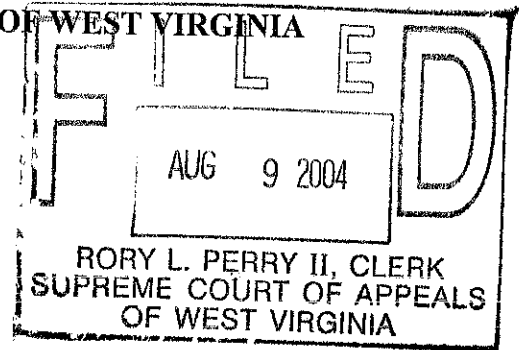


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN RE: **ELIZABETH A., RICHARD O. and
 KIMBERLY O.**

NO. 31761



BRIEF OF APPELLEES

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West Virginia Statutes Cited:

West Virginia Code §58-5-1

West Virginia Cases cited:

In the Interest of Tiffany Marie S., 470 S.E.2d 177 (1969)

APPELLEES' BRIEF RESPONDING TO APPELLANT'S BRIEF
**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

In this case, the Department of Human Resources (hereinafter identified as the DHHR) filed a petition to remove all of the children based upon (1) allegations of sexual abuse found in a letter purported to have been authored by Richard O., the father of Kimberly O. and Richard O. and (2) that Richard O. had committed a sexual act upon a friend of Elizabeth A., an older sibling of the other infants, one to two years earlier in a tent in the yard of the home. The children were removed from the home. Adjudicatory hearings were held and after the close of the testimony, counsels were afforded the opportunities to submit written closing arguments. The Court found that the Petitioner's evidence was not credible and dismissed the Petition.

The *guardian ad litem* for Kimberly O. and Richard O., infants, appealed and a stay was ordered to prevent the children from returning home with their parents. A subsequent petition (mentioned by the Petitioner in this case in her brief) was filed but was dismissed.¹

¹ DHHR then, obviously, attempted to also continue the fight in the Circuit Court by altering the "facts" to now try the case on the contents of the "letter" (previously abandoned as untrue). (If the "tent" story did not work, then maybe the "letter" story could be reintroduced and perfected.)¹ DHHR acted as though they were oblivious to the testimony of their own witness, Elizabeth A., to the unmistakable effect that the contents of the "letter" were things that she could not "remember" and that they had abandoned any such contention that the "letter" (regardless of who was the author) was true. (Refer to Footnote 4. In the context of the testimony, this was a clear denial that the "letter" was true.) Thus, while this appeal was pending, Petitioner DHHR sought from the Circuit Court another Petition to re-litigate and embellish upon the "letter" while this appeal was pending. Chief Judge David W. Nibert, 5th Judicial Circuit, refused to issue the second Petition because the grounds alleged were clearly identifiable as another attempt to re-litigate

STATEMENT OF FACTS

This action began by Petition executed on December 10, 2002, alleging variously that Adult Respondent Richard O. (a) had personally given to her a disgustingly and sexually perverted letter purportedly describing a history of sexual contacts between them and (b) that he had also had sexual intercourse with a childhood friend in a tent some one or two years earlier in her presence.

At the adjudicatory hearings, the Petitioner called Melody Bradbury. In her first testimony, Melody stated that she and Elizabeth were at Richard O's home in November 2001 and were playing Monopoly in a tent that was set up outside the residence. She testified that Richard O. tried to touch Elizabeth's arm. She denied that Richard O. had attempted to touch her. She also denied that Richard exposed his private parts to them. She further denied any prior abuse in North Carolina. Melody testified out of the presence of the adult respondents.

