

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FROM THE CIRCUIT COURT OF CABELL
COUNTY, WEST VIRGINIA

In re: The Matter of :

Daisy Keesee &
John Keesee, (now deceased),

Petitioner/Respondent

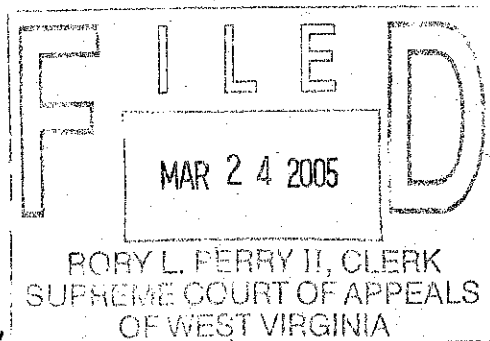
v.

Appeal No.: 32696

Kimberly Turley (formally Keesee)
& Kevin L. Keesee,

Respondent/Petitioner

PETITION FOR APPEAL



AS FILED BY KIMBERLY TURLEY

& Appellant Brief

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Now comes the petitioner, Kimberly Turley, (respondent below), pursuant to Rule 4 of the West Virginia Rules of Appellate Procedure, and respectfully requests this Honorable Court to grant her Petition for Appeal and to reverse the trial Court's orders of July 1, 2004 and August 26, 2004, granting the respondents', and petitioners' below, John and Daisy Keesee, grandparents' visitation with Mrs. Turley's children Holly, age 11, and Ashlee, age 3.

**PROCEEDINGS BELOW AND RULINGS
OF THE FAMILY AND CIRCUIT COURTS**

On January 24, 2004, Daisy and John Keesee filed their petition for grandparents' visitation before the Family Court of Cabell County.¹ Mrs. Turley objected to the visitation on grounds that continued exposure to the grandparents and the unhealthy environment in which they lived was unsafe, immoral and not in the best interests of her children's welfare. The Cabell County Family Court granted visitation by order entered July 1, 2004. (See Exhibit A). The order of visitation was appealed to the Circuit Court, the Honorable Dan O'Hanlon presiding. On August 20, 2004, Judge O'Hanlon ruled that the trial court did not properly address the statutory criteria as dictated by W. Va. Code §48-10-502 in granting grandparents visitation. Judge O'Hanlon further ruled that the family court did not properly consider the best interests of the children as required by both statutory and common law. Judge O'Hanlon remanded the case for further evaluation and for specific findings of facts. Of specific concern to Judge O'Hanlon was the trial court's lack of findings regarding the mother's fear of the children being exposed to danger while in the grandparents' custody. (See Exhibit B, Order Remanding Matter to Family Court) On August 26, 2004 and without further proceedings, the Family Judge entered an order articulating various findings affirming his early rulings granting visitation. This ruling was once again appealed due to the fact that Mrs. Turley believed the court did not consider the legitimacy of her

¹ John Keesee died on November 6, 2004.

concerns nor did it apply the intent of the law in granting grandparents' visitation. However, the appeal was not returned to the remanding court, but instead was assigned to Judge Alfred Ferguson. Judge Ferguson, without oral arguments, affirmed Judge Anderson's rulings. Judge Anderson's granting of visitation is clearly erroneous and puts the children at risk of harm. Permitting grandparents visitation that places children at harms door is not in compliance with West Virginia statutory and common law, and therefore, it is from this series of orders that Mrs. Turley appeals.²

STATEMENT OF FACTS

On February 18, 2002, Kimberly Turley, formerly known as Kimberly Keesee, and Kevin Keesee separated, and on December 20, 2002 they were divorced. During the marriage, Kevin Keesee had both drinking and drug related addictions. He was both physically and mentally abusive to his family. This behavior was both witnessed and condoned by his parents, John and Daisy Keesee. (See hearing tape, testimony of Mrs. Turley, Daisy and John Keesee). During separation, the abusive behavior became so threatening to Mrs. Turley and her children that the court prohibited contact of any kind between Kevin Keesee and his biological children. Kevin's behavior continued to demonstrate that he is both violent and unconcerned of the legal consequences associated with his actions. (See Order of August 9, 2002, attached as Exhibit C).

