. 2, p. 63. The GAL does not dispute that there was no evidence offered that Crystal W. participated in the recent drug activity in/around her home and conducted by James A., but simply not participating does not mean that she did not have knowledge or should not have recognized the activity. Even if this Court finds that Crystal W.'s own drug dealing and drug history does not indicate that she should have known about the illegal activity in/around the time it was occurring in her home and conducted by her significant other; clearly Crystal W. was put on notice of James A.'s drug trafficking at the time of the task force raid on her home October 30, 2009, yet she continued her relationship with James A. as was later revealed during testimony of several of witnesses.

19. This finding is not alleged to be clearly erroneous.
20. *That Ms. W. has consistently denied knowledge of any drug activity by James A., and no evidence was presented that Ms. W. knew of or was involved in any drug activity leading to Mr. A.'s arrest on October 30, 2009. [Emphasis added]* The GAL finds the lower court's reliance on

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violent crimes are the focus of this task force and those activities are alleged to have been taking place in Crystal W.'s home wherein she, Mr. A., and Infant Lawrence resided.

Crystal W.'s consistent denials that she knew nothing of the drug activity extremely disturbing, after all, Crystal W. "consistently denied" having continuing contact with James A., until such time as the GAL presented witnesses who had seen them together at the trailer at 226 Avondale and public places after the task force raid up to and including the morning of the last hearing on March 24, 2010. Obviously Crystal W.'s consistent denials about anything should not be the basis for the return of a child of tender years to her care, especially in light of this Court's repeated holdings that children under three years of age are particularly vulnerable.

21. *That the Court finds the consistent statements of Ms. W. credible, asserting that she did not know of or have reason to know of Mr. A.'s illegal activities based on the following facts:*

- A. *The crack cocaine seized from the residence was found hidden within a smoke detector — a discrete, concealed location that a reasonable person would not regularly investigate unless there was indication of a problem with the detector. The GAL states that the crack cocaine was found in the kitchen area of the home, albeit, in the smoke detector. March 24, 2010 Tr., Vol. 2, pp. 67-68. The kitchen area is a common area in the home. This GAL opines that since drug dealing is an illegal activity and both James A. and Crystal W. had significant criminal history, including drug charges, it is likely that the drugs would be secreted in the home and not simply lying around. In fact, even Crystal W. claimed that she thought "it was a pretty hidden spot," this GAL has no doubt that she did. March 24, 2010 Tr., Vol. 2, p. 221.*
- B. *Ms. W. testified that she had no indication of any problem or reason to investigate the smoke detector. Mar. 24 Tr., p. 220. The GAL questions the lower courts reliance upon any testimony of Crystal W., and the fact that the crack was found in her home,*

while Infant Lawrence was residing there on a full time basis surely indicates that the home was not safe for Infant Lawrence.

- C. *Mr. A. had regular access to the residence for substantial time periods when Ms. W. would not have been present and not known of Mr. A.'s activity. Again, this finding inherently relies upon the credibility of Crystal W.'s testimony that she was gone for much of the day and that she had no knowledge of James A.'s activities while she was gone. This GAL would point out to the Court that James A. testified that while Crystal A. was working, James A. had Infant Lawrence in his care. March 24, 2010 Tr. Vol. 2, p. 20*
- D. *Ms. W. testified that Mr. A. had access to the residence while she was present at her full-time employment at Walgreens from which she presented pay stubs (introduced into evidence as Respondent Mother's Exhibit 5), NA meetings, and during the time she spent with her family. Mar. 24 Tr., pp. 218-19. Again, Crystal W. presented one pay stub.*
- E. *Ms. W. has complied with call-ins and reporting for drug screens and all such screens were negative. Ms. W. has continued to call-in and test negative. Mar. 24 Tr., p. 132. While it did appear that Crystal W. had been substantially complying with her improvement period, including testing negative for illegal drugs, this is hardly a basis to find that a person is not involved in illegal activities, i.e., drug dealing. This GAL is unaware of any requirement that drug dealers be users or that there is anything to suggest that only users are dealers.*
- F. *Mr. A. complied with call-ins and reporting for drug screens and all such screens were negative, and Ms. W. knew these results. Mar. 24 Tr., p. 132. Again, while it did appear that James A. had been substantially complying with his improvement period, including testing negative for illegal drugs, this is hardly a basis to find that a person is not involved in illegal activities, i.e., drug dealing. This GAL is unaware of any requirement that drug dealers be users or that there is anything to suggest that only users are dealers. One might argue that by **not using drugs** one might be a better, more profitable and productive dealer.*

22. *Although the Court finds Ms. W. credible as to whether she knew Mr. A.*

*was selling crack cocaine, the Court notes that Ms. W.'s veracity has been called into question with regards to other matters. This, again, is the starting point of the GAL's assertion that the lower court's findings of facts and conclusions of law are clearly erroneous. This GAL would assert that Crystal W.'s deceit and lies preclude any finding that she is credible. This GAL would add that it is not simply her deceit which negatively reflects on her credibility, but her entire testimony and conduct during the hearings showcases her demeanor, indignation when caught lying, her quarreling with counsel, her constant snide remarks, and evasive answers.*

23-24. These findings are not alleged to be clearly erroneous.

