

**BEFORE THE WEST VIRGINIA SUPREME COURT**

IN RE: THE CHILD OF

TEVYA WEATHERHOLTZ,  
Petitioner Below, Appellant,

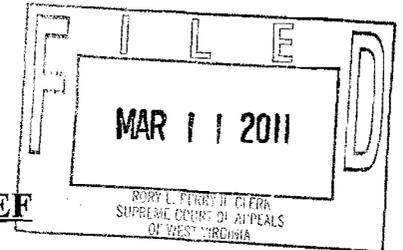
VS

CASE NO. 35760

ELIAS TRAD VANCE,  
Respondent Below, Appellee.

(Appealing Order of Circuit Court of Hardy County, West Virginia  
Circuit Court Judge Jerry D. Moore who  
affirmed the Order of Family Court of Hardy County, West Virginia  
Family Court Judge David P. Born  
Civil Action No. 03-D-55)

**APPELLANT'S REPLY BRIEF**



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**APPELLANT'S REPLY BRIEF**

After reviewing Appellee's brief, Appellant would like to point out certain things as a result of the Statement of Facts set forth in the Appellee's brief.

On page 5 of the brief, Appellee makes reference to Appellant's addiction to drugs. Addiction is not the proper terminology. Nothing in the record indicates anything other than a brief period of abuse, precipitated by the Appellant accidentally backing over a woman and seriously injuring her. Appellant foolishly, at the time, turned to an illegal drug to help her deal with the stress created at that time.

In the next full paragraph on page 5 of the Appellee's Statement of Facts, Appellee represents that the Appellant continued to use drugs after her release from Chestnut Ridge Hospital. There is nothing in the record to support this. To the contrary, there is no evidence in the record whatsoever of Appellant's use of drugs after her release from Chestnut Ridge Hospital, in July of 2005. It is interesting to note that throughout Appellee's recitation of facts, Appellee maintains that he doesn't use drugs. At the time that the Appellee filed for custody on October 17<sup>th</sup>, 2005, the hearing resulting from this application involved Appellant's father. Appellant's father, concerned for the well being of his grandson, had spoken with both the Appellant and the

Appellee. The grandfather was involved in the Appellant's involuntary hospitalization in July of 2005. He was also involved in trying to find out what was best for his grandson at the time. His testimony shows that at the time of the hearing resulting in the December 19<sup>th</sup>, 2005, order, Appellant's father testified before Judge Arrington that the Appellee had also admitted his use of controlled substances, particularly methamphetamine.

On page 6 of the Appellee's brief, there is a recitation of fact stating that the Appellant filed for modification in July 2006. What Appellee doesn't say is that this was a Pro Se modification and Appellant had no knowledge with regard to how to proceed against the Appellee who had competent counsel. Appellant, at that hearing, advised the Court of her negative drug tests, both blood and urine. This is certainly relevant since the Appellee chooses to go into the history of all of the hearings.

It is true, that the Appellee did file for a Contempt Petition and Modification in February of 2007. Again, Appellant attempted to represent herself, certainly an unwise move. At that time, Appellant was accused of moving without notification. It is certainly interesting that the Appellee had moved from Dorcas, to Whitmer, West Virginia, without notifying the Appellant. Appellant didn't know to counter the pleadings and her move was less distance than that of the Appellee. The allegation about failing to return the child on time once, fails to set forth the fact that there was a horrible winter storm and snow was involved in the Whitmer area of Randolph County. The same paragraph indicates that the Appellant was jailed for nonpayment of child support. The reality is that the Judge ordered her jailed unless she paid this support. Her mother, paid the arrearage to forestall and avoid jail. Why Appellee fails to set this forth these things in his facts, is certainly something the Supreme Court should consider.

In the last paragraph on page 6 of the Appellee's recitation of the facts, the Appellee mentions that the Family Court dismissed Appellee's March 31<sup>st</sup>, 2008, Petition for Modification. Again, Appellee fails to mention the fact that at this hearing, Appellant had subpoenaed Appellee's wife to testify. Appellee opposed her testimony, and the Family Court ruled that the Appellee's wife would not be permitted to testify. The Supreme Court has to wonder why the Appellee did not want his then wife to testify in the hearing as Appellant's witness.

Appellant admits that since 2005, there were three hearings before the Court, prior to the one filed in January 2010, the first was the Appellant's Pro Se Petition for Modification. The second was the Appellee's Petition for Contempt, when the Appellant was, again, pro se. The third was when the Appellant was represented by counsel, but she did not have corroboration of her allegations once the Family Court ruled that the Appellee's wife would be precluded from testifying.

When the Appellee divorced his second wife, Terri Bennett, in the fall of 2009, his second exwife's testimony became available for the first time.

