

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32703

**FILED**  
JUN 28 2005  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

IN RE: THE ADOPTION OF  
JON L.

FROM THE CIRCUIT COURT OF ROANE COUNTY, WEST VIRGINIA

## **BRIEF OF APPELLANTS**

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June 28, 2005

## **BRIEF OF APPELLANTS**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

### **Proceeding and Opinion Below**

The appellants, Warren Lee A. and Melissa A. A., are asking the Supreme Court of Appeals to overturn the ruling of Circuit Judge David Nibert, denying a change of name for their child, Jon, in his adoption proceeding. The authority for the appeal is W. Va. Code §48-22-704, dealing with finality of the order and challenges to the order of adoption, requiring that a petition to vacate must be filed within six months of the date the order is final.

### **Statement of the Case**

The facts preceding the adoption case are these: Melissa A. A. and her first husband, Jonathon Kelli L., gave birth to a child, Jon Clayton L., on October 16, 1998. They were divorced in Kanawha County in June 2000. Their divorce decree provided for shared custody of the child, but the appellant Melissa A. A. was the primary caregiver. On October 15, 2000, the day before Jon's second birthday, Jonathon Kelli L. was tragically killed in an automobile accident.<sup>1</sup> Shortly after their son's death, his parents, Robin L. and Janet L., filed an action in Kanawha County Family Court and were granted regular and ongoing visitation rights to Jon, which they have faithfully exercised. The relationship between the appellants and the paternal

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<sup>1</sup> Jon received a wrongful death structured settlement and also receives Social Security benefits on account of his birth father's death. The adoption does not change his entitlement to either the settlement or the monthly child survivor benefit.

grandparents is strained, but the child does enjoy a relationship and has regular contact with his late father's family. On June 7, 2003, Melissa A. A. and Warren Lee A. were married, and Melissa and Jon moved to Warren Lee A.'s Roane County home. The parties returned to Kanawha County Family Court, and agreed to entry of a modified grandparent visitation order, taking into account the child's new residence in Roane County and his attendance in preschool.

In June 2004, a year after the marriage, Warren Lee A. petitioned the Circuit Court of Roane County to adopt Jon. As required by law and because she strongly favored this permanent relationship for her son, his wife, Melissa A. A., joined in the petition for adoption. At the time the case was set for hearing, Melissa A. A. was pregnant with the parties' daughter<sup>2</sup> and Jon, who was then five years old, was ready to begin kindergarten. The appellants both testified that it was important to them that the relationship between Jon and Warren Lee A. be formalized by adoption, both before Jon's sibling was born and before he started to school. It was also very important for them that this whole family share the same surname.

Pursuant to W. Va. Code §48-10-902, the right of the paternal grandparents to visit with Jon is unaffected by the child's adoption. However, because the child's father was deceased, the adoption statute, W. Va. Code §48-22-601(a)(5), required that the paternal grandparents be given notice of the adoption. They were properly served by certified mail. On the day of the hearing, they appeared with their attorney, Charles Phalen, Jr., to object both to the adoption and

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<sup>2</sup>Emma Lee A. was born on November 18, 2004.

to the proposed name change for their grandson. Their objections were made orally and they filed nothing in writing, either prior to or at the hearing.

Christine M. Hedges, a local lawyer, was appointed as Jon's guardian ad litem by the Court at the time the adoption petition was filed. Her duties included investigating the matter and recommending whether the child was the proper subject for adoption and whether the home of the petitioners was a suitable home for the child. Ms. Hedges visited the family at their home and completed her investigation, as required by the Court, and submitted a written report, which recommended the adoption. She did not, however, have the opportunity to meet the paternal grandparents until the day they appeared for the final adoption hearing.

The Judge allowed the grandparents and their counsel to attend the beginning of the hearing to express their objections. He then excused them from further proceedings, and took testimony in support of the petition for adoption. Being convinced that the legal standards were met, that the A.s were fit parents, and that the child's interests would be promoted, the adoption was granted. However, he declined to change the child's surname, because the grandparents did not consent. He found that this is a decision the child can make for himself, when he is older. The appellants offered that the child's middle name could be the grandparents' surname, but this, too, was not satisfactory to the Judge. It is from that ruling which they appeal.

**Assignments of Error**

The petitioners respectfully urge this Court to find judicial error in the case below, as follows:

**First Error:**

The Court erred in refusing to change the surname of a child to that of his adopting father in an adoption proceeding.

