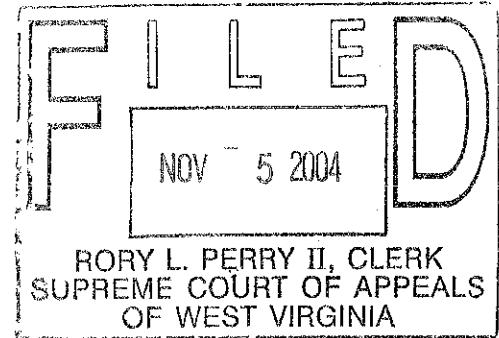


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 31864

APPELLANTS' BRIEF



IN RE: GRANDPARENT VISITATION OF  
CATHY L. (RILEY) MORRISON,

Appellee,

vs.

MARK BRENT RILEY and  
CARLA ANN RILEY,

Appellants.

Appeal from the judgment of the Circuit Court  
of Harrison County, rendered on the 17<sup>th</sup> day of  
February, 2004, Civil Action No. 03-D-187-4

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## List of Authorities

<u>Authority</u>	<u>Pages</u>
1.) <u>Brandon L. v. Moats</u> , 209 W.Va. 752, 551 S.E. 2d 674 (W.Va. 2001)	4,-10,12
2.) <u>Linsie D.L. v. Richard W.S.</u> , 591 S.E. 2d 308 (W.Va. 2003)	5
3.) <u>Troxel v. Granville</u> , 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000)	5-6,8-11
4.) <u>West Virginia Takes Refuge in Troxel's Safe Harbor: State Ex Rel. Brandon L. v. Moats</u> ; by Kristina Thomas Whitaker, W. Va. L. Rev., Winter 2003.	6
5.) <u>Howard v. Howard</u> , 661 N.W.2d 183 (2003)	11-12
6.) <u>Ingram v. Knippers</u> , 72 P.3d 17, 2003 OK 58 (2003)	11
7.) <u>Blixt v. Blixt</u> , 437 Mass. 649, 774 N.E.2d 1052 (2002)	11
8.) <u>State v. Davison</u> , 31 Kan.App.2d 192, 64 P.3d 434 (2002)	11
9.) <u>Richburg v. Richburg</u> , 2004 WL 1534136 (Ala.Civ.App.) (2004)	11
10.) <u>In re the Visitation of C.H.</u> , 792 N.E.2d 608 (2003)	11
11.) <u>DeRose v. DeRose</u> , 469 Mich. 320, 666 N.W.2d 636 (2003)	11

Now comes the Appellants, Mark Brent Riley and Carla Ann Riley, by their counsel, Thomas W. Kupec, and presents the following Brief.

**KIND OF PROCEEDING AND NATURE OF RULINGS BELOW**

The natural Grandmother of an adopted child sought visitation rights under the Grandparent Visitation Rights Statute. The adoptive parents opposed visitation as did the Guardian Ad Litem. The Family Court made the decision to allow visitation without applying any burden of proof which was upheld by the Circuit Court, without a hearing.

**STATEMENT OF FACTS**

C.L.R., hereinafter referred to as the adopted child, was born February 13, 1999, in Harrison County, West Virginia to S.R. and J.R., hereinafter referred to as the birth parents. Thereafter, the Appellants herein adopted said child, by Decree of Adoption entered by the Circuit Court of Harrison County, West Virginia, on May 23, 2002.

In the adoption proceeding the Circuit Court found that the adopted child had been in the constant and continuous care, custody and control of the Appellants for most of her life and exclusively since February, 2001.

Both the birth mother and birth father executed a consent to adoption and were served with proper notice concerning the adoption. The birth father made an appearance by an attorney in the adoption proceeding but agreed and consented to the adoption. The birth father is the cousin of Mark Brent Riley, one of the Appellants herein.

The Petitioner in the underlying proceeding, the Appellee herein, is the ex-wife of Mark Brent Riley's brother and the mother of the birth father. She has remarried since her divorce from him.

Therefore, the Appellee is the natural Grandmother of the adopted child, who was adopted

by her uncle and aunt.

The Appellee filed a Petition on April 22, 2003 seeking Grandparent Visitation on the basis that she was a significant care giver for the adopted child prior to her adoption and that she had not seen the child for over a year. The allegation of being a significant care giver was disputed and the issues were joined. Thereafter the parties agreed that a Guardian Ad Litem should be appointed and jointly moved the Court to appoint a Guardian Ad Litem and the Court appointed a Guardian Ad Litem, by Order entered on October 21, 2003. The Guardian Ad Litem submitted her report on December 4, 2003, and recommended that the adoptive parents "have the sole determination of who (the adopted child) may spend time with and the Petitioner (Appellee herein) is not granted formal visitation as a Grandparent of the adopted child."