25. That Ms. W. testified on March 24, 2010 that she has continued to have no contact with Mr. A., except for one encounter on March 3, 2010. The GAL would direct this Court to #19 of the WVDHHR and GAL's proposed order and the facts as set forth above on this issue. In addition, Crystal W. And James A. Could not even tell the same "story" about the March 3, 2010 event despite being present when each other testified, i.e., Crystal W. claimed a person named "Alicia" dropped James A. off at the Shell station (March 24, 2010 Tr., Vol. 1, p. 17) and James A. claimed that his friend "Steve" gave him a ride to Shell on March 3, 2010 – when asked if "Steve" had a last name, James A. gave a non responsive answer. James A. then revised his testimony – mid-stream and claimed "Steve"

took him to Wal-Mart and that was where he met Crystal W. March 24,  
2010 Tr., Vol. 1, p. 20

26A-B These findings are not alleged to be clearly erroneous.

26C. *The Court notes that the guardian ad litem called Travis Luttrell to testify about contact between Ms. W. and Mr. A. after Mr. A.'s arrest. The Court found Travis Luttrell to lack credibility to the most extreme degree, as Travis Luttrell could not indicate the time frame about which he was testifying without coaching from the guardian ad litem. Mar. 24 Tr., pp. 82-83. Mr. Luttrell has a criminal background, which includes offenses of moral turpitude and dishonesty. Mar. 24 Tr., pp. 88-89. As such, the Court completely disregarded the testimony of Travis Luttrell. Further, the Court notes for the record that Travis Luttrell appeared to be **under the influence and high at the time of his testimony.** [Emphasis added] While the GAL acknowledges that Mr. Luttrell was clearly uneasy during his testimony, quite possibly it was because as Mr. Luttrell admitted, he was arrested in connection with the activity taking place at Crystal W. and James A.'s home – drug dealing. Or possibly it was because he was an adverse witness to Crystal W. and James A., and in particular James A., a person who has a history of violent felonies, including shooting a man. Feb. 18, 2010 Tr., p. 46. If the lower court felt that Mr. Luttrell was intoxicated or under the influence, Judge Yoder could have asked Mr.*

Luttrell to submit to a drug screen after his testimony or he could have addressed it during Mr. Luttrell's testimony and made inquiry – neither of which he did. When reviewing the transcript of Mr. Luttrell's testimony, this Court will see that Mr. Luttrell was called as a witness at approximately 12:00 noon on March 24, 2010 – after having appeared in response to a subpoena for the matter set to start at 9:00 a.m., and because Crystal W. withdrew her request to sequester witnesses, Mr. Luttrell sat in the courtroom the entire morning until called for testimony. March 24, 2010 Tr., Vol 1, pp. 7-8; March 24, 2010 Tr., Vol 2, pp. 81-90. When asked by Mr. Colvin, counsel for James A., if he was under the influence of any drugs or alcohol, Mr. Luttrell said “no” but did confirm that he takes/had taken methadone – a drug known to be used for treatment of an opiate addiction. March 24, 2010 Tr., Vol. 2, p.89. And even after Mr. Luttrell advised that he took methadone, the lower court failed to further inquire or to drug test Mr. Luttrell. Next, Judge Yoder's finding that Mr. Luttrell had a criminal history which included moral turpitude and dishonesty is unsupported by the evidence. When asked by Ms Dalby, counsel for Crystal W., if he had been convicted of bad checks, Mr. Luttrell's response was “probably” but then he stated that he had never been convicted of not telling the truth. Mr. Luttrell stated he has some criminal history, “some stupid stuff” and the recent drug arrest.