Appellant admits that her January 2010, Petition for Modification, in the main, sets forth: that she has been drug free since July of 2005; that she has remarried; that she has been gainfully employed as a substitute teacher's aide, in the Hardy County Education System; that the Appellee has an alcohol problem; that Appellee has a drug problem; that Appellee has a violent temper; and that the Appellee, as a boiler maker, has no time to spend with their son, and delegates his care to others.

There is no dispute that Appellant used drugs, prior to July 2005. There is no dispute that Appellant has remarried. There is no dispute that the Appellant has been hired by the Hardy

County Board of Education as a substitute teacher's aide. What is disputed by the Appellee is that he has an alcohol problem, a drug problem, a violent temper, and that he delegates his child care to others.

It should be noted that the Appellant lived with the Appellee for 2 ½ years before they were married. Appellant was then married to the Appellee for 2 ½ years. Appellant cared for Eli during their marriage. They divorced in September of 2003. Appellant had the primary residence of the parties' son from the time of their divorce in 2003, with the Appellee having parental time, when his job permitted, until July of 2005. From the time of the parties' divorce until July of 2005, Appellee's contact with their son was as his employment permitted. In July of 2005, the Family Court, as a result of Appellant's hospitalization, ordered a 50/50 parenting arrangement until December of 2005, when the primary residence was transferred from the Appellant to the Appellee.

Appellee married in the fall of 2005, before the primary residence was shifted to him. His second wife, Terri Bennett, testified that the Appellee was never home, except on weekends, except for a six-month period of time, after his fourth DUI arrest when he was sentenced to home confinement with work release for six months. Appellant and Terri Bennett are the only two people on earth, from 1997 until 2009, that lived with the Appellee. His exwives are the only two people on earth that had the opportunity to observe his alcohol use, his controlled substance use, his temper, and who actually took care of Eli. No other person, on earth, lived with him during this period of time other than these two women, his two exwives.

Appellee, argues, in his Statement of Facts, that Appellant and her witness are inaccurate. He argues that he parents the parties' child himself, and further recites that since 2008 he has

either worked at Mt. Storm, in Grant County, or Morgantown, in Monongalia County. Terri Bennett, his second exwife lived with him during this time period. Her testimony was that he was never home except on weekends, with one exception. There was one time period, after Appellee was arrested for his fourth drinking and driving offense, that he was sentenced to six months home confinement with work release. Other than that, he was only home on weekends.

The undisputed evidence shows that Appellant was the primary caretaker of the parties' son from his birth until the time that the Family Court changed primary custody in December of 2005. After that, until the Appellee's divorce from his second wife, Terri Bennett, in the fall of 2009, Terri Bennett was Eli's primary caretaker. Terri Bennett testified specifically that the Appellee was not home nightly and in fact, had a mobile home, or trailer, in the Fairmont area where he stayed during the week, when working in Morgantown.

Appellee, in his Statement of Facts, argues that he does not have an alcohol problem, a substance abuse problem, or an anger problem. Terri Bennett, Appellee's second exwife, testified that from the fall of 2005 to August of 2009, when she divorced Appellee, she provided the caretaking functions for Eli. She testified that before she married Appellee, she had him checked out with a law enforcement friend, and learned that he had a drinking and driving conviction in Utah in 1990, a DUI in Grant County in 1992, and a third drinking and driving charge in Grant County in 1998. She testified that after she married him, he had his fourth drinking and driving charge in December of 2006, which was only charged as a second offense. She also testified that when this happened, she was ordered and directed by Appellee to keep his fourth DUI arrest and conviction in Lewis County a secret from the Appellant. Appellee argues that his arrest was a public record and Appellant should have known of it. His arrest was such a well kept secret that

his own family wasn't aware of it at the hearing.

Her testimony further, is that while married to Mr. Vance, she had seen the Appellee use cocaine on several different occasions, methamphetamine on several different occasions, and mushrooms on different occasions. She said that this illegal drug use by the Appellee was nothing compared to what she identified as his daily use of marijuana and alcohol when home. She testified that his average daily consumption of alcohol, while at home, was a 12 pack, or more, of beer every evening and marijuana every day. When asked how he got away with this kind of alcohol and marijuana use with his work as a boiler maker, she advised that the Appellee had purchased what is known as a "Whizzinator," an artificial silicone penis, that he would fill with the clean urine of another and use when tested. In fact, she testified that at the 2008 hearing, Appellee feared a drug test, and attended the hearing wearing the Whizzinator after he had her apply makeup to it to make it look more realistic. He had also filled the Whizzinator with the parties' son's urine.

In addition to the four drinking and driving charges, Terri Bennett testified to two recent automobile wrecks that Appellee had where both vehicles were totaled as a result of the Appellee's drinking. One was in the fall of 2009 when the Appellee totaled Mrs. Bennett's automobile. She inspected her vehicle, immediately after the wreck, and determined the wreck was alcohol related as the result of the strong smell of beer throughout the vehicle. She testified about another wreck where the Appellee totaled another car in early 2010, where drinking was the cause. Appellee blamed both wrecks on deer.