(the "letter" from) the first case now on appeal to this Court. As proof that this was both a "second bite at the apple" and deception upon both Courts, Petitioner DHHR then removed from the petition as an exhibit the copy of the "letter" (already litigated in the first case now on appeal) and altered the Petition to specifically allege acts that had been the subject of the "letter" (despite Elizabeth A's previous testimony that she could not "remember" any of the allegations asserted by the letter) and again presented the third version of the same Petition to the Circuit Court for issuance.¹ The Circuit Court (upon being then assured that the grounds were new and different) thereafter issued the third proffered Petition. Petitioner DHHR then provided the letter as a part of the disclosure rather than as an exhibit as had been refused by the Circuit Court.

At the Preliminary Hearing on the second case (third version of the Petition) on April 12, 2004, the Petitioner DHHR presented Elizabeth A., the primary fact witness, who (a) admitted that she had lied in her testimony in the first case (now on appeal to this Court) and (b) had a contrary (and totally opposite) version of her story to which she proceeded to testify. (She now alleged that the conduct described in the "letter" was actually true but that she had lied about that in the first case.) The Circuit Court appeared to Counsel to be visibly startled that the case again involved the same "letter" (and a rehash of the allegations) as previously alleged in the first case (denied by the witness, dismissed by the Circuit Court and now on appeal). The second case (third version of the Petition) was effectively identical to the case now on appeal after having been dismissed but being presented with altered testimony (a different tale). The Circuit Court dismissed the second Petition subsequent to the Preliminary Hearing by Order entered July 22, 2004. Counsel concludes that the admission of perjury in the first case must well have affected the credibility of Elizabeth A. in the second case. Thus, both cases were found to be based upon false and/or incredible testimony.

Cinday Derreberry testified. She is the sister of Joann A. and the guardian of Melody. She testified that she and Joann questioned both girls after a piece of a condom wrapper and a beer bottle were found in the tent. Both girls said that nothing happened. Cinday also testified that both girls stretch the truth at times. She also testified that Elizabeth A. would take fits and get "out-of-control." She testified that Elizabeth A. and Richard O. would get into arguments and Richard would try to discipline Elizabeth and that Elizabeth would resent it.

Elizabeth testified that she, Melody, and Richard O. were playing Monopoly in the tent. She said that she fell asleep and woke up to see Richard O. having sexual intercourse with Melody. (Recall that Melody had testified that this had not then, or ever, happened.) She denied that Richard tried to touch her. Elizabeth denied any knowledge of either letter in the DHHR custody. Elizabeth testified out of the presence of the adults.

The Respondent, Richard O., called Officer Mikel Harper from the Spencer City Police department. Officer Harper stated that he took a statement from Melody Bradbury at the start of this case. Melody had told him that in the tent, Richard had pulled down his pants and underwear and had exposed himself to both girls. She had also told the officer about an incident in North Carolina in which Richard had asked both girls to perform oral sex upon him.

The Respondent, Richard O. then called Patty Paxton. She is Richard's sister. She testified that the descriptions of abuse by her father in the first letter were not true. (The unauthenticated "letter" had described in detail how sexual abuse had been a family tradition on the O family.) She has never been sexually abused by their father. She

testified that Richard and Elizabeth's relationship was rough due to arguments and the like.

The Respondent, Richard O. took the stand. He adamantly denied any sexual misconduct in the tent incident. He also denied writing any of the letters in question. He testified that he treated Elizabeth as his own daughter and had helped raise her since she was a young child. He testified that she would tag along with him when he would go anywhere and she even helped design his tattoo of the children's names on his arm. In an apparent attempt to establish authorship of the "letter," Ms. Ashley (Elizabeth's *guardian ad litem*) gave him a spelling test. He misspelled all of the words given but only a couple of the words were spelled like the misspellings in the letters.

The Respondent, Richard O., then re-called Melody Bradbury. The testimony was striking in its blatant and continually changing versions of alleged events. This time the young lady changed her story and said that Richard had exposed himself in the dark to her and Elizabeth. She said he left before they went to sleep. She explained that she lied the last time because Richard was in the room (however, Richard O. had not been in the room when she testified). Melody further testified that she did not tell the police officer about alleged events in North Carolina and she insinuated that the police officer had lied about that part of the report. Melody again testified outside of the presence of the adult respondents.