Regardless, no criminal history, NCIC, CIB, or records of convictions were ever produced or offered as evidence. March 24, 2010 Tr., Vol. 2, pp. 87-89. Finally, the lower court's characterization of this GAL "coaching" this (or any other witness) is wholly unsupported and erroneous. It is true that Mr. Luttrell initially had difficulty identifying the date he saw Crystal W. and James A., at the local K-Mart/Food Lion Parking lot, but even a critical reading of the direct examination of Mr. Luttrell by this GAL would only indicate that after Mr. Luttrell provided his responses, this GAL attempted to narrow down the time period with other questions. The GAL identifying the current year as 2010, the current month as March, and even the date of the Super Bowl could hardly be considered coaching – each of those things are factual statements known to all parties and the court and could be information that would be subject to judicial notice. This Court will also note that despite the lower court's assertion in the June 18, 2010 Order that this GAL "coached" Mr. Luttrell, no party objected during the direct examination and Judge Yoder never admonished this GAL for any improper questioning.<sup>9</sup> Infant Lawrence is

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<sup>9</sup>Furthermore, although this GAL does not intend to argue or suggest that Crystal W. is in any way a reliable or credible witness, even Crystal W. confirmed Mr. Luttrell's testimony that they had the argument at the K-Mart/Food Lion Parking lot. March 24, 2010. Tr., Vol. 2, pp. 241-43. Since Judge Yoder apparently did find her credible, his finding that "Mr. Luttrell

entitled to vigorous and competent advocacy; if the lower court actually believed that this GAL was acting improperly, it could have **and should have**, *sua sponte*, addressed the issue. Instead, it appears that when the GAL or even the WVDHHR's counsel attempt to zealously represent their clients, the lower court considers that advocacy and mitigates Crystal W.'s lies and deception. In re: Jeffrey R.L., supra; In re: Elizabeth A., supra; and Amy K., supra;

26D (D) *Additionally, the Court notes that Jimmie Williams, who is employed by the Berkeley County Prosecuting Attorney's office, testified that he was asked by the Prosecutor to perform surveillance on Ms. W. He testified that on two occasions, February 18, 2010 and March 24, 2010, he waited outside Ms. W.'s home at 226 Avondale Road and on both occasions, saw an African-American male and a white female, which "appeared to be" Ms. W., leave the home and take separate transportation to the Berkeley County Courthouse. Mar. 24 Tr., p. 94. Mr. Williams also testified that he could not describe any facial features of the subjects because of the distance between them and him during Mr. Williams's surveillance. Mar. 24 Tr., pp. 94, 1 12. (E) Mr. Williams took pictures of the individuals he observed leaving the home at 226 Avondale Road, which were admitted into evidence as GAL's Exhibit 8 and 9; however, the individuals in the*

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lacked credibility to the most extreme degree" is puzzling.

*pictures were not readily identifiable and could not be deemed conclusively as the respondent parents by the Court. As such, the Court has given Mr. William's testimony the appropriate weight it deserves, considering its plausible but inconclusive nature.* The lower court again goes out of its way to disregard compelling evidence offered by this GAL on behalf of Infant Lawrence. While Mr. Williams did not know the parents and had not seen or had contact with them prior to February 18, 2010, when he testified at the March 24, 2010 hearing, Mr. Williams was able to identify both Crystal W. and James A. as the persons who were at 226 Avondale prior to the February 18, 2010 hearing and the March 24, 2010 hearing – he did so by noticing their clothing and their cars and by observing the same car and person (Mr. A.) arrive at the courthouse shortly thereafter. Once on the witness stand, Mr. Williams was able to point out both parents as the persons who left 226 Avondale each morning. March 24, 2010 Tr., Vol. 2, pp. 94, 95, 96, 97, 100, 102, 103, 106, 110, 112, 113, 115, 116, and 117. As with Travis Luttrell's testimony, but by no means an endorsement of Crystal W.'s credibility, Ms W. did admit that she and Mr. A. were together at 226 Avondale on the mornings of February 18, 2010 and March 24, 2010 (March 24, 2010 Tr., Vol. 2, p. 217) – if the lower court is willing to find Ms W. credible on critical issues, this GAL questions why he appears to disregard the testimony of Mr. Williams

which has been confirmed by Crystal W.?

27-28. These findings are not alleged to be clearly erroneous.

29. *While the Court does not look favorably upon Ms. W.'s lack of candor and willingness to be forthcoming with information regarding her contact with Mr. A., the Court does not find that Ms. W. lacks credibility with regards to all matters. Instead, the Court notes the DHHR Representative, Jennifer Foster, testified that Ms. W. has been highly motivated to achieve reunification with her son, communicating regularly and honestly with Ms. Foster, cooperating fully with the Department, and remaining drug free. Mar. 24 Tr., pp. 119, 178. Finally, the Court notes that Ms. W. was subject to tiresome and combative examination, which the Court considered in weighing Ms. W.'s ability to testify truthfully. See, e.g., Feb. 18 Tr., pp. 63-67. This finding and most that follow are the most egregious findings contained in the lower court's June 18, 2010 Order. For the lower court to disregard Travis Luttrell's testimony in its entirety and yet pick and choose portions of Crystal W.'s testimony, is incomprehensible to this GAL. Even without Mr. Luttrell's testimony – which at least comported with the testimony of several other witnesses who had testified about seeing Crystal W. and James A. together after the drug raid, up to and including the mornings of each hearing – there was overwhelming evidence that Crystal W. was/is dishonest and further that*