Kevin and Mrs. Turley have two children, Hollie, age 11 and Ashlee, age 3. On January 24, 2004, John and Daisy Keesee filed a petition for grandparents' visitation. Although the children, mainly Hollie, had frequently visited with their grandparents prior to separation, Mrs. Turley testified that this was not by choice. Unfortunately, an abusive person, such as Kevin

² The appellate rules as articulated in the Family Court Rules appear to be similar to a supreme court appeal in that it requires the filing of a petition for appeal; a granting or denial of the appeal; and if granted, the right to oral arguments. In the case at bar, the petition was filed and an order affirming the rulings was issued. This was done without a formal granting of the appeal and without an opportunity to present oral arguments.

Keesee, frequently limits the spouse's contact with other people. In this case, Mrs. Turley's associations were limited by Kevin to his friends and family. (See hearing tape Mrs. Turley, 2:05). Specifically Mrs. Turley testified that Kevin would not permit her to socialize outside of his family circle. Kevin would threaten and physically abuse Mrs. Turley, and he would disable her car to prevent her from leaving the home. Due to times of extreme violence, the grandparent's home was a safer environment for the children than the marital home. It is important to note that Mrs. Turley testified it was a safer location, not the preferred location. (See hearing tape, 4:30 and 9:10).

In 2002 and after years of living in an abusive home, Mrs. Turley made the monumental decision to break away. A situation filled with fears and abuse. Her first step towards freedom was to get a job. Her second step was to leave the home and move her and the children to her father's home.³ Due to lack of resources, Mrs. Turley attempted to obtain a divorce without the benefit of counsel. Richard Fredeking represented Kevin Keesee. The initial temporary hearing resulted in Kevin being granted significant visitation with the children due to the fact that Mrs. Turley was working and the father was on social security disability. Although Mrs. Turley attempted to convince the court of the violence associated with the Keesee home, Judge Anderson ignored Mrs. Turley's pleas until Kevin was careless enough to demonstrate his violent nature in public. Only after Kevin committed acts of violence and subsequently threatened to kill Mrs. Turley and the children did Judge Anderson restrict Kevin's contact with the children. (See Exhibit C, Temporary Protective Order) Even after the court had prohibited contact between Kevin and his children, on November 1, 2002, Kevin left the following message on Mrs. Turley's father's answering machine.

³ It is interesting to note, that Mrs. Keesee testified that Kevin and Mrs. Turley's troubles started when Mrs. Turley got a job. Consistent with domestic abuse, the abused person can only break away if they have some financial ability to do so. So in one sense, Mrs. Keesee's comment was correct, Mrs. Turley started the fight for freedom when she stood up to Kevin and got a job. This allowed her the financial ability to break away.

This is K man. You're trying to take my kids away from me, and you f--- me and we'll all die and go to hell. And, that means you big man, and the main thing is Kim Keesee and ----- Charlie. We'll all die and go to hell. You F---ed with the wrong Motherf---er. I ask for my kids, I ask you nicely and you can kiss my ass, and if I see you out, your ----- Listen, I'm just dying to see you Motherf---ers in a crowd, all right. You are good people; I'm just dying to see you all all right. You are number one dickheads. Don't f--- with me all right. You ain't taking my kids away from me. I will kill every f---ing one of you all right. Don't you, Hey I might stay in jail for two years for saying this (cuts off).

Mrs. Turley begs the court to listen to the tape. It will give this court a true feeling of the personalities involved. The trial court refused to listen to the tape, and therefore, the trial court could not have been in a position to understand or consider its contents. (See trial exhibit 5, cassette tape of Kevin Keesee's message).

Mrs. Turley would not agree to visitation with the paternal grandparents, and the recent death of Mr. Keesee has not changed her position. Mrs. Turley gave four reasons for her position. First, Mrs. Turley testified that the grandmother, Mrs. Keesee, had previously permitted Kevin Keesee to see the children during a prior restraining order prohibiting such contact, and that Daisy had stated that she would permit Kevin to see the children in the future. Secondly, Mrs. Turley testified that Kevin had repeatedly threatened to kill her and the children and that any visitation with Kevin's parents would place the children at an increased risk of harm. Third, due to the fact that drugs and alcohol are regularly present in the grandparents' environment, the grandparents' home is far from appropriate for a child of any age. Fourth, the evidence clearly demonstrates that the grandparents, as a unit, could not control the people and environment around them. Based on the fact that John Keesee recently passed away, the ability of the grandmother to control the adults around her is of even greater concern.

