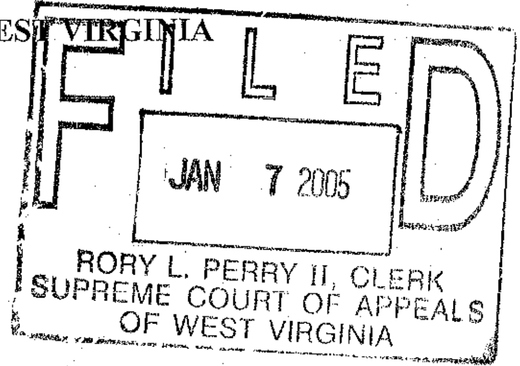
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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

NO. **32166**

BRIEF OF APPELLEES

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In Re: Elizabeth A., Richard O. and Kimberly O. Appeal No. 31761 (Now Pending)

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

In re Stephen Tyler R., 30654 (7-1-2003), 580 S.E.2d 854

APPELLEES' BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

KINDS OF PROCEEDINGS, FACTUAL BACKGROUND AND NATURE OF RULINGS BELOW

This case cannot be adequately reviewed or understood except when considered along with that certain case involving all of the same parties and upon the same facts as in Appeal No. 31761.

Appeal No. 31761 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. *Petitioner DHHR's case absolutely depended upon whether Richard had performed the acts described in the "letter" upon Elizabeth and whether Richard O. had had sexual intercourse with a child friend in the "tent" incident.* If false, there was no case. All allegations depended upon the truth and proof of these allegations.

The authorship and authenticity of the writing was never established and is subject to two conflicting theories, one being that it was a "set up" of Richard O. by Elizabeth A. in retaliation for a pattern of discipline imposed by Richard O. contrary to her wishes to live rather unfettered by rules and, specifically, for not permitting Elizabeth A. to stay overnight with a friend. The opposing theory 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. Petitioner's and allies' attempts to prove that Richard O. was the source of the writing itself was futile and the Circuit Court made no such finding. (Interestingly, there were *two* letters and the second letter tended to show Elizabeth A. as the author of both. However, again, no finding of authorship was made by the Court.)

The "letter" was theorized by all parties to have originated from the computer located in Elizabeth A.'s bedroom and upon which she spent considerable time. However, in her testimony of March 14, 2003, *Elizabeth A. dismissed the contents of the "letter" as something that she could not "remember" and no further consideration of the "letter" was entertained in the action.* Thus, the acts referred to in the "letter" were summarily abandoned by Petitioner DHHR and Appellant *guardian ad litem*, Elizabeth A., the Court and all parties as variously fantastic, inexplicable, untrue, unimportant, irrelevant and of no further concern.

Further testimony was presented and was quickly seized upon as the remaining crux of the Petitioner's case (not the accuracy of the contents of the unauthenticated "letter"). Elizabeth A. (and the Petition) had alleged that Richard O. had had sex with another minor in her presence in a tent in the yard of the residence some year or two before. (The allegations against Joann A., Elizabeth A.'s mother, pivoted upon the allegation that she had not properly protected Elizabeth A. from the alleged conduct.) In the hearing, however, that alleged victim testified *for Petitioner that the sexual*

intercourse had simply not happened – undercutting that remaining part of the Petitioner's case (and the issue of whether Joann A. had protected Elizabeth A. from the spurious allegation.). Many other matters were addressed with a consistent disparity of testimony as to critical details that should have been more closely related if such testimony had been true.

By Order entered on December 3, 2003, the Circuit Court decided, after hearing all witnesses presented by all parties, (among other things) that "..the testimony of the two teenage girls (Elizabeth A. and her friend) is not worthy of belief..." and that "(t)he petitioner has failed by clear and convincing preponderance (sic) of evidence that the acts alleged in the petition occurred." DHHR and allies had no case on the "facts" as they pursued them in the Adjudication Hearing. That the Circuit Court was absolutely correct in its finding of incredibility was later dramatically confirmed (as described hereafter and particularly in Footnote 4). Thereafter, on January 28, 2004, this appeal was filed to this Court.