The Guardian Ad Litem reviewed all the relevant factors of W.Va. §48-10-502 and determined that the parents should be the ones to determine who may see their daughter.

Thereafter a hearing was held before the Family Court Judge, who took time to consider his ruling and a Final Order was entered on January 20, 2004 and this was appealed to the Circuit Court and his Final Order denying the Appeal was entered on February 17, 2004. It is from these Orders that an Appeal is taken.

#### **POINTS AND AUTHORITY**

1. The Family Court failed to find in his "Final Order" that the visitation is in the best interest of the child, which must be proved by clear and convincing evidence pursuant to W.Va. Code §48-10-702.

2. The Family Court failed to make two "ultimate determinations" as established by this Court in Brandon L. v. Moats, 209 W.Va. 752, 551 S.E.2d 674 (W.Va. 2001) relating to the best

interest of the child and the protection of the parent - child relationship.

3. The Family Court unjustly interfered with the constitutional rights of the parents in ordering visitation over their objection without just cause.

4. The Family Court failed to apply the presumption that visitation privilege need not be granted as required under §48-10-702(b).

5. The Family Court abused it's discretion, when, without any justification, it rejected the report of the Guardian Ad Litem.

6. The Appellee failed to meet any burden of proof to justify Grandparent visitation.

#### **DISCUSSION OF LAW**

Grandparents in West Virginia had no rights to visit with their grandchildren prior to the West Virginia Legislature passing a statute giving them such. Therefore, the "Grandparent Act, by it's own declaration, is the exclusive statutory scheme for resolving issues of Grandparent visitation". Brandon L. v. Moats, 209 W.Va. 752, 551 S.E. 2d 674, 677 (W.Va. 2001); *see also* §48-10-102. As such, any visitation rights a Grandparent may have comes only from these statutory provisions. §48-10-101 *et. seq.* Further, to knowledge of the undersigned, this Court has issued only one definitive case concerning this matter, Brandon L. v. Moats, 209 W.Va. 752, 551 S.E. 2d 674 (W.Va. 2001) Also see, Linsie D.L. v. Richard W.S., 591 S.E. 2d 308 (W.Va. 2003).

In this case the natural Grandmother filed a Petition for Visitation with the adopted child, which appears to be within the statutory guidelines. However, in deciding the Petition for Visitation, the Family Court ignored the findings of Brandon L. and violated the basic rights of the parents concerning the care and custody of their child as determined by the United States Supreme Court of Appeals in Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed. 2d 49 (2000), and adopted

and discussed by this Court in Brandon L. v. Moats.

### **Constitutionality and Content of §48-10-101 *et. seq.***

Brandon L. v. Moats and Troxel v. Granville have been subject to analysis in the West Virginia Law Review: West Virginia Takes Refuge in Troxel's Safe Harbor: State Ex Rel. Brandon L. v. Moats; by Kristina Thomas Whitaker, Winter 2003.

The Law Review article compares the Brandon L. v. Moats case with Troxel v. Granville, concerning the constitutionality of the West Virginia Statute.

“Reasoning that West Virginia’s statute is more narrowly tailored than the “breathtakingly broad” statute invalidated in *Troxel*, the Court held that it was constitutional. The supreme court noted that West Virginia’s statute requires a trial court to make two determinations: (1) that visitation is in the best interests of the child, and (2) that visitation will not substantially interfere with the parent-child relationship. Additionally, West Virginia’s statute includes a list of twelve specific and one general factor that a court must consider in deciding whether to grant a visitation petition. The *Brandon L.* court concluded that this list of determinative factors renders the statute narrowly tailored enough to be constitutional.” At page 548.

The Brandon L. case listed and emphasized the factors identified by the Legislature:

“In addition to setting forth the axiomatic standard of best interest by which any visitation decisions are to be made under the act, section five of our act requires a correspondent affirmative determination that such visitation “would not substantially interfere with the parent-child relationship.” W.Va. Code §48-2B-5(a) (Now § 48-10-501). As an aid to making this joint determination of best interests and lack of substantial interference with the parent-child relationship, the Legislature has delineated twelve specific and one general factor for the trial court’s consideration of this weighty issue.