she has no compunction about lying under oath – at least not until she is caught. The lower court does not explain or indicate any justifiable reason for the finding that Crystal W. can be trusted on any issue. The reasons why Ms Foster testified that during the improvement period, she thought that Crystal W. (and James A., for that matter) were complying with their improvement period and communicating honestly with the WVDHHR was that she had not yet discovered their deceit. Finally, the lower court’s willingness to absolve Crystal W. of lying under oath because she was zealously examined by the WVDHHR’s counsel is simply astonishing. A simple reading of that portion of the transcript cited by the lower court in this finding will show that Crystal W. was being evasive and non-responsive to Ms Crockett’s questions and Ms Crockett continued to press the questions – without any objection from any counsel nor any admonishment from Judge Yoder. For a true example of a “tiresome and combative” examination, this Court is directed to Ms Dalby’s cross-examination of Jennifer Foster wherein counsel berated and demeaned the witness to the point where Ms Foster responded that she did not appreciate how Ms Dalby was talking to her. Judge Yoder allowed Ms Dalby to badger Ms Foster to almost a breaking point and when Ms Foster complained, the lower court rose out of his chair, yelled and left the courtroom. Upon returning he admonished both the witness and Ms

Dalby. At no time during the GAL or the WVDHHR's questioning of any witness, including Crystal W., did the lower court ever have to admonish counsel for being inappropriate. March 24, 2010 Tr., Vol 2, pp. 138 - 181, and in particular pp. 161 - 176. Therefore, for Crystal W. to be given a pass for lying because Ms Crockett was doing her job and doing it well is clearly unsupportable.

30. *That Ms. W.'s contact with Mr. A., while ill-advised, did not violate the terms of her improvement period, as there was no written provision forbidding contact with Mr. A.. Further, the Court recognizes that some contact with Mr. A. may have been necessary to divide up communal property and relocate Mr. A.'s business from the home. [Emphasis added]*
- This GAL takes her charge very seriously, and because of that, to suggest that Crystal W.'s continuing relationship with a man (James A.) who the lower court found to be dealing drugs from their home (not to mention his other violent acts such as shooting someone) is "ill-advised" simply misses the mark. Having a relationship of any kind with a person dealing drugs is not simply ill-advised – it is placing yourself **and your child** – in harm's way. Now quite possibly, since Crystal W. had dealt drugs herself, she felt that she could handle the dangers associated with drug dealing – but over and over during her testimony, when she was attempting to placate the WVDHHR and GAL by claiming that she had ended her relationship with

Mr. A., Crystal W. acknowledged that drug dealing is illegal and can be a dangerous activity. In addition, while Crystal W. testified over and over that the only times they were together was the times they were seen (caught) by others, and those times they were moving or making arrangements to move or settle up property – not one witness who testified about seeing them together between the drug raid and the last morning of the hearing – March 24, 2010 – ever reported seeing any property exchanges, nor did counsel for Crystal W. inquire if property exchanges were going on between the two. So only the incredible testimony of both Crystal A. and James A. can be the basis for the lower court’s finding which is used to justify or legitimize their on-going contact/relationship. Neither Crystal W. nor James A. is deserving of the “benefit of the doubt here” and the lower court’s finding in this regard is clearly erroneous.

31. *That based upon the guardian ad litem's failure and the Department's failure to offer clear and convincing evidence that Ms. W. was involved in, knew of, or should have known of Mr. A.'s illegal activity, the Court finds that Ms. W. substantially complied with the terms of her improvement period, specifically the terms requiring Ms. W. to avoid contact with persons engaging in illegal activity and to provide safe housing for the infant. This GAL continues to maintain, as she did in the proposed order submitted by the WVDHHR and GAL on the motions pertaining to Crystal*

W. that Crystal W., if she did not know, she *should have known*, about the drug activity in her home because her knowledge and familiarity with drug dealing and the drug lifestyle.