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] *This is the instant case for which the Petition for Appeal was filed on September 2, 2004 and is the subject of this Response.* DHHR acted

[1] This new Petition was misrepresented in Appellant's Brief in Case No. 31761 dated July 9, 2004, alleging that the underlying factual basis for a new Petition was "new" evidence when it was demonstrably actually a "new" story regarding the same evidence.

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 the appeal in Case No. 31761 was pending, Petitioner DHHR sought from the Circuit Court another Petition to relitigate and embellish upon the "letter." 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 relitigate (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 in Case No. 31761) 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.[2] The Circuit Court (upon being then assured that the grounds were new and different) thereafter issued the third proffered Petition (now being the subject of this appeal). Petitioner DHHR then blithely provided the letter as a part of the disclosure rather than as an exhibit as had been refused by the Circuit Court.

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[2] Counsel opines that the inclusion of the "letter" with the second Petition issued by the Court (third version) would give obvious notice that the "letter" issue was to be relitigated. The Circuit Court had already refused a new Petition (second version) with the "letter" attached as an Exhibit. Knowing that, DHHR simply removed the Exhibit and embellished the allegations to describe activity emanating from references in the "letter." If the "letter" was not to be relitigated, why attach it to the second (refused) Petition? Then, why remove it from the third Petition where it would not be obvious to the Circuit Court and slip it in with the disclosure?

While Appeal No. 31761 was pending on appeal in this Court, neither Appellant nor Petitioner DHHR informed this Court that they were continuing the same allegations (albeit a different "spin") in the lower Court while allowing this Court to rule and act upon the appeal in ignorance of (a) the second petition and (b) testimony by their primary witness admitting that she had lied in this case that is on appeal.[3]

Thereafter 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 as Appeal No. 31761) 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).[4]

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[3] Note that neither the Petitioner below, DHHR, nor the *guardian ad litem* for Elizabeth A. filed either individual appeals or joined in this appeal.

[4] In the first case, *In Re: Elizabeth A., Richard O. and Kimberly O., Supreme Court No. 31761,* (Case Nos. 02-JA-28, 29 and 30 below), Elizabeth A. testified on March 14, 2003, as follows:

> "Q. Do you remember any of the things that this letter talks about that happened in the past?"
> "A. No, I do not."

To put the question and answer in context, the "letter" had contained very explicit language describing sexual acts that had ostensibly occurred between Elizabeth A. and Adult Respondent Richard O. In the

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.

The *guardian ad litem's* Appeal Petition in Appeal No. 31761 and subsequent Brief is predicated upon the truth of the testimony of Elizabeth A. in the instant case. It is now undeniable that from April 12, 2004, when Elizabeth A. testified that she had lied in this case, to May 27, 2004, when this Court granted the appeal in Appeal No. 31761, that the *guardian ad litem* and Petitioner DHHR knew that the factual basis upon which the appeal was based was false. In fact, for an unknown period of time even before the actual filing of the second Petition as they maneuvered to craft a Petition that the Court would sign, both Appellant and DHHR had to know that the story was different and contrary to the former testimony and, finally, that the Supreme Court of Appeals was in the dark.

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context of the hearing, the question and answer clearly disposed of any indication that Elizabeth A. maintained that any of the sexual activity had actually happened. No follow up was necessary inasmuch as Elizabeth A. had denied (as not remembering?) any such acts.

In the second case (third Petition and of which this Court has been unaware), being Case Nos. 04-JA-11, 12 and 13 below (improperly identified on the transcript attached) on April 12, 2004, Elizabeth A. testified as follows:

"Q. How can we tell about what you are saying today?" (Referring to Elizabeth A. having lied in the first case and questioning her credibility now.)

"A. You'll just have to use your best judgement (sic) because yeah, I did lie the last time I testified, but that was in fear of getting hurt."