Those factors are:

- (1) The age of the child;
- (2) The relationship between the child and the grandparent;
- (3) The relationship between each of the child's parents or the person with whom the child is residing and the grandparent;
- (4) The time which has elapsed since the child last had contact with the grandparent;
- (5) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
- (6) If the parents are divorced or separated, the custody and visitation arrangement which exists between the parents with regard to the child;
- (7) The time available to the child and his or her parents, giving consideration to such matters as each parent's employment schedule, the child's schedule for home, school and community activities, and the child's and parents' holiday and vacation schedule;
- (8) The good faith of the grandparent in filing the motion or petition;
- (9) Any history of physical, emotional or sexual abuse or neglect being performed, procured, assisted or condoned by the grandparent;
- (10) Whether the child has, in the past, resided with the grandparent for a significant period or periods of time, with or without the child's parent or parents; or
- (11) Whether the grandparent has, in the past, been a significant caretaker for the child, regardless of whether the child resided inside or outside of the grandparent's residence.
- (12) **The preference of the parents with regard to the requested visitation;** and
- (13) Any other factor relevant to the best interests of the child.

W.Va. Code § 48-2B-5(b)(1) - (13), (Now 48-10-502)

Brandon L. v. Moats, 209 W.Va. 752, 551 S.E. 2d 674, 685 (emphasis supplied by the Court).

This Court then went on to expand on the factors that the legislature identified: "A final significant difference between our statute and the Washington statute is the inclusion of a burden of proof standard requiring grandparent(s) seeking visitation to prove by a preponderance of the

evidence that the requested visitation 'is in the best interest of the child'. W.Va. Code § 48-2B-7(a), (c).(Now 48-10-701 and 702). *Id.* This Court was able to determine that this list of determinative factors along with the inclusion of the burden of proof standard renders the statute narrowly tailored enough to meet the requirements of Troxel and be constitutional.

### **Burden of Proof Requirement**

One primary focus of the Court in the Brandon L. case, in holding the grandparent visitation statute constitutional as argued in that case and comparing it to the Troxel is the application of the burden of proof required.

The Appellee filed her Petition pursuant to §48-10-702 and the Petitioner therefore is subject to such section.

§48-10-702 states:

**Proof required when action is not pending for divorce, custody, legal separation, annulment or establishment of paternity.**

(a) If a petition is filed pursuant to section 10-402 [§ 48-10-402] when the parent through whom the grandparent is related to the grandchild does not: (1) Have custody of the child; (2) share custody of the child; or (3) exercise visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose, the grandparent shall be granted visitation if a preponderance of the evidence shows that visitation is in the best interest of the child.

(b) If a petition is filed pursuant to section 10-402 [§ 48-10-402], there is a presumption that visitation privileges need not be extended to the grandparent if the parent through whom the grandparent is related to the grandchild has custody of the child, shares custody of the child, or exercises visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose. This presumption may be rebutted by clear and convincing evidence that an award of grandparent visitation is in the best interest of the child. (2001, c.91.)

This code section is applicable to the case at hand because, in this case, the Appellee(Grandmother) is related to the adopted child as a result of the appellee's relationship to her ex-brother-in-law. Since Mr. Riley has custody of the adopted child there is a statutory presumption that visitation policy need not be extended to the Appellee by virtue of §48-10-702 (b). There is no dispute that Mr. Riley is the parent through whom the appellee is related to the grandchild, or otherwise, the Appellee would not have standing to bring this action. Under §48-10-902, if the adopted grandchild was not adopted by someone related to the grandparent, the Appellee would not have the right to bring this action. Therefore, there can be no question that the appellant, Mr. Riley, is the parent through whom the Appellee is related to the grandchild, and since he has custody of that child, under this statute there is a presumption that visitation privileges need not be extended. As stated in section (b) of §48-10-702, the burden to rebut such presumption would be by clear and convincing evidence that an award of visitation is in the best interest of the adopted child. The Family Court erred in the case at hand because the Family Court did not apply the presumption against visitation privileges nor did it require the Appellee to meet the clear and convincing burden. In fact, the Family Court did not apply §48-10-702 to the case at hand in any way.

#### **Best Interest of the Child**

This Court in Brandon L. adopted the viewpoint of Troxel in determining the role of the parents in determining visitation: "We note that in light of the *Troxel* decision it is clear that 'the court must accord at least some special weight to the parent's own determination' provided that the parent has not been shown to be unfit." Brandon L. v. Moats, 209 W.Va. 752, 551 S.E. 2d 674, 685 (Citing Troxel v. Granville, 530 U.S. 57, 70).