Mrs. Keesee lives at 7009 Skyhigh Road, Ona, West Virginia. It is a significant distance to law enforcement. The only neighbors within running distance are Buddy, the Keesee's son and brother to Kevin Keesee, and MaryJane Belton, Mrs. Keesee's mother. There is no cell phone coverage. During the past several years, John Keesee was convicted of cultivating and possessing marijuana. By his own admission he had been arrested for public intoxication on many occasions. (See hearing tape 1:42:30) A normal day in the Keesees' home involved John drinking approximately one case of beer per day. (See hearing tape Kim Turley, 1:25:38). Buddy, the Keesees' son and next-door neighbor has been convicted on at least three DUI charges. (One incident resulted in a death) Buddy was recently charged with two counts of possession of a controlled substance with the intent to distribute. Buddy Keesee is suspected to be involved with marijuana trafficking. (See Exhibit D). Kevin, the biological father, has been convicted on various drug and alcohol related charges. In or around the fall of 2002, Kevin Keesee was arrested for destroying property and threatening to kill Mrs. Turley's father. (See Exhibit E, 911 transcript). He was originally sentenced to home confinement, however, in or around March or April of 2004, he violated home confinement and was temporarily incarcerated. At the initiation of home confinement, Kevin Keesee tested positive for cocaine. Even after his release from jail, Kevin Keesee's behavior continued to be erratic, unpredictable and dangerous.⁴

The grandmother, Daisy Keesee, testified that Kevin is a regular visitor in her home and that she talks with him daily. Of greatest concern to this counsel is Mrs. Keesee's testimony that her son respects her and does not drink in front of her. If Kevin and Buddy Keesee have such great respect for their parents, why do both of them have significant criminal records? Furthermore, logic dictates that this is not a true statement especially when one recognizes by Mrs. Keesee's own admission that her husband, John, consumed alcohol

⁴ Various docket statements were presented to the court marked as Respondent's exhibits 1, 2, and 3, reflecting various arrests and convictions for Johnny, Buddy and Kevin Keesee. These exhibits reflect only a portion of charges involving the Keesee family.

daily. Kimberly pleaded for the court not to force her to place the children in a drug and alcohol invested environment that had taken her years to break away from.

Melody Frye, counselor appointed by the court to attempt family counseling during the original divorce between Kevin and Mrs. Turley, testified that during her involvement with the court ordered family counseling, Kevin Keesee confessed that he would "kill Kim and drag her body down Route 2."⁵ Kevin also threatened that if he could not see his children no one would see them, and she understood Mr. Keesee was threatening to kill his own children. Ms. Frye testified that Kevin understood that she would be called to testify in his case, and that he exhibited no fear of the consequences associated with his conduct. She stated that Kevin had made a subliminal threat to her own, Ms. Frye's, children. In fact, Ms. Frye testified that she was fearful of appearing and testifying in the hearing on this matter as she was concerned about her own safety. (See hearing tape 2:09:59 and 2:12). Ms. Frye further testified that she had been asked to see Hollie prior to the hearing on grandparents' visitation, the oldest child at issue before this court, and opined that Hollie was afraid to visit with her grandparents due to a fear that Kevin would be present.⁶ Ms. Frye testified that she was highly concerned that Kevin Keesee would follow through with his threats to hurt Mrs. Turley and the children and that grandparents' visitation would create a serious risk of harm to Mrs. Turley, Hollie and Ashlee. As further evidence that Kevin Keesee is a serious threat to Mrs. Turley and the children is the fact that on April 17, 2004, just a couple of weeks after Kevin was released from jail for attempting to break into Mrs. Turley's father's home to kill him, Kevin left a threatening letter on Mrs. Turley's father's car stating "If I can't see my kids nobody will see their kids."⁷ (See Exhibit F).

⁵ Mrs. Frye's testimony can be located on the hearing tape at 2:07:29.

⁶ Ms. Frye did not examine Ashlee due to the fact that Ashlee was less than a year old when Mrs. Turley and Kevin separated, and therefore, Ashlee does not have recollection of a relationship with the Keesees.