The context of the question and answer was precisely on the question of her admission that she had lied in the first case (now on appeal). In the first case, her testimony was that Richard O. had sexually abused another minor, a friend (who denied it in her own testimony) and that the "letter" contained sexual matters that had not happened. Her spin was to give a nonsensical and illogical reason to excuse her perjury but her

The Appeal Petition in Appeal No. 31761 is largely a partisan argument rather than an actual attempt to relate matters of fact in the proceedings below to accurately inform the Court. Critical facts are omitted such as that the "letter" had not been authenticated (and nobody can prove who wrote it), that the truth of the contents of the "letter" had been denied by Elizabeth A. and abandoned by the Petitioner and allied advocates and that the charges against Joann A., that she had failed to protect the children, was largely undercut. (The charges were completely undercut when the reputed "tent" victim testified for the Petitioner that no sexual intercourse occurred.) The Petition then also makes sweeping conclusions, such as that Richard O. is a "sexual predator" when no such judicial finding was entertained or made.

The Appeal Petition in Appeal No. 31761 contains many "facts" in controversy and that were found to be not credible by the Circuit Court. However, one "fact" is nowhere alleged, i.e. *that the mysterious and unauthenticated "letter" was true.* That was apparently a strategic decision *made later* to obtain the second petition in Circuit Court under the guise of "new" allegations while Appeal No. 31761 was pending and without the seeming necessity of alerting the Supreme Court of Appeals of ongoing activity below that, in fact, materially affected Appeal No. 31761.

The ends simply cannot justify the means.

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admission of perjury was clear. This development was withheld from this Court and the Appeal Petition was considered by this Court without knowledge of the admitted perjury.

RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. Did the Circuit Court err by finding "no probable cause" and therefore dismissing the abuse and neglect petition following a partial preliminary hearing?

As to a matter of fact finding, refer to *In re Stephen Tyler R.*, 30654 (7-1-2003), 580 S.E.2d 854, Syllabus Point One, that "Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. **These findings shall not be set aside by a reviewing court unless clearly erroneous.** A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety." Syllabus point 1, *In re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).[5]

As to the Preliminary Hearing being a "partial preliminary hearing," there is no standard at law whatsoever to define a "whole" preliminary hearing. In every case known to West Virginia law, the State or Petitioner has complete freedom to present whatever it

believes is necessary to carry its burden of proof. Appellees are confident that the Petitioner made its presentation to its complete satisfaction. Appellant was likewise free to offer evidence. Appellees are equally confident that she both knew this and did it. Appellant is merely dissatisfied with the result – again.

2. Did the Circuit Court err by refusing to grant the guardian ad litem's motion for forensic child maltreatment evaluations for her clients, without a hearing or any meaningful opportunity to address the request?

This is an interesting complaint knowing the history of the cases. The record and matters not particularly clear of record, but known to the participants, demonstrate ample incidents in which Appellant has gained advantage by circumventing the traditional manner of making motions and giving notice of a hearing. For example, Appellant moved for a stay of proceedings in Appeal No. 31761(after it was also dismissed by the Circuit Court) and tendered (at the same time) an order to the Court granting her motion without giving any notice whatsoever to any party nor scheduling a hearing thereon. There was no hearing and Appellant's order was entered by the Circuit Court *prior to Appellees' knowledge of the existence of such a motion.* Conversely, the hearing on Appellees' Motion to Reconsider Stay and Issue Instructions filed on December 4, 2003, and scheduled for hearing on January 14, 2004, was suddenly and mysteriously cancelled *on the morning of the scheduled hearing* and then delayed by the Court's schedule until

[5] 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.

April 5, 2004. (Note that the instant Petition was filed in the interim.) Appellant's complaint of error is somewhat suspect.