**Second Error:**

The Court erred in sustaining the objection of the grandparents to change of the child's name, when they are only accorded the right to notice and their consent to the adoption is not required.

**Points and Authorities Relied Upon**

**West Virginia statutes:**

W. Va. Code §48-22-101 *et seq.* (Adoption)

W. Va. Code §48-25-101 *et seq.* (Change of Name)

W. Va. Code §48-10-902 (Grandparent Visitation)

**West Virginia cases:**

State ex rel. Smith vs. Abbot and King, 187 W. Va. 261, 418 S.E.2d 575 (1992)

Petition for Change of Name of Harris to Struble et al., 160 W. Va. 422, 236 S.E.2d 426  
(1977)

Lufft vs. Lufft, 188 W. Va. 339, 424 S.E.2d 266 (1992)

In Re: Petition of Nearhoof to Adopt Nearhoof, 178 W. Va. 359; 359 S.E.2d 587 (1987)

State ex rel. Brandon L. vs. Moats et al., 209 W. Va. 752, 551 S.E.2d 674 (2001)

Clifford K. and Tina B. vs. Paul S., (No. 31855), June 17, 2005.

In Re: Grandparent Visitation of Cathy L. (R.) M. vs. Mark Brent R. et al., (No. 31864),

May 11, 2005

**United States Supreme Court case:**

Troxel vs. Granville, 530 U.S. 57 (2000)

### Argument and Discussion of the Law

A. The Court erred in refusing to change the surname of a child to that of his adopting father in an adoption proceeding.

The adoption of a child creates a new relationship, which is recognized and treated differently than most, if not all, other affairs of the court. The adopted person becomes the court-established legitimate issue of the person or persons who have adopted him or her, and the adopted person is entitled to all rights and privileges and subject to all the obligations of a natural child of the adopting parent. The child and his or her birth parents are completely divested of the legal rights which existed prior to the adoption. W. Va. Code §48-22-703. The adoption order is required to state the "name by which the child is thereafter to be known." W. Va. Code §48-22-702. A new, not amended, birth certificate is issued, showing the child being born to the adoptive parents, and the child's new name. The court file is kept in a locked or sealed cabinet, and not open for inspection or copying by anyone, except by order of the Court. W. Va. Code §48-22-702. The hearing is private, and not open to the public, with only those persons who have a particular right to be affected being entitled to notice. W. Va. Code §48-22-601. The only exception to the severing of relationships with the birth family is that the adopted child's grandparents, who have or subsequently procure an order of visitation, may continue their visitation if the adopting parent is a stepparent, grandparent or other relative of the child. See W. Va. Code §48-10-902; State ex rel. Brandon L. vs. Moats, 209 W. Va. 752, 551 S.E.2d 674 (2001); In Re: Nearhoof, 178 W. Va. 359, 359 S.E.2d 587 (1987).

A name change proceeding does not divest anyone of parental rights or establish any new family relationships. By contrast, the case is very public, starting with a newspaper advertisement announcing that the person desires a name change, and allowing anyone who knows of any reason why a name should not be changed to appear and be heard in opposition. W. Va. Code §48-25-102. Upon a finding that proper procedures have occurred, that no injury will be done to any person by reason of the name change, that proper reason exists to change a name, that the name change is not desired for any fraudulent or evil intent, and that the person desiring the name change is not a sex offender, a murderer, or incarcerated, the name is ordered changed. W. Va. Code §48-25-103. A certified copy of the order changing the name is recorded in the county clerk's office. W. Va. Code §48-25-104. By case law and not by statute, a living birth father must be given actual notice of the name change proceeding, if his whereabouts are known, and there must be a specific finding of due diligence to locate him before notice is given by publication. In Re: Harris, 160 W. Va. 422, 236 S.E.2d 426 (1977).

In the instant case, the paternal grandparents, relying on law specific to the name change statute, argued that the child's name could not be changed because the child's birth father, who was deceased, had discharged his parental rights. The appellants submit that this interpretation of the law is wrong and should not apply in adoption cases. Citing In Re: Harris, supra, and Lufft vs. Lufft, 188 W. Va. 339, 424 S.E.2d 266 (1992), the grandparents persuaded the Circuit Court that because Jon Clayton L.'s birth father, Jonathon Kelli L., who had died almost four years prior, was exercising parental rights before his death, that the child must forever have his

surname. However, both of the cited cases involved name change proceedings. This case is an adoption, where the child is getting a new court-ordered relationship, not just a new name.