⁷ Although the trial court refused to admit the note into evidence for reasons not absolutely clear to appellant, the court remarked that the note gave him great concern.

Ms. Frye testified that she did not recommend visitation with the grandparents due to her concern that contact with Kevin's parents would give Kevin access to the children's schedule thus making it easier for him to gain access to the children. This would allow Kevin a greater opportunity to carry through with his threats of violence. She further testified that personality disorders as exhibited in Kevin are frequently based on the environment a person would have been exposed to during his youth, and therefore, she was concerned that Kevin was a simple reflection of his parents, Daisy and Johnny Keesee. Recognizing that Kevin's brother has similar drug and alcohol problems, Ms. Frye is concerned that Kevin is a product of the drug, alcohol, as well as, violent environment of the grandparents, John and Daisy Keesee.

It is requested that this Honorable Court give careful consideration to Mrs. Frye's testimony. Mrs. Frye has been involved in counseling, including domestic violence counseling, for more than thirteen years. She testified that never before in her career had any patient scared her in the way Kevin Keesee did. In Mrs. Frye's professional opinion, Kevin could not be controlled by anyone. In her words, "I can't imagine how anyone would be able to control him [Kevin Keesee]. He says there is nothing wrong with him and he has no fear of consequences." (See hearing tape at 2:12:24) Mrs. Turley pleads for this court to listen to Mrs. Frye's testimony. (See hearing tape, 2:07)

Ms. Frye also testified regarding Hollie's emotional status. In Mrs. Frye's opinion, Hollie has shown marked improvement in her personality since being separated from the Keesees. Hollie now demonstrates a positive outlook and has become much more active and involved. A situation that did not exist during her prior court ordered family counseling. (See hearing tape, Melody Frye beginning at 2:07:15).

Hollie, since the separation has been able to participate in activities outside of the "family" such as youth sports. Hollie has been allowed to attend church regularly and participate in youth programs. She has successfully completed the Drug Abuse Resistance Education (D.A.R.E.) program which educates youth on the dangers of alcohol and drug abuse. She has shown

marked improvement in her school grades and is beginning to enjoy life as any young girl should. Mrs. Turley does not want to expose her children to an environment that breeds dysfunction and addictions. No responsible parent would.⁸

In general, the court scoffed at the evidence surrounding members of the Keesee family other than evidence related directly to John and Daisy. In general the court appeared to have the opinion that the environment surrounding the Keesees' home and life was not relevant. Although the court stated that Kevin Keesee was not to have any contact with the children, the court found no reason to prohibit contact with the grandparents. The court appeared unconcerned with the fact that the grandparents had not been able to control the conduct of their children, Kevin or Buddy, throughout the past several years. The court appeared to have even less concern as to the possibility that Kevin and Buddy were the prodigy of a cycle of violence created by the environment that their parents exposed them to during their childhood. Therefore, the court granted grandparents' visitation on the 1st and 3rd Saturday of each month from 1 p.m. to 6 p.m. for five months. Additional time may be requested in five months. No restrictions were placed on the grandparents as to where visitation would take place. The grandparents are free to take the children to their home.

Kevin Keesee has threatened to kill. By his own comments he is not concerned as to whether the killings will take place in public or a private location. (See Exhibit _____, tape). The Keesees insinuated to the court that Kevin has known of the children's home address for some time, yet he has not killed them. This position is both illogical and dangerous. (See cross-examination of Melody Frye hearing tape 2:20:41). The evidence throughout both the divorce proceedings and the underlying proceedings demonstrates that Kevin has destroyed property when he rammed and totaled Mrs. Turley's

⁸ The significant portion of the evidence revolved around Hollie, age 11, as she is the child that had the most exposure to the grandparents. Ashlee is only three years of age. She has had very little contact with the Keesees, and she would have no personal recollection of them.

car. He attempted bodily harm and attempted to harm Mrs. Turley's father for which he was convicted and ultimately imprisoned. And, after he was released from jail, Kevin once again threaten Mrs. Turley and her family by leaving a note on Mrs. Turley's father's car. The argument to wait and see if he kills is both illogical and deadly for Mrs. Turley and her daughters, Hollie and Ashlee.

