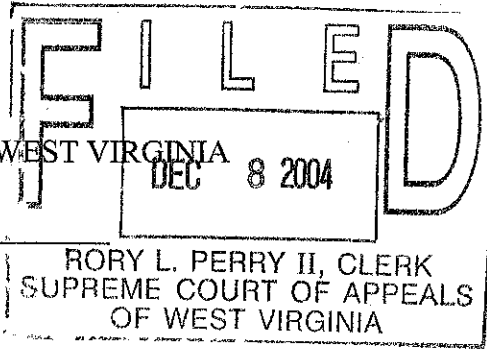


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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CHARLESTON

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

Appellee,

vs.

Case No. 31864

MARK BRENT RILEY and  
CARLA ANN RILEY,

Appellants.

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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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BRIEF OF THE GUARDIAN AD LITEM

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Guardian Ad Litem

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LIST OF AUTHORITIES

Cases:

1.) Brandon L. v. Moats, 209 W.Va. 752, 551 S.E.2d 674 ..... 6

2.) Troxel v. Granville, 530 U.S. 57 ..... 6

Statutes:

1.) W.Va. Code §48-10-101 ..... 1, 3

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3.) W.Va. Code §48-10-502 ..... 2, 4

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II.

PROCEEDINGS AND RULINGS IN CIRCUIT COURT

On or about the 16<sup>th</sup> day of April, 2003, Appellee filed a Petition for Grandparent Visitation seeking visitation of C.L.R. pursuant to the provisions of Chapter 48, Article 10, Section 101, *et. seq.* of the Code of West Virginia. Appellants opposed the requested visitation and the matter proceeded to hearing before the Family Court of Harrison County (hereinafter the "Family Court") on the 10<sup>th</sup> day of December, 2003. Prior to proceeding to hearing, counsel for both parties jointly moved the Family Court for the appointment of a Guardian Ad Litem and by Order entered the 10<sup>th</sup> day of December, 2003, Ashley A. Lawson was appointed as the Guardian Ad Litem. During the course of the proceedings before the Family Court, the Family Court Judge heard testimony from the Appellee, Robert Morrison (the Appellee's 2<sup>nd</sup> husband) and Appellant, Carla Ann Riley. The Family Court also considered the report of the Guardian Ad Litem, who opined that the best interests of C.L.R. were to deny formal visitation rights in Appellee. Additionally, at the hearing, the Family Court had the benefit of proffers from the Guardian Ad Litem and counsel for the parties. By Final Order dated January 20, 2004 and by Order Correcting Clerical Errors in Final Order entered February 5, 2004, the Family Court awarded visitation to Appellee. The ruling by the Family Court was properly appealed to the Circuit Court of Harrison County which elected to affirm the Family Court's rulings without conducting a hearing. Appellants filed their appeal with the Supreme Court of Appeals of West Virginia (hereinafter the "Court") or about June 2, 2004. Thereafter, Appellants filed a motion with the Court requesting the appointment of a new Guardian Ad Litem due to the fact that Ashley A. Lawson had relocated her practice to the state of Kentucky. By an Order made

and entered on the September 9, 2004, the Court appointed the undersigned as Guardian Ad Litem and set a briefing schedule for Appellants and Appellee. By letter dated October 6, 2004, which was generated by the deputy clerk of the Court to the undersigned in response to a letter written by the undersigned to determine the role of the Guardian Ad Litem in the appeal of this matter, the undersigned was given permission to file a brief. It is pursuant to the authority set forth in the foregoing letter that the Guardian Ad Litem submits this brief.

### III.

#### SUMMARY OF RELEVANT FACTS

C.L.R., was born on February 13, 1999, in Harrison County, West Virginia to S.R. and J.R. (hereinafter referred to as the "birth parents"). Appellants formally adopted C.L.R. pursuant to a Decree of Adoption entered by the Circuit Court of Harrison County, West Virginia on May 23, 2002. Appellee is the natural paternal grandmother of C.L.R. by virtue of the fact that she is the mother of C.L.R.'s birth father. Mark Brent Riley, one of the Appellants herein, is the uncle of the birth father and formerly a brother-in-law of the Appellee. Said another way, C.L.R. was adopted by her great aunt and uncle, the Appellants herein.

### IV.

#### ASSIGNMENT OF ERROR

1. The Family Court of Harrison County abused it's discretion by awarding grandparent visitation to Appellee when, pursuant to the factors set forth in W.Va. Code §48-10-502,

the visitation was not in the best interests of C.L.R.

V.

ARGUMENT

The provisions of the Grandparent Visitation Act codified at W.Va. Code §48-10-101 et. seq., clearly provide that when considering court mandated visitation between grandparents and grandchildren, the child's best interests should be paramount. See W.Va. Code §48-10-101. In an effort to assist the Court in determining what is in the child's best interests, W.Va. Code §48-10-403 provides for the appointment of a Guardian Ad Litem. Specifically, §48-10-403 states as follows:

When a motion or petition is filed seeking grandparent visitation, the court, on its own motion or upon the motion of a party or grandparent, may appoint a guardian ad litem for the child to assist the court in determining the best interests of the child regarding grandparent visitation. [emphasis added]

As indicated hereinabove, Ashley A. Lawson was appointed by the Family Court as Guardian Ad Litem for C.L.R. In addition to the mandate imposed upon her by W.Va. Code §48-10-403, Ashley A. Lawson's obligations were governed by Rule 21.01 of the Trial Court Rules. Trial Court Rule 21.01 provides as follows:

.....  
Any guardian ad litem shall make a full and independent investigation of the facts involved in the proceeding; and either by his or her testimony made of record, or by full and complete answer therein, make known to the court his or her recommendations, concerning the action sought in the proceedings unless otherwise ordered or instructed by the court. .... [emphasis added]

As a result of the foregoing, Ashley A. Lawson, as Guardian Ad Litem, was responsible for making a determination as to what action was in the best interests of C.L.R. and for recommending to the Family Court the appropriate action to be taken. After conducting a full and independent investigation of the facts and circumstances, Ashley A. Lawson filed a report with the Family Court of Harrison County recommending that it was in C.L.R.'s best interest to deny formal visitation rights to the Appellee. In the process of making a determination as to what action was in the best interests of C.L.R., Ashley A. Lawson advised the Family Court in her report that the following actions were undertaken:

1. Review Petition for Grandparent Visitation
2. Review Response to Petition for Grandparent Visitation
3. Review Decree of Adoption
4. Review Order from the Court appointing GAL
5. Review relevant statutory and case law
6. Conferred with Mark Brent Riley
7. Conferred with Carla Ann Riley
8. Conferred with Cassidy Lauren Riley
9. Conferred with Cathy L. Morrison
10. Conferred with Robert Morrison
11. Conferred with Jaime Weasenforth
12. Attempted to confer with Trudy Noechel, Carla Riley's sister.

See Report of Ashley A. Lawson, Guardian Ad Litem, for C.L.R., page 1.

Having reviewed Ashley A. Lawson's report, it is apparent that, in the process of determining what action was in the best interests of C.L.R., she gave specific consideration to the thirteen (13) factors set forth in W.Va. Code §48-10-502. Although the Family Court Final Order states that the Family Court also considered those factors, when the facts as they were developed in the proceedings before the Family Court are applied to the factors set forth in W.Va. Code §48-1-502, the Family Court's decision to award grandparent visitation is not supported by results of those factors and thus appears to be a clear error

judgment. Specifically, consideration of each factor reveals that eleven (11) of the thirteen (13) factors are applicable to this case and that more than a majority of the factors do not favor an award of visitation:

1) The age of the child factors against visitation. C.L.R. had just celebrated her 3<sup>rd</sup> birthday when she last saw Appellee and was approximately 4 ½ years old when the hearing before the Family Court took place.

2) The status of the relationship between C.L.R. and Appellee factors against visitation. Appellee had not seen C.L.R. in 1-1/2 years.

3) The relationship between Appellee and Appellants factors against visitation.

4) The time which elapsed since C.L.R. last had contact with Appellee factors against visitation. At least 1 ½ years had passed since C.L.R. saw Appellee and, given the fact that C.L.R. had just turned 3 years old when she last saw Appellee, she is likely to have no memory of Appellee.

5) The effect that visitation would have on the relationship between C.L.R. and the Appellant's factors against visitation because the visitation would interfere with time that would otherwise be spent with Appellants.

6) Not applicable because a divorce or separation did not occur which would have resulted in a custody and visitation arrangement.

7) The time available to C.L.R. and Appellants factors against visitation because of Mark Brent Riley's work schedule and C.L.R.'s schedule.

8) The good faith of the Appellee factors in favor of the Appellee.

9) Not applicable.

10) The fact that the child did not reside with Appellee factors against visitation, but the additional fact that C.L.R. spent some time with Appellee factors in favor of visitation.

11) The fact that Appellee was a caretaker at times for C.L.R. factors in favor of visitation.

12) The preference of the Appellants in regard to the requested visitation would factor strongly against the visitation.

13) The Court's finding that "Petitioner and her husband are intelligent, well educated people with significant life experience and insight" factors in favor visitation.

Although it appears as though this Court has not been presented with circumstances that have allowed it to specifically determine the weight that should be afforded to the parental preference factor (factor #12), this Court did discuss the issue in the case of Brandon L. v. Moats, 209 W.Va. 752, 551 S.E.2d 674, and found that :

....nothing in the legislative delineation of these factors in section 5 [§48-10-501 et. seq.] that suggests either that the factors are to be given equal weight or that a parent's preference on the issue of visitation is not to be accorded any enhanced consideration.

*Id.* at 684. However, this Court continued in Brandon L. as follows:

....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.

Citing Troxel v. Granville, 530 U.S. 57, at70.

It is clear by the foregoing precedent that this Court recognized that some special weight should be given to the parental preference factor. That being the case, affording

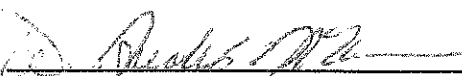
any special weight whatsoever to the parental preference factor causes the result of the factors to weigh even more heavily against visitation and thus makes it more readily apparent that the Family Court abused its discretion by awarding visitation to the Appellee.

VI.

CONCLUSION

For the foregoing reasons, the Guardian Ad Litem prays that this Court will terminate the visitation granted to Appellee by the Family Court thus empowering Appellants to make the ultimate determination as to what is in the best interests of C.L.R.

Respectfully submitted,

  
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Guardian Ad Litem

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CHARLESTON

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MARK BRENT RILEY and  
CARLA ANN RILEY,

Appellants.

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 6<sup>th</sup> day of December, 2014, I served the foregoing "**Brief of the Guardian Ad Litem**" upon the following, by depositing a true copy thereof in the United States mails, postage prepaid, in a sealed envelope addressed to him as follows:

Charles G. Johnson, Esquire  
Johnson, Simmerman & Broughton  
P. O. Box 150  
Clarksburg, WV 26302-0150

Thomas W. Kupec, Esquire  
228 Court Street  
Clarksburg, WV 26301

  
\_\_\_\_\_  
D. Andrew McMunn