This Court continued in Brandon L.,

Despite this legislative recognition of the important role that grandparents can play in the lives of children, a grandparent who seeks to avail him or herself of this statutorily-granted mechanism for seeking visitation must be able demonstrate that the visitation being sought will be in the best interest of the child[ren] and will not substantially interfere with the parent-child relationship. See W.Va. Code § 48-2B-5(a). This will be very difficult to do in cases where adoptions have preceded the petitions seeking visitation unless the petitioning grandparent[s] can demonstrate to the trial court's satisfaction, within the guidelines and standards established by the Legislature, that such visitation is likely to be a positive factor in the child's life and will not unduly disrupt the child's relationship with his/her parent(s). And, as we emphasized previously, in the absence of an established relationship between the grandparent[s] and the child[ren], it will be most difficult to meet the statutory standards imposed under the act.

Brandon L. v. Moats, 209 W.Va. 752, 551 S.E. 2d 674, 687 (Emphasis added).

In Troxel, the United States Supreme Court required that at a minimum, the trial court give weight to the parent's wishes regarding visitation by a grandparent, and, furthermore, held that there is a presumption that a parent will act in the child's best interest and that the grandparents have the burden to overcome the presumption. Troxel v. Granville, 530 U.S. 57, 66-70. The Court determined "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66. The Court held that the application of the statute by the lower court "directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* at 69. This "failed to provide any protection for [the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at 70. The Court further determined that "the decision whether such an intergenerational relationship would be beneficial in

any specific case is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court *must* accord at least some special weight to the parent's own determination” (emphasis added). *Id.*

The Court held that the lower court judge’s approach to awarding visitation, “show[s] that this case involves nothing more than a simple disagreement between the Washington Superior Court and [the mother] concerning her children’s best interests.” *Id.* The Court concluded that “the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a ‘better’ decision could be made.” *Id.* at 72.

A multitude of states applied the Troxel decision to their own Grandparent Visitation Statutes and have upheld these standards. *See, Howard v. Howard*, 661 N.W.2d 183 (2003), Ingram v. Knippers, 72 P.3d 17, 2003 OK 58 (2003), Blixt v. Blixt, 437 Mass. 649, 774 N.E.2d 1052 (2002), State v. Davison, 31 Kan.App.2d 192, 64 P.3d 434 (2002), Richburg v. Richburg, 2004 WL 1534136 (Ala.Civ.App.) (2004), In re the Visitation of C.H., 792 N.E.2d 608 (2003), DeRose v. DeRose, 469 Mich. 320, 666 N.W.2d 636 (2003).

These state courts have universally held “To obtain visitation, the grandparents must rebut the presumption [that a fit parent will act in the child’s best interest]. The burden of proof will lie with them to establish, by a preponderance of the credible evidence, that a decision by the judge to deny visitation is not in the best interests of the child. More specifically, to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare.” Blixt v. Blixt, 437 Mass. 649, 658, 774 N.E.2d 1052, 1060 (2002). Furthermore, state supreme courts held that the failure of grandparent visitation statutes to give the presumption of fitness to parents rendered it unconstitutional on its

face. Howard v. Howard, 661 N.W.2d 183 (2003)

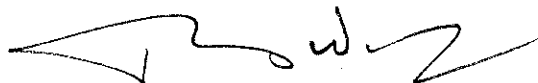
In the case at hand, the Appellee failed to meet her burden of proof and more importantly the Family Court failed to even consider these issues. Further, the Court went on to grant visitation to the Petitioner's husband, who has no biological connection to this child and was not a party to this suit.

Although this Court may not wish to reconsider some of the issues raised herein, it is clear, as Justice Davis pointed out in her dissent, this case raises the very sincere question of adoption and the effect on the child when it is not final and subject to attack by others. Brandon L. v. Moats, 209 W.Va. 752, 551 S.E. 2d 674, 688.

**RELIEF REQUESTED**

Wherefore, the Petitioners urge this Court to grant the appeal and that the visitation granted to Appellee be terminated and denied.

Respectfully Submitted:



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**THOMAS W. KUPEC State Bar No. 2111**  
Counsel for Appellant

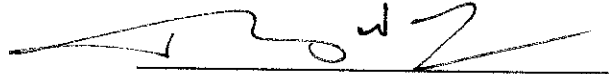
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of November, 2004, I served a true copy of the foregoing **Appellants' Brief**, upon the following persons, by United States mail, postage prepaid, in an envelope addressed to them as follows:

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