When granting visitation, the trial court did instruct the grandparents not to inform Kevin of the visitation. However, this approach does not create a safe zone for these children. Mrs. Keese testified that she talks with or sees Kevin on a daily basis. Recognizing her constant contact with Kevin, it would be nearly impossible for Mrs. Keese to prohibit Kevin from randomly stopping by her home or contacting her during visitation. Recognizing that Mrs. Keese has never prohibited her son from coming to her home, instructing him to stay away would only confuse Kevin creating curiosity, or it would anger him causing acts of violence. Furthermore, the news of the children visiting with the Keesees will quickly spread to family and neighbors, and as a result would ultimately be communicated to Kevin. Even if Daisy attempts to keep knowledge of the visitation from Kevin, it will only be a matter of time before he discovers that the children are visiting.

Ms. Turley appealed Judge Anderson's rulings. On August 20, 2004, Judge O'Hanlon, remanded the case and instructed the trial court to make specific findings of fact as to whether it is in the best interests of the children for the respondents to have visitation,

taking into consideration the factors set out in W.Va. Code §48-10-502 and §48-10-501, and *Mary Jean H. v Pamela Kay. R.*, making a determination as to whether it is the best interest of the children for the Respondents to have visitation over the objection of the custodial parent and evaluating the concerns of danger to the children expressed by the Petitioner.

See Order Remanding Matter to Family Court attached as Exhibit B.

By order entered on August 26, 2004, Family Court Judge Anderson affirmed his rulings by stating that "it is appropriate to grant reasonable

visitation to the grandparents and it is this court's feeling that it is in the best interest of the children and would not substantially interfere with the parent-child relationship." (See Order on Remand attached as Exhibit G).

In affirming his rulings, Judge Anderson states that prior to the divorce the children had a good relationship with the grandparents. Although the grandmother testified that she had been aware, or at least informed of Kevin's addictions and violent behavior, the trial court stated that there was no history of physical, emotional, sexual or other abuse assisted or condoned by the grandparents. In the trial court's opinion the grandparents had been significant caretakers, yet the trial court failed to address Judge O'Hanlon's concerns regarding the dangers associated with the children spending time with the grandparents. The trial court never made a finding that the Keesee's could provide a safe environment. Although no substantial limitations were placed on the visitation that would insure that Kevin would not have access to the children, on the second appeal, Judge Ferguson affirmed the trial court's award of visitation. (See Exhibit H, Order Affirming Family Law Judge's Order)

The trial court's refusal to address the mother's concerns of exposing the children to the risk of murder, as well as, exposing the children to an environment filled with drugs and alcohol, clearly conflicts with both the intent of W.Va. Code §48-10-510 *et. seq.* and the holdings of the West Virginia Supreme Court of Appeals. Furthermore, exposing children to drugs and alcohol as well as the risk of death is both illogical and could not possibly be in the best interest of any child. It is from this ruling that the respondent, Kimberly Turley, appeals.

STANDARD OF REVIEW

The West Supreme Court of Appeals reviews a final order and ultimate disposition of a family court under an abuse of discretion standard. The standard of review of findings of fact made by a family court is clearly erroneous and the standard applied to the application of law to the facts is an abuse of discretion. Questions of law and statutory interpretations are reviewed

de novo. *John P. W. v. Dawn D.O.*, 214 W.Va. 702; 591 SE 2d 260 (2003), and *State Ex rel. W.V. Dept of Health and Human Resources v. Carpenter*, 211 W.Va. 176, 564 SE 2nd171 (2002).

DISCUSSION OF LAW

I. The grandparents failed to rebut the presumption that Mrs. Turley's parental decision to prohibit visitation was in the children's best interests.

West Virginia Code §48-10-501 states that a court may grant reasonable grandparent visitation that would be in the best interests of the child and would not substantially interfere with the parent child relationship.

In making a determination on a motion for grandparent visitation the court shall consider the following factors:

- (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 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;
- (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 grandparents' residence;
- (12) The preference of the parents with regards to the requested visitation; and
- (13) Any other factor relevant to the best interests of the child.

W.Va. Code §48-10-502. (2001)

The West Virginia Supreme Court of Appeals has established that the trial court must consider the child's best interests.

While Grandparent Visitation Act affords certain protections to grandparents, it is in no measure guaranty of right to visitation, but rather child's best interests must be given greatest priority, and child's rights are superior to that of grandparents seeking visitation.