32. *That Ms W. participated in the terms of her improvement period as required by W.Va. Code §49-6-12 (2009).* This GAL asserts that mere compliance does not equal a successful improvement period.
33. *That although the guardian ad litem's motion to revoke was filed before the conclusion of Ms. Wells' improvement period, this Court was unable to convene a hearing before its expiration date. Nevertheless, Rule 38 of the West Virginia Rules of Procedure for Child Abuse and Neglect requires this Court to hold a hearing to determine whether the improvement period was successful.* The GAL (and WVDHHR) asked for alternative relief in their proposed order – first, asking the lower court to revoke Crystal W.'s improvement period which was set to expire on November 21, 2009 or, second, asking the lower court to find that the improvement period was unsuccessful. To find an improvement period successful, the lower court is required to not only look at whether there was compliance during the improvement period, but also **whether there has been sufficient improvement in the context of all circumstances in the case to justify the return of the child.** [Emphasis added] *Syl. Pt. 6, In re: Carlita B.*, 185 W.Va. 613, 408 S.E.2d 364 (1991). This GAL believes that based

upon the credible testimony and evidence offered by the GAL during the hearing, there was not sufficient improvement in Crystal W.'s circumstances to justify returning Infant Lawrence to her care. This matter began and at all times, was a drug case – based upon the parents' involvement with drugs. While it was Crystal W. and James A.'s drug use/abuse that first got the WVDHHR's attention, it is obvious that their drug involvement went beyond using to drug dealing. To claim that the conditions of abuse and neglect have been corrected because a parent or parents have stopped using/abusing drugs and are now only involved in drug dealing is outrageous. Crystal W. is still engaged in a life-style that involves drugs, whether that involvement is due to use/abuse of drugs, selling of drugs, condoning the selling of drugs, or maintaining a relationship with a drug dealer – it is still a drug life-style that is dangerous and adverse to the best interests and safety and well-being of Infant Lawrence, a nineteen month old baby. This GAL would also refer this Court to the lower court's finding #21 in the June 18, 2010 Order wherein Judge Yoder revoked James A.'s improvement period, to-wit: *That when this case began, Mr. A. was involved in illegal drug use, and it appears that Mr. A. was still engaging in illegal drug activity as of October 30, 2009, albeit drug dealing and not drug use; both activities center around illegal drugs and both are equally detrimental to Mr. A.'s ability to*

*adequately and safely parent his child. As such, the improvement period was unsuccessful.* This GAL can find no reasonable or credible evidence to support the lower court's finding that Crystal W.'s continuing relationship with James A., both in and outside of her home, was any different than James A.'s activities – activities that it found to be detrimental to Mr. A's ability to safely parent his child. Voluntarily associating with a drug dealer, both in and outside of her home, is clearly an activity that is adverse to not only Crystal W.'s best interest, but more importantly, Infant Lawrence's best interest.

34-36. *(34) This Court finds that DHHR and the guardian ad litem failed to comply with the requirements set forth in W. Va. Code §§ 49-6-3(a), 49-6-3(b), 49-6-9(f) (2009), mandating the State show, within a reasonable time, that there was: (1) imminent danger to the child, and (2) no reasonably available alternatives to removal or that there was an emergency situation, when they removed the child from the physical custody of Ms. Wells on or about October 31, 2009. (35) The Department and the guardian ad litem have failed to prove that the infant child was in imminent danger in the custody of Ms. W. after the arrest of Mr. A. where there is no proof that Ms. W. was aware of or participated in any drug dealing related to the October 30 raid, and she fully cooperated with the Department in the interest of protecting the child. (36) "After the*

*passage of a reasonable time necessarily required to effectuate the State's interest in protecting a child's health and welfare in an emergency situation, the onus for continued retention of the child from the custody of his natural parents falls upon the State and not upon the parents." State ex rel. Lemaster v. Oakley, 157 W.Va. 590, 595, 203 S.E.2d 140, 142-43 (1974).* This GAL is not a state agency, nor a state actor, and neither is she employed by WVDHHR. The GAL had no obligation to make any showing on this issue assuming *arguendo* that a hearing of any kind was even mandated. (See the lower court's finding #12 wherein it found that Crystal W. voluntarily placed the child with WVDHHR at the meeting with Ms Foster.) The GAL points out that at **no time** was legal custody of the child ever returned to either parent and the child was only returned to the physical custody of the parents on a trial basis; granted this trial reunification was in anticipation of the dismissal of the case in the near future. The GAL believes that the WVDHHR, in its contemporaneous writ, has fully addressed this issue and this GAL does join in the WVDHHR's writ in full.