The lower court overlooked the findings of both Harris, supra, and Lufft, supra, which recognize that children bear the surname of a father by custom and usage in society. In this case, Warren Lee A. became Jon's new father, but as a result of the court's ruling, Jon does not bear his father's surname. Additionally, the Court failed to follow the other requirement of these cases, that the name change would have significantly advanced the child's best interest. The appellants clearly established that Jon was starting school, he was getting a new sibling, and his whole family unit, as it existed in his world that day, all had the same surname but Jon. How could it be in his best interest that he and those closest to him would have to explain why Warren Lee A. was his dad, but Jon's last name was not the same? As recognized in State ex rel. Smith vs. Abbot, 187 W. Va. 261, 418 S.E.2d 575 (1992), an adoption case challenged too long after the fact, the child's name was allowed to remain that of the adopting parents "for the sake of continuity and simplicity."

B. The Court erred in sustaining the objection of the grandparents to change of the child's name, when they are only accorded the right to notice and their consent to the adoption is not required.

The more troubling issue in this case is the fact that the Circuit Court elevated the rights of the paternal grandparents in this case to one of *consent*, when in fact, the only entitlement they had in the adoption proceeding was one of *notice*. The appellants submit that the grandparents should not have been allowed to veto their choice to rename the child either Jon Clayton A. or Jon L. A., using the biological father's and grandparent's surname as a middle name.

W. Va. Code §48-22-601(a)(5) provides that:

Unless notice has been waived, notice of a proceeding for adoption of a child must be served, within twenty days after a petition for adoption is filed, upon:

... (5) A grandparent of the child if the grandparent's child is a deceased parent of the child and before death, the deceased parent had not executed a consent or relinquishment or the deceased parent's parental relationship to the child had not been otherwise terminated.

W. Va. Code §48-22-301(e) provides that "If one of the persons entitled to parental rights of the child sought to be adopted is deceased, only the consent or relinquishment of the surviving person entitled to parental rights is required." [Emphasis supplied] Further, if it is a stepparent adoption, the law provides that the parent who is the surviving birth parent "must assent to the adoption by joining as a party to the petition for adoption." W. Va. Code §48-22-301(b)(3). The

appellants assert that only the consent of Melissa A. was required in this case, and it did not matter whether Robin L. or Janet L. were in agreement with the petition, so long as the Court could establish that the adopting step-parent was a fit person.

Appellants do not argue that the Jon's grandparents are unimportant, that they should not have known about the adoption, or that their right to visitation should be affected by this adoption. They indeed recognize that the role of the grandparents in Jon's life is important and significant. However, it is their position that they, the appellants, have been found to be fit parents and their estimation of their son's best interest should be accorded deference. While the grandparents rights and relationship with Jon are significant, as discussed in the case of Clifford K. and Tina B. vs. Paul S., No. 31855, June 17, 2005, their rights were "simply not on par" with those of Warren L. A. and Melissa A. A. The grandparents should not have been allowed to dictate the surname by which the A.'s child should be known.

The issue of grandparents' rights has been much debated and litigated, especially since the ruling of the United States Supreme Court in the case Troxel vs. Granville, 530 U.S. 57 (2000). In that particular case, the justices struck down, as unconstitutional, a Washington statute granting any person the right to petition for visitation rights, at any time, and authorizing state superior courts to grant such rights whenever visitation may serve a child's best interest. The Court found that the Fourteenth Amendment's Due Process Clause has a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests, including parents' fundamental right to make decisions

concerning the care, custody and control of their children. The Supreme Court recognized that a fit parent's own determination must be accorded at least some special weight. In Troxel, the Court determined that the trial judge had placed on the parent the burden of *disproving* that visitation would be in the best interest of her daughter. The United States Supreme Court invalidated the Washington law because it allowed the judge's view to prevail over the parent's estimation of best interest.

The appellants submit, that in this case, the Circuit Judge did exactly the same thing as the Washington judge by requiring that they disprove that keeping the child's name as L. would not be in his best interest, and the Circuit Judge substituted his judgment that it would be better for Jon to decide, when he is older, what his surname should be, rather than allowing and permitting the parents' estimation of best interest to prevail. As recently relied on in the opinion issued on May 11, 2005, in the case In Re: The Grandparent Visitation of Cathy L. (R.) M. vs. Mark Brent R. et al., No. 31864, this Court has said that the constitutional admonitions of Troxel must be observed, and parents' determinations of their children's best interest must be given appropriate weight and deference.

Here, the law is clear that the consent of the grandparents is not required, nor necessary, in