Mary Jean H. v. Pamela Kay R., 198 W.Va. 690; 482 S.E.2d 675 (1996).

The West Virginia Supreme Court of Appeals further addressed grandparent visitation by stating:

We perceive that the statutory scheme for grandparent visitation – which provides for two ultimate determinations by the trial court, related both to the best interests of the children involved and the protections of the parent-child relationship from any significant interference – constitutes a workable means by which the legitimate interest of the children in maintaining a viable relationship with their grandparents and the liberty interests of parents relative to the care, custody, and control of their children can be effectively examined, protected, and promoted.

The statute provides a comprehensive and fair means by which the best interests of the children and the relationships with their respective parents or grandparents can be protected from harm resulting either from the inconsiderate or excessive demands of grandparents or the obstinate or unreasonable and **insignificant** objections of parents, any of which, on occasion, be driven more by emotion than pursuit of the proper interests of the children and their parents.

Ex. rel Brandon L. V. Moats, 209 W.Va. 752, 551 S.E. 2d 674 (W.Va. 2001), *emphasis added*.

The grandparents have the burden of proof to show visitation is in the child's best interest. *Id.*

Additional criteria was established by the West Virginia Supreme Court of Appeals as to grandparents' visitation in *Lindsie D.L. v. Richard W.S.*, 214 W.Va. 750; 591 S.E.2d 308 (2003). (The issue presented to the Supreme Court was sibling visitation, however, the ruling was held to apply in grandparent situations also.)

The Due Process Clauses of . . . the West Virginia and . . . of the Constitution of the United States protect the fundamental right of parents to make decisions concerning the care, custody, and control of their children. We further hold that there is a presumption that fit parents act in the best interests of their children.

Id. 313, *emphasis added*.

This Honorable Court further stated:

That the trial court can place such conditions on visitation that it finds are in the best interests of the children and that also reasonably accommodate the rights and preferences of the parent. Court ordered visitation should not result in exposure to activities, conditions, circumstances, or influences that are contrary to the parent's reasonable preferences.

Id. at 315, *emphasis added*.

Although the family court ruled that "it is this Court's feeling that it [visitation with grandparents] is in the best interest of the children . . . , the evidence did not rise to the level necessary to rebut the presumption that Mrs. Turley's position in refusing visitation was in the children's best interest.

In the case at bar, Mrs. Turley has expressed both legitimate and alarming concerns as to why she will not consent to visitation between her children and their paternal grandparents. Safety is the number one concern.

The evidence presented to the Court was as follows:

1. The grandparents have daily contact with their son and the children's father, Kevin Keesee. The man who threatened to kill both his children and Mrs. Turley. These threats were made to a court appointed counselor and left on voice mail. (See hearing tape, trial exhibit 5, Mrs. Keesee at 1:40:50 and 1:44:30 and Melody Frye generally at 2:07:15)

2. In the late 1990s, the grandfather was convicted of drug related offenses including the cultivation of marijuana. The grandfather drank daily in Daisy's presence, and he used marijuana. (See hearing tape, Mrs. Turley at 1:25:38, Daisy Keesee generally at 1:42:16 and Johnny Keesee at 1:42:30).

4. The grandparents have a close relationship with their son Buddy Keesee who has had multiple charges including two new drug charges on August 24, 2004. Buddy Keesee lives next door to Daisy Keesee. (See evidence generally, Trial Exhibits, and Exhibit D).

5. The grandparents have raised two children, Kevin and Buddy, and both of their children have significant criminal histories and they have completely dysfunctional lives. (See general record)

6. That drugs and alcohol are regularly present in the grandparents' home. (See hearing tape, Mrs. Turley, 1:20:45)

7. That the grandparents condoned their son's abusive behavior towards Mrs. Turley and her children. (See general testimony of Mrs. Keesee. Hearing tape at 1:40:02).

8. That the court appointed counselor testified that Hollie's attitude was much more positive since the divorce and that Hollie did not want to re-associate with the grandparents.

9. There was absolutely no evidence that suggest the grandparents' home is a safe and/or appropriate environment.

10. Although the grandmother testified, but did not substantiate poor conduct on the mother's part, the mother has never been subject to criminal charges. In fact, Mrs. Turley does not drink. (See hearing tape generally).

