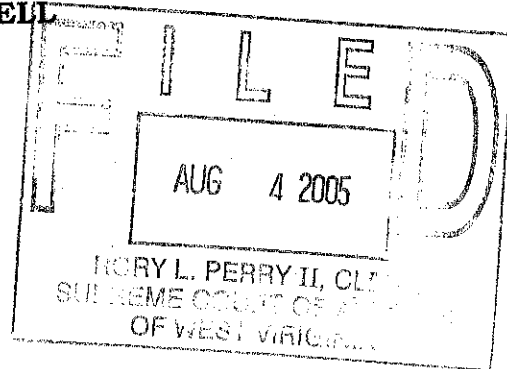


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**FROM THE CIRCUIT COURT OF CABELL
COUNTY, WEST VIRGINIA**



In re: The Matter of :

**Daisy Keesee &
John Keesee, (now deceased),**

Appellee,

v.

Appeal No.: 32696

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

Appellant.

APPELLANT, KIMBERLY TURLEY'S, REPLY BRIEF

Counsel for Appellant:

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Now comes the petitioner, Kimberly Turley, (respondent below), pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure and files the following as her reply to Appellee's response to the appeal.

STATEMENT OF FACTS

Appellant, Kimberly Turley reasserts the Statement of Facts as provided in her original Petition for Appeal.

DISCUSSION OF LAW

Ms. Turley is a fit parent that has made a visitation decision she believes serves her children's best interest.

The Appellee in her response brief failed to articulate any evidence or findings by the trial court demonstrating that Ms. Turley's decision to prohibit visitation was not in the children's best interests. Furthermore, the appellee refuses to acknowledge the fact that a parent, not the grandparent, has the right to choose the environment he or she believes is appropriate for his or her own child. In general, a parent has a right to dictate with whom his or her child would associate. Frequently parents prohibit their children from hanging out with individuals of unsavory characters or individuals with opposing religious or moral beliefs, etc. This is the parent's constitutional right to rear their children in the religious and/or moral environment deemed appropriate by the parent.

The appellant recognizes that grandparent visitation statutes have created an exception to the rule. However, this exception is narrow and not intended to circumvent legitimate concerns **or** reasons raised by the parent. Although the children's safety is of paramount concern to Ms. Turley, a

parent's decision to prohibit visitation does not have to be based on safety issues.

As previously asserted in Ms. Turley's original proceedings, 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*, 209 W.Va. 752, 551 S.E. 2d 674 (W.Va. 2001). 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.*, 214 W.Va. 750; 591 S.E.2d 308 (2003), *emphasis added*.

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. 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*.

This Court in its recent opinion *In re Grandparent Visitation of Cathy L. v. Mark Brent R.*, 2005 WL 1124985 (W. Va. May, 2005) further defined a parent's right to make decisions in the rearing of his or her child. Specifically this court stated that

Troxel instructs that a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interest of the child analysis. It must also

consider and give significant weight to the parents' preference, thus precluding a court from intervening in a fit parent's decision making on a best interests basis.

Id.

There is absolutely no evidence to suggest to this court that Ms. Turley is not a fit parent. Unlike the Keesees, she has never been arrested, never demonstrated problems with drugs or alcohol, and never been accused of abuse. Ms. Turley has always cared for and provided for her children, and has attempted to be the best parent that her environment permitted. The appellee has not asserted or presented any evidence that Ms. Turley is not a fit parent.

Furthermore this court stated in *Kathy L., supra*, that a trial court is not permitted to substitute its opinion as to what is in the child's best interests for that of the parent. In finding that grandparents' visitation should not have been granted, this court ruled:

The preferences of the parents were not adequately considered by the family court, and proper weight was not given to those preferences. The concerns of the parents appear to have been considered and dismissed by the family court, primarily upon the basis of the court's disagreement with the parents regarding the degree of family strain to be occasioned by visitation and the court's perception that visitation would not seriously undermine any plans the parents envisioned for Cassidy or her familial associations. This is precisely the type of situation outlined by the United States Supreme Court in *Troxel*, as it invalidated the Washington statute: 'The Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails.'

Id.

In the case at bar, Ms. Turley articulated various reasons that she opposed visitation with the grandparents. Basically, Ms. Turley does not approve of the environment to which the Appellee exposes herself. Although technically the law does not require a parent to demonstrate that his or her concerns are supported by fact, in an effort to demonstrate that her position

was reasonable, Ms. Turley testified as to the circumstances the family lived in when she was a part of the Keesee tribe. She also presented evidence of criminal charges and convictions to demonstrate to the court that her perception of the Keesee's home environment was legitimate. Appellee seems to argue that some of the criminal charges did not result in convictions. This position is both absurd and not relevant to this case. The evidence speaks for itself. Kevin Keesee's visitation rights were extinguished because he threatened to kill his family. Threats made to a court ordered counselor. Ms. Keesee testified that she maintains daily contact with Kevin Keesee. Her son and next-door neighbor, Buddy Keesee, also has a record. His recent criminal charges have not been disposed of, and therefore, the appellant cannot state the legal outcome. However, whether or not Buddy's charges result in convictions is not the issue before this court. The issue is, whether or not Ms. Turley's decisions are made by a fit parent and based on legitimate life style preferences.

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. Without reiterating Ms. Turley's previous arguments on the legitimacy of these findings, the court's role is not to make an independent finding on what is in the child's best interests, but must make a determination of whether or not the parent's preference would be contrary to the child's best interests. In this case, the court gave no consideration to the validity of Ms. Turley's position and her reasons supporting her position.

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 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

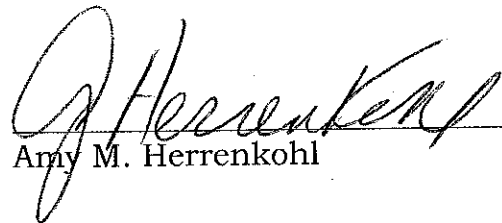
maintain a relationship with grandparents that could place them at risk for physical harm and expose them to a drug and alcohol abuse.

No one can say that the reasons articulated by Ms. Turley in prohibiting visitation are irrational and not based on legitimate evidence. The trial court simply substituted its preference for that of the parent. 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 appellant, Ms. Kimberly Turley, respectfully requests this court to reverse the trial courts award of grandparents' visitation.

Kimberly Turley
By Counsel,



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CERTIFICATE OF SERVICE

I, Amy M. Herrenkohl, counsel for the appellant, Kimberly Turley, do hereby certify that service of Appellant, Kimberly Turley's, Rely Brief has been made upon the appellee, 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 2 day of August, 2005.


Amy M. Herrenkohl