After listening to the evidence submitted by both the Appellant and Appellee's second exwife, Judge Born found and concluded that Appellant did not prove that drug use by the

Appellee exists. Judge Born made no findings regarding Appellee's alcohol use, no findings regarding Appellee's temper, and no findings regarding who actually cared for young Eli.

It is interesting to note that near the end of the hearing, Judge Born advised counsel that he did not like to hear evidence of exwives, or family members. The evidence in this case consisted of nothing but the Appellee's exwives and Appellee's family members, with one exception, Eli's teacher. Judge Born and Judge Moore were both clearly erroneous in the findings of fact that were made. Judge Born and Judge Moore both seem to hang their hat on the fact Eli was doing well in school. It is submitted that before the Sharon Tate murder, a child of Charles Manson might have been doing well in school. That would be no basis for ordering that child to continue to live with Charles Manson.

In the discussion portion of Appellee's brief, Appellee argues that the Appellant didn't show that she didn't have a drug problem, and she produced no independent evidence to substantiate this. She submitted evidence of blood and urine tests that were negative in her 2006 pro se initial petition. At the hearing on March 31<sup>st</sup>, 2010, Appellant moved the Court to have both parties drug tested. First, because she and Appellee's second exwife both believed that the Appellee was on something, and second, because she wanted to prove to the Court that she was and has been drug free. Appellant counted on the requested drug test, not only to show that she was drug free, but more importantly, to show that the Appellee was not. The Family Court failed to order the test which is normally routinely granted by the Family Court of Hardy County.

Appellant submits that she did meet every burden of proof required of her. Appellee's witnesses, his father, his stepmother, his cousin, his grandmother, and his aunt, testified that they had never seen him impaired by drugs, or alcohol. It is submitted that none of these people lived

with the Appellee from 1997 to the date of the hearing. The only two people on earth that ever lived with Appellee, during this time period, are the Appellant and his second exwife, Terri Bennett. Both testified, in detail, with regard to his alcohol abuse, his drug abuse, and his violent temper. None of Appellee's witnesses knew of his four drinking and drug convictions.

Appellee makes a great argument that the Appellant did not produce evidence of the Appellee's fourth DUI conviction from 2006, in her 2008 hearing. The undisputed evidence is that the Appellee ordered his second wife to keep his fourth DUI conviction a secret from the Appellant and the Family Court wouldn't allow Appellee's wife to testify against him in 2008.

Appellee called his family to testify with regard to the fact that they had never seen him impaired by drugs, or alcohol. However, it is terrifically significant that none of his family was even aware of his four DIU convictions. How relevant, competent, or material can their testimony be about him not using drugs, or alcohol, when they, to a person, admitted that they had no knowledge of his four drinking and driving convictions. If he can keep four drinking and driving convictions from all of the members of his family, it wouldn't be much more difficult to keep his alcohol abuse, and drug abuse, from them when he hadn't lived with any of them for years.

It is submitted that the findings of Judge Born, upheld by Circuit Judge Moore, are clearly erroneous. Appellant's abstinence from drugs, since 2005, and the Appellee's continuous abuse of alcohol and drugs, is certainly a changed circumstance. Appellant's evidence preponderated. A change in the primary residence of young Eli, is called for and will materially promote his welfare. This is material benefit, not speculatively benefit.

**RELIEF**

WHEREFORE, Appellant respectfully requests of the Honorable West Virginia Supreme Court as follows:

1. That the order of the Family Court of Hardy County and the order of the Circuit Court of Hardy County, dated June 10<sup>th</sup>, 2010, be reversed.
2. That the Supreme Court remand the case with directions to modify the existing Shared Parenting Arrangement, and direct that the primary residence of young Eli be placed with his mother, the Appellant, and make the appropriate adjustments to child support.
3. That the Appellant be awarded her reasonable attorney fees and costs in this appeal.
4. General relief.

  
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Counsel for Appellant

TEVYA WEATHERHOLTZ  
By Counsel

STATE OF WEST VIRGINIA,  
COUNTY OF GRANT, to-wit:

TEVYA WEATHERHOLTZ, the Appellant named in the foregoing APPELLANT'S REPLY, being first duly sworn, says that the facts and allegations herein contained are true except so far as they are therein stated to be on information, and that, so far as they are therein stated to be on information, she believes them to be true.

  
TEVYA WEATHERHOLTZ

Taken, sworn to and subscribed before me, this the 10<sup>th</sup> day of March, 2011.

My commission expires 3/10/19.



  
NOTARY PUBLIC

**CERTIFICATE OF SERVICE**

I, John G. Ours, counsel for the Petitioner, do hereby certify that I have served the foregoing APPELLANT'S REPLY upon the Appellee by mailing a true copy thereof to his counsel, Patricia Kotchek, at her mailing address of P.O. Box 218, Petersburg, WV 26847, by U.S. Mail, postage prepaid, on this the 10 day of March, 2011.

  
JOHN G. OURS