11. The grandmother testified that she was aware of the claims of violence against her son during his marriage, as well as, has knowledge of his criminal activities, yet she refuses to admit that her son is violent. (See hearing tape Mrs. Keesee, 1:40:02)

Judge Anderson's decision to grant visitation was an abuse of discretion, as well as, a clear misinterpretation and application of the law. The evidence clearly established that visitation with the grandparents would place the children at an increased risk of harm.

II. The mere fact that the grandchildren visited with the grandparents in the past is not grounds to grant grandparents' visitation when the children would be exposed to a known danger, and therefore, best interests of children would not be met by continued relationship with grandparents.

The criteria that a trial court is to consider in evaluating the evidence regarding a parent's decision to preclude visitation is to evaluate whether or not the parent's decision is reasonable, or unreasonable and driven more by emotion than pursuit of the proper interest of the children and their parents. See *Ex. Rel. Branden L. v. Moats, supra*. However, the grandparent/child relationship shall not be maintained if it would expose the children to activities, conditions, circumstances and influences that are contrary to the parent's reasonable preference. See *Lindsie D.L. v Richard W.S, supra*.

The United States Supreme Court has directly addressed concerns regarding court ordered visitation with non-parents. In *Troxel v. Granville*, 520 U.S. 57; 120 S.Ct. 2054; and 147 L.Ed.2d 49 (2000), the United States Supreme Court clarified that the Due Process Clause of the Fourteenth

Amendment protects fundamental rights of parents to make decisions as to the care, custody and control of their children. *Id.* Throughout history, the Supreme Court has been careful to uphold the fundamental right and liberty of a parent to direct the upbringing and education of children under their control. *Id.* "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, citing *Prince v. Massachusetts*, 321 U.S. 158; 64 S.Ct. 438; and 88 L.Ed. 645 (1944).

In finding that the Washington statute regarding non-parent visitation and/or custody was too broad, the United States Supreme Court reasoned in *Troxel* that no one had alleged nor did the court find that the parent at issue was unfit. Specifically the Supreme Court reasoned "there is a presumption that a fit parent acts in the best interests of their children." *Id.* at 68, 2061. "Accordingly, so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of the parent's children." *Id.*

In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it 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.

Id.

This court in *State ex. rel. Brandon v. Moats, supra*, evaluated the constitutionality of the West Virginia statute under the directives of the *Troxel* decision. In upholding the constitutionality of the statute, this Honorable Court determined that the West Virginia statute was sufficiently narrow in scope, and it required the trial court to address the parent's preference. This Court further addressed the United States Supreme Court's concern as to

whether or not the trial court must give the parent's determination special weight. Although this Court determined that the *Brandon* case did not provide the opportunity to determine the amount of weight that should attach to parental preference, this Court did recognize that *Troxel* requires the trial court to give "special weight" to a parent's determination of visitation. *Brandon* at 209 W. Va. 763; 551 S.E.2d 674. Judge Anderson in his order of August 26, 2004, gave absolutely no consideration to, or mention of, Mrs. Turley's position on visitation. In fact, Judge Anderson did not make one finding as to why he felt the parent's preference to prohibit visitation was unreasonable or not in the children's interest. By all indications, the court gave no weight to Mrs. Turley's preference.

How much more evidence should it take for a trial court to prohibit grandparents' visitation. Do we wait and see if the man who has been convicted of acts of violence and who has threatened murder to a court appointed counselor kills before we prevent visitation. It cannot be suggested that Mrs. Turley's desire to protect her children from a known harm, drugs and alcohol is unreasonable.

Recognizing that one grandparent was an admitted alcoholic and convicted drug cultivator, and further recognizing that the grandparents have raised two dysfunctional drug and alcohol addicted children, Mrs. Turley's position that she does not want her children exposed to the Keesees is both reasonable and in the best interest of the children. The grandparents' home is a bad environment. Raising children is hard enough without exposing them to bad influences, bad environments and bad people. Why would a court want to risk exposing young impressionable minds to the same environment that resulted in Kevin and Buddy's personality disorders. The answer is simple, grandparents' visitation should be denied.