37-38. (37) *"The best interests of the child is the polar star by which decisions must be made which affect children." Michael K.T v. Tina L. T, 182 W.Va. 399, 405, 387S.E.2d 866, 872 (1989) (citing State ex rel. Cash v. Lively, 155 W.Va. 801, 804, 187 S.E.2d 601, 604 (1972)).* (38) *The Department*

*and the guardian ad litem have failed to prove that continued retention of the child from the custody of his natural mother, Crystal Wells, is in the child's best interests.* The lower court's finding that a child's best interest is the polar star and guiding principal in abuse and neglect cases is not clearly erroneous, however, the lower court's finding **in the case at bar** that the (WVDHHR) and this GAL failed to prove that it was adverse to Infant Lawrence's best interest to reunify him with Crystal W. is clearly erroneous when the lower court's finding is predicated on finding Crystal W. credible. As this GAL has repeatedly pointed out – even if Crystal W. did not know about the drug dealing in her home, even if somehow she was oblivious to the activities in her home, the very fact that she maintained her relationship with James A. *after* the task force raid, *after* she saw the drugs on the table, *after* James A. was originally arrested, *after* the WVDHHR worker suggested that she separate from James A., and *after* she made a representation to the lower court in her motion for return of custody that she did end her relationship with James A., she *still* persisted in a relationship with James A. Not only did she persist in her relationship, but **she knew it was wrong and adverse to her child** and that is exactly why she consistently lied about it to the lower court during the February 18, 2010 and March 24, 2010 hearing – that is, until confronted with irrefutable evidence that she was still involved with

James. A.

A final part of the lower court's June 18, 2010 Order appears to be a critique of this GAL and a long standing practice in the Twenty-third Judicial Circuit wherein guardians ad litem occasionally participated in adoption proceedings for their ward(s). This GAL has provided an affidavit for this Court's review and consideration on this issue, but will also state herein, that although the lower court knew about this practice and the fact that both this GAL and Ms Dalby (counsel for Crystal W.) had filed adoptions as guardians *ad litem* prior to the start of the February 18, 2010 hearing, the lower court never removed this GAL from this or any other matter where she served/serves as a guardian ad litem. The lower court also did not, in his June 18, 2010 Order or at any time subsequent to that order, remove this GAL from serving in this or any other case based upon the "appearance of impropriety" or an alleged motivation for pecuniary gain. In fact, the lower court has continued to appoint this GAL to serve as a guardian ad litem in new abuse and neglect cases. Obviously if the lower court felt that this GAL was tainted and compromised, so much so that it essentially has minimized if not wholly disregarded this GAL's motion and evidence, as it relates to Crystal W<sup>10</sup>. it is unclear why it would continue to create

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<sup>10</sup>Nowhere in the June 18, 2010 Order Revoking James A.'s Improvement Period is this discussion about this GAL. However, this GAL will advise this Court and has provided as an attachment to her affidavit, that the lower court did include this same discussion and same attachments to an order in another abuse and neglect case that was entered shortly after the June 18, 2010 order in this case – but in that case, the lower court ruled in favor of the position of the WVDHHR and this GAL.

this type of issue by appointing this GAL. This issue and the lower court's miscellaneous attachments to his June 18, 2010 Order were never raised by any party or the lower court during the hearing, in fact, much of the information was either solicited from the lower court via letter or was initiated by the lower court in discussions with Court Improvement Project Board members.<sup>11</sup> This GAL does not see how this issue has any bearing on the case at bar and further, this GAL can affirmatively state that at no time during the case at bar has there been any discussion with the current foster family about providing adoption services for them. In fact, if the lower court had even inquired about the concurrent plan in this case, it would have learned that the current foster family is not willing to adopt but a close family member of the foster mother, one who has developed a relationship with Infant Lawrence and who lives in a racially diverse area outside of the State of West Virginia, is the concurrent plan. Therefore, this GAL would not be able to provide adoption services in this case in any event.

While the controversy over whether or not guardians could/should provide adoption services for their ward, this GAL did discover that this is a practice that was not exclusive to the Twenty-third Judicial Circuit, but that in light of the disagreement among counsel and now some judges, this GAL did request an opinion from the West Virginia State Bar which is attached to her affidavit as is their response. Essentially the Bar stated it was a conflict to file adoption petitions for pre-adoptive parents when you served as the minor's guardian ad litem. This response was received on June 23, 2010 but this GAL. This GAL immediately stopped participating in adoptions under those circumstances. This GAL has never been cited by this

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<sup>11</sup>This GAL is also a member of the Court Improvement Project Board.

Court, or the lower court, or the WV State Bar for any unethical conduct, and does believe that she or any of the other guardians *ad litem* who filed petitions in the Twenty-third Judicial Circuit did so for any improper purpose and least of all, not for the possibility of a fee.

This GAL does believe and will so provide evidence in her affidavit, that the lower court appears to have a personal bias or dislike towards her, which manifested itself shortly after she filed motions to disqualify the lower court, and while that substantive issue is a matter for another tribunal, the fact that a child of tender years may be put in harm's way because the lower court has disregarded the hard work and effort of this GAL to present credible and compelling evidence on her motion makes it issue this Court may need to address.

Finally, this GAL does join in the WVDHHR's writ including that part where it seeks to prohibit the lower court from proceeding with the dispositional improvement period for Crystal W. Although it is true that when the parties stipulate to the parent(s) meeting their burden for an improvement period per West Virginia Code §49-6-1(c), a disposition hearing is not held. In the case below, there were no stipulations and in fact, as noted in the WVDHHR and GAL's proposed order submitted after the February 18, 2010 and March 24, 2010 hearing, the WVDHHR and GAL believed Crystal W.'s post-adjudicatory improvement period should have been either revoked or found to be unsuccessful. Nonetheless, the lower court, *sua sponte* and without first conducting an dispositional hearing, placed Crystal W. on a dispositional improvement period. The GAL asserts that the lower court improperly granted the dispositional improvement period.

## Conclusion

This Court has time and time again made it clear that both the WVDHHR and GAL need to be pro-active and do more to protect children. That is exactly what has taken place in this case. This GAL learned of a drug raid on the home of Crystal W. – the home where Infant Lawrence was residing – and immediately filed a motion to revoke the improvement periods of both parents. While at the time the motion was filed (within four days of the drug raid), much information was unknown, what was known was that drugs were found in the home and that one or both parents might eventually face criminal charges for drug dealing or for maintaining a crack house. As this GAL further investigated, along with the assistance of the WVDHHR and its counsel, she learned that although Crystal W. might not be charged, there was substantial proof that James A. did maintain drugs in home shared by Crystal W., Infant Lawrence, and him, and that several pit bull dogs were kept at that location, and that despite the knowledge of that James A. kept drugs in her home and dealt drugs from her home, Crystal W. continued to have a relationship with him. Had this GAL ignored this information or failed to bring it to the lower's court's attention, this Court would no doubt find that she had failed in her obligations pursuant to Jeffrey R.L., and rightly so.

The lower court's finding that Crystal W. is credible is wholly unsupported even with a cursory review of the transcripts and in particular Crystal W.'s testimony on both days. A thorough reading of Crystal W.'s testimony reveals she not credible and her testimony and claims that she did not know of the drug dealing must be disregarded. At the very least, her claims that she and James A. are no longer in a relationship but for those few meetings – which were

observed by others – where they were working out property distribution must be disregarded and a finding that her improvement period was unsuccessful is appropriate.

The lower court's June 18, 2010 Order and the subsequent July 27, 2010 Order, clearly put Infant Lawrence, a child of tender years and who can not defend nor protect himself from the dangers surrounding drug dealing or the drug lifestyle of both Crystal W. And James A., in harm's way and therefore, this GAL contends that the lower court's findings of facts and conclusions of law as set forth in the June 18, 2010 Order and the July 28, 2010 Order wherein Crystal W. was granted a disposition improvement period are clearly erroneous.

**RELIEF PRAYED FOR**

WHEREFORE, Infant Lawrence requests that this Court

- A. Issue a Rule to Show Cause against the Respondent directing him to show cause, if he can, as to why a Writ of Prohibition should not be awarded against him;
- B. Stay all proceedings in the underlying abuse and neglect case pending the resolution of and ruling on the writ(s);
- C. Stay unsupervised visits between Crystal W. and Infant Lawrence pending the final resolution of the writ(s);
- D. Issue a Writ of Prohibition against the Respondent prohibiting any further enforcement of the June 18, 2010 Order and July 27, 2010 Order (at least as it pertains to the improvement period for Crystal W.);
- E. Direct that the Respondent enter the WVDHHR and GAL's proposed Order Revoking Crystal W.'s Improvement Period and Order Denying Motion for Return of Child;
- F. Direct the Respondent to conduct a disposition hearing as soon as possible, fully incorporating the findings of facts and conclusions of law as set forth in the Order Revoking Crystal W.'s Improvement Period and Order Denying Motion for Return of Child; and

- G. Grant him such other and further relief as this Honorable Court deems necessary, appropriate, or proper.

Respectfully Submitted:



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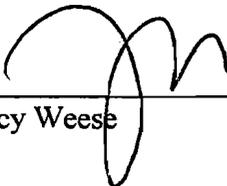
Tracy Weese, Esq. (WVSB #5126)  
POB 3254  
Shepherdstown, WV 25443  
(304) 264-0595

**VERIFICATION**

STATE OF WEST VIRGINIA,

COUNTY OF BERKELEY TO-WIT:

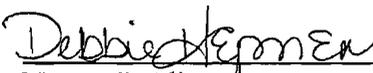
TRACY WEESE, ESQ., after first being duly sworn, upon her oath, hereby deposes and states that the facts and allegations contained in the foregoing PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION are true and correct, except insofar as they are therein stated to be based upon information and belief, and insofar as they are therein stated to be based upon information and belief, she believes them to be true and correct.

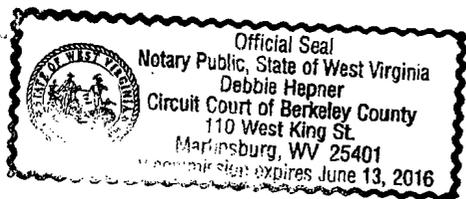
  
\_\_\_\_\_  
Tracy Weese

Taken, subscribed and sworn to before me, the undersigned authority,

this the 11th day of August, 2010.

My commission expires: June 13, 2016

  
\_\_\_\_\_  
Notary Public



**NO: \_\_\_\_\_**  
**IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA**

LAWRENCE JAY A., INFANT  
PETITIONER

(Case Below: 09-JA-15  
Berkeley County Circuit Court)

vs.

THE HONORABLE JOHN C. YODER,  
BERKELEY COUNTY CIRCUIT JUDGE,  
RESPONDENT

**CERTIFICATE OF SERVICE**

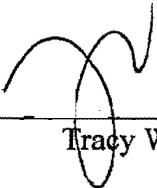
I, Tracy Weese, do hereby certify that I have served a true copy of the foregoing PETITION FOR WRIT OF PROHIBITION AND MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION, MOTION FOR STAY OF UNSUPERVISED VISITS BETWEEN CRYSTAL W. AND INFANT LAWRENCE PENDING THE RESOLUTION OF THE WVDHHR AND GAL'S PETITIONS FOR WRIT OF PROHIBITION, MOTION TO EXCEED PAGE LIMIT FOR APPENDIX ACCOMPANYING A PETITION WRIT OF PROHIBITION, MOTION TO JOIN IN AND IN SUPPORT OF WVDHHR'S PETITION FOR WRIT OF PROHIBITION AND MOTION TO CONSOLIDATE PETITIONS, MEMORANDUM OF NAMES AND ADDRESSES FOR RULE TO SHOW CAUSE TO BE SERVED UPON IF GRANTED, APPENDIX OF GAL, AND AFFIDAVIT OF GAL upon the following by United States First Class Mail, postage prepaid, on this the 11th day of August, 2010:

Honorable John C. Yoder  
Berkeley County Circuit Judge  
380 W. South Street, Suite 3411  
Martinsburg, WV 25401

Nancy A. Dalby, Esq.  
Counsel for Crystal W.  
202 N. Charles Street  
Charles Town, WV 25414-1510

Nicholas F. Colvin, Esq.  
Counsel For James A.  
P.O. Box 1720  
Martinsburg, WV 25402

C.Carter Williams  
Assistant Attorney General  
Counsel for WVDHHR  
112 Beans Lane  
Moorefield, WV 26836  
Counsel for WVDHHR



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Tracy Weese

**NO: \_\_\_\_\_**  
**IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA**

LAWRENCE JAY A., INFANT  
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**MEMORANDUM OF NAMES AND ADDRESSES FOR RULE TO SHOW CAUSE  
TO BE SERVED UPON IF GRANTED**

**RESPONDENT JUDGE:**

Honorable John C. Yoder  
Berkeley County Circuit Court  
Berkeley County Judicial Center  
380 W. South Street, Suite 3411  
Martinsburg, WV 25401

**CRYSTAL W.:**

Nancy A. Dalby, Esq.  
202 N. Charles Street  
Charles Town, WV 25414-1510

**WVDHHR:**

West Virginia Department of  
Health and Human Resources  
By Counsel:  
C. Carter Williams  
Assistant Attorney General  
112 Beans Lane  
Moorefield, WV 26836

MEMORANDUM OF NAMES AND ADDRESSES FOR RULE TO SHOW CAUSE  
TO BE SERVED UPON IF GRANTED

JAMES A.:

Nicholas F. Colvin, Esq.  
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Martinsburg, WV 25402

PETITIONER INFANT LAWRENCE A.:

Tracy Weese, Esq.  
P.O. Box 3254  
Shepherdstown, WV 25443



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Tracy Weese, Esq. (WVSB #5126)  
Guardian *ad litem* for Lawrence Jay A.  
POB 3254  
Shepherdstown, WV 25443  
(304) 264-0595.

MEMORANDUM OF NAMES AND ADDRESSES FOR RULE TO SHOW CAUSE  
TO BE SERVED UPON IF GRANTED

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