Of great import is the fact that when a case is dismissed, parties' motions are moot. The preliminary hearing was provided for by Petitioner who, universally, provides the petition and order. The Preliminary Hearing was over on April 12, 2004. The decision in the case was then properly "in the breast of the Court." Appellant's motion was filed thereafter. The Court apparently did not need Appellant's motion (or Appellee's motion opposing it for that matter) or any further proceedings to rule on all of the evidence presented to the apparent satisfaction of both Petitioner and Appellant. The Court had no obligation to afford anyone a hearing on a matter it was deciding to dismiss *after Petitioner rested its case.*

3. Did the Circuit Court err by stating that the child victim's testimony was not credible based upon her "forgetting" the events in a prior abuse and neglect proceeding, although the events were not specifically set forth in the petition?

The "child victim" in this case is almost 18 years of age and was 16 years of age when she first testified in the first of these cases on March 14, 2003. She was old enough to lie in both cases and old enough to know what she was doing. That the Court found her in both instances to have been untruthful is clear in the record. That this near adult understands (a) the concepts of truth, falsity, oaths and (b) calculated claims of "forgetting" strikingly unforgettable allegations (even in the face of a "letter" to "remind"

her) is clear. That she is somewhat unskilled at predicting the gullibility of the Court by claiming sudden recall is also clear. It stretches the imagination to accept a carefully worded denial with a later epiphany of recollection and clarity. To opine otherwise without any evidence is to reach for imaginary justification.

SUMMARY

This appeal is based entirely upon admittedly perjured testimony. "When you don't have the facts, argue the law," is a famous maxim from Counsel's past. That is the case here. That Appellant complains that she did not have a full hearing avoids the question whether the Petitioner and Appellant had an opportunity to present their case. They appeared with their only first hand fact witness and presented her with ostensibly the full story. The parties must have believed that they appeared for some important reason to present evidence – and they did so. That it was a complete hearing is clear of record. Else, would the parties not have demanded a hearing sometime between April 12, 2004 (the "preliminary hearing"), and July 22, 2004 (the order of dismissal)? They did not. Whether the Court called it a "preliminary hearing" (that Appellant insists it could not be) or it was an "adjudication" (that it, therefore, must have been) is immaterial. The parties presented their evidence and it was not found credible and *failing any standard of proof in law*. In fact, their star witness admitted lying in the previous case *about the same set of facts.* So, this Court is now asked to send one or both cases on appeal back to the Circuit Court for a third try at fashioning a story that the lower Court might believe. (Does that foreshadow yet again another appeal *ad infinitum*?) The testimony would either be the same or (yet again) different. If it is the same, it has already been rejected as

not credible. If it is again different, one might be safe to opine that the lower Court would again (for even more reason) find the testimony not credible.

The Supreme Court of Appeals is being asked to substitute its own judgment in the place of a fact finder contrary to its own previous holding (*In re Tiffany Marie S.*). The Supreme Court of Appeals is further being asked to ignore admitted perjury. The Supreme Court of Appeals is being asked to put form over substance. Appellant and Petitioner have had two attempts to convince a fact finder and failed. (In fact, Petitioner did not even appeal.) The case(s) espoused by Petitioner and Appellant even got worse with time inasmuch as their solitary star witness finally admitted what the Circuit Court already knew, i.e. that she was lying. If Appellant has a legal point upon which this Court should rule, this case is a poor choice upon which to make, change or define law.

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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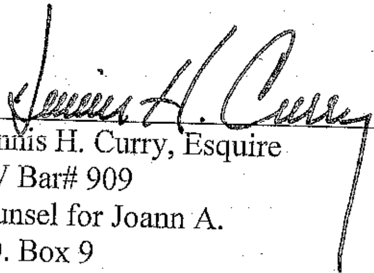

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CERTIFICATE OF SERVICE

Pursuant to the Rules for Appeal in West Virginia, the undersigned counsel for the Adult Respondents hereby certifies that they did on the 7th day of January, 2005, 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 Appellees" in person, by facsimile transmission and/or by US Mail, postage prepaid, of a true copy thereof to the following counsels of record:

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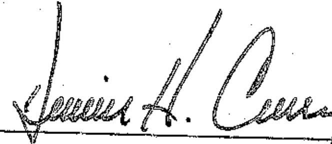

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