The Respondent, Joann A. took the stand. She testified that she had found the letters. She testified that she and her sister, Cinday, had taken the possibility of misconduct seriously and had investigated the tent happenings with the result that no one ever admitted to anything. She took out a restraining order after she found the first letter.

She found the second letter (purportedly from Elizabeth A. to a friend alluding that the first letter had been a ruse to eject Richard O. from the home) and dropped the restraining order. She had sought outside assistance in her own investigation and concern by going to Psych Services psychological counseling and advise on such unfamiliar matters and the counselor made the referral. The DHHR notes said that the referent had said that Joann admitted to actually seeing her boyfriend sexually abuse her niece and daughter. Joann denied this.

On rebuttal, the Petitioner called the referent, Janice Blake of Psych Services. She clarified that Joann had told her that her daughter Elizabeth had reported seeing Joann's boyfriend have sex with the niece in the tent and not that Joann A. had reported personally seeing such activity.

RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

JURISDICTION

This is an appeal from a Circuit Court dismissal order and the Respondents admit that this Court has jurisdiction over appeals. West Virginia Code §58-5-1 allows civil appeals to be taken on appeal to this court.

STANDARD OF REVIEW

The Appellees would agree with the quoted text from *In the Interest of Tiffany Marie S.*, 470 S.E.2d 177 (1969) from the Appellant's brief with emphasis on "These findings shall not be set aside by a reviewing court unless clearly erroneous."²

ARGUMENT

The Petitioner (DHHR) had failed to establish its case to the standard of proof necessary to find that the infant respondents are abused or neglected children as defined by law. In this case, Richard O. is accused of abusing and neglecting his minor children. The allegations suggest that Richard O. had engaged in sexual misconduct with a cousin of his children in a tent between one and two years prior to the Petition and that he had written a letter to the infant respondent Elizabeth A. detailing prior sexual abuse.³

Much of Melody Bradbury's testimony is simply not credible. She repeatedly contradicted herself even while on the witness stand. She even claimed that Richard's presence the first time that she testified had intimidated her but he nor either Adult Respondent were in the courtroom either time she testified. It was apparent that she was attempting to conjure her testimony and justify it as she was faced with varying questions.

Cinday Derreberry appeared credible and neutral. She gave the motivation behind the alleged letters. She said that Richard and Elizabeth's relationship was strained, that she would resist Richard's authority. She resented his attempts to discipline her.

One (of two) critical questions is, "who wrote the letters?" If you compare the letters, the same misspellings occur throughout both letters. It is very apparent that whoever wrote the first letter also wrote the second letter. Neither letter is signed. The first letter uses words that a feminine writer would use such as "make love."

² Note that the Circuit Court has now *twice* found the Petitioner's primary fact witness to not be credible on *both* of her versions of the evidence and has now *twice* dismissed *two* petitions on the merits and after personally presiding over the proceedings.

³ That Richard O. would detail in writing a confession of criminally explicit sexual misconduct was, and is, strikingly unlikely to Counsel. Nobody, even Appellant, pursued any theory that the letter was true.

Richard could not have written the second letter. It contained information known only to Elizabeth A. after he had already been ejected from the home. In the letter, Elizabeth tells her friend Rachel that she will talk to her Sunday night. Elizabeth visited Rachel on the Sunday night after Richard was removed from the home. Elizabeth testified that her plans to see Rachel were made after Richard left the home. Thus, Richard could not have known that Elizabeth was going to have any contact with Rachel on that Sunday Night. He was removed Friday before even Elizabeth knew she would have contact with Rachel. Aside from that, it makes no sense that Richard would be the author of the first letter.

First, the letter makes serious allegations against Richard's father. Richard and Patty both denied that their father had any sexual misconduct with them or their siblings. Second, if Richard is trying to hide this, why would he write what happened down and increase his chances of being caught. The letter indicates that Richard was leaving but there was no testimony that he had any plans to leave.

The only person who benefited from those letters was Elizabeth. As she stated in the second letter, she finally got Richard out of the house and even had his family mad at him.

As to the tent incident (the second critical question), there was testimony that in the fall of 2002, Elizabeth and Richard had been involved in an argument and Elizabeth wanted out of the house. The DHHR placed her with Richard's relative in Calhoun County. If Elizabeth had actual knowledge of Richard and Melody having sexual intercourse that would have been her perfect opportunity to disclose it (but, it may not have been thought of yet). The only scenario that makes sense is that Elizabeth later

planned the letters then made up the tent story at that time. (Once again, note that the pretended "victim" of the "tent" sex denied it in her testimony.)

Notably on reflection, DHHR (a) failed or declined to offer testimony in this case and (b) appeared to alter and/or conceal evidence exculpatory to the Respondents (and, consequently, damaging to its case).⁴ Matters that later (especially after a second case was filed and heard in the Circuit Court of which this Court was unaware) appeared to be important and within the knowledge of DHHR were missing. For example, allegations about the Respondents appearing at the DHHR office together would have to be substantiated by testimony from the Petitioner or its agents (That offhanded allegation went to the issue of whether Joann A. was protecting her children while the issue of the first "letter" was pending.). DHHR also "misquoted" Janice Blake to the effect that Joann had actually seen any sexual abuse. Also, Elizabeth A. testified that her statements to the DHHR were recorded. Upon a demand by Respondents to produce the tapes, the DHHR denied the existence of tapes of these interviews. The DHHR did not disclose Melody's prior inconsistent statements to the officer nor on tape until this Counsel discovered their existence and asked the Circuit Court to require their production.

In sum, there is no consistent substantiated evidence the Richard O. wrote any inappropriate letters or did any inappropriate sexual acts. There was absolutely no evidence of abuse or neglect of his two biological children. Richard O. has always treated Elizabeth as if she were his own child but if she wants to live with her biological father that is fine. Richard O. asks the Court to dismiss this petition and return the custody of his two minor biological children to him and their mother Joann A. This case

⁴ It is consistent with this practice that DHHR and Appellant failed to advise this Court of the second case and the repudiation of the underlying testimony in this case while this appeal was pending.

is composed of ill founded suspicions, excited accusations, agenda driven persecution, contradictions and testimony found by the trial court to be simply not credible (and later openly admitted by Elizabeth in the second case as "lies.").

The Appellant is correct in stating that here was no evidence that either of the two younger children were abused or neglected. In her brief she states that Melody was sexually abused by Richard O. but that the younger children should be deemed to be abused or neglected because Elizabeth was sexually abused by Richard O. The Appellant's own confusion on the point of which child was abused and in what manner shows how this case was vague to the point that the judge, parties, nor attorneys actually know whether the alleged acts occurred. No human could unravel the blatant fabrications and contradictions heard by the Circuit Court in these cases (including the follow-on case filed while this case was pending and of which this Court was not properly apprised).

As to the Appellant's arguments about the Court refusing to terminate the parental rights of the Respondents, the Court did not refuse to terminate parental rights, because the case never reached the stage of a dispositional hearing. The Court cannot terminate parental rights when the children are not abused and/or neglected .

PRAYER FOR RELIEF

The Respondents respectfully ask this Honorable Court to affirm the rulings of the Circuit Court of Roane County and dismiss this action.

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CERTIFICATE OF SERVICE

Pursuant to the Rules for Appeal in West Virginia, the undersigned counsel for the Adult Respondent hereby certifies that she did on the 9th day of August, 2004, deliver the original and nine copies of this document to the Clerk of the West Virginia Court of Appeals and serve the foregoing and hereto appended paper entitled "Brief of Respondents" by facsimile transmission of a true copy thereof to the following counsels of record:

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