In its order on remand, the trial court simply states in support of granting visitation that prior to the divorce the children had a good relationship with the grandparents. The court further stated that there was no history that the grandparents abused the children or that the grandparents condoned

abuse. The trial courts comments are in direct conflict with the evidence. A review of the evidence reveals that the grandparents both knew of and enabled the serious abusive habits of Kevin Keesee. In fact, a close inspection of Daisy's testimony reveals that she is not willing to admit that Kevin is violent. (Hearing tape, Mrs. Keesee 1:40:02) Although Daisy was forced to admit that Kevin had made threats to kill, she attempts to excuse this behavior by saying "he was just mad" (See hearing tape, 1:40:30). Petitioner concedes that people may say things they regret when they are angry, but reality demonstrates that even when a person is "mad," he or she does not threaten to kill. Let alone threaten to kill in the presence of a court appointed counselor. Behavior of this nature is not simply a comment made in anger, its insane. You cannot reason with the insane, all you can do is try to protect those who may be the subject of their irrational behavior. Insane people kill! Putting these children in a location where Kevin could have easy access to them is both irrational and dangerous. Kevin is the product of his environment, and Mrs. Keesee is part of Kevin's environment. Of even greater concern is the fact that Mrs. Keesee is an older woman who could not possibly control the conduct of Kevin Keesee. When asked what she would do if Kevin would appear during visitation, Mrs. Keesee testified that she would ask him to leave, and if he did not, she would call the police.⁹ (See hearing tape, Mrs. Keesee 1:44:15). Recognizing Kevin's complete contempt for authority, as well as, the significant distance between the Keesee home and law enforcement, half of the Howells-Mills population could be dead before the police could respond to such a call. No one can control Kevin Keesee. A review of the life style of both Buddy and Kevin Keesee clearly reflects that their mother has absolutely no control over them.

The trial court failed to make findings as to what evidence, if any, was sufficient in weight to rebut the legal presumption that the mother's decision to prohibit grandparents' visitation was based on rational and legitimate concerns. The trial court failed to identify what, if any, evidence reflected the

⁹ Mrs. Keesee also testified that she had already discussed the issue of visitation with Kevin. According to Mrs. Keesee "Kevin says he won't come around."

parent's decision to prohibit visitation was insignificant or unreasonable. In fact, the trial court failed to give any consideration to the parent's preference. The trial court failed to make findings as to why the grandchildren should maintain a relationship with grandparents that could place them at risk for physical harm and expose them to a drug and alcohol abuse. The trial court misapplied the law when it failed to give special weight to the parent's preference. The trial court's decision to permit visitation was an abuse of discretion resulting in exposing children to a known danger, and therefore, the ruling should be reversed.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein and to be more fully detailed at an oral presentation of arguments on this matter, the petitioner, Mrs. Turley, respectfully requests this court to grant her petition for appeal and to ultimately reverse the trial courts award of grandparents' visitation.

The petitioner requests oral arguments.

Kimberly Turley
By Counsel,



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APPENDIX OF EXHIBITS

- A. **Order Granting Visitation, July 1, 2004**
- B. **Order Remanding Matter To Family Court, August 20, 2004**
- C. **Temporary Protective Order, August 9, 2002**
- D. **Newspaper Article Re: Buddy Keese**
- E. **911 Transcript**
- F. **2004 Note By Kevin Keese**
- G. **Order On Remand, August 26, 2004**
- H. **Order Affirming Family Law Judge's Order, November 15, 2004**

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

IN RE: THE MATTER OF

DAISY KEESEE &
JOHN KEESEE, (now deceased)

Petitioner,

v.

Civil Action No. 04-D-0073
FCJ Ronald E. Anderson
Cabell County Courthouse

KIMBERLY TURLEY (formally Keesee)
& KEVIN L. KEESEE,

Respondents,

CERTIFICATE OF SERVICE

I, Amy M. Herrenkohl, counsel for the respondent, Kimberly Turley, do hereby certify that service of **Petition For Appeal From A Family Court Order** has been made upon the petitioner, Daisy Keesee, by mailing a true and exact copy thereof to her counsel, David J. Lockwood, whose address is 741 Fifth Avenue, Huntington, West Virginia 25701, in a properly stamped and addressed envelope this 24 day of February, 2005.


Amy M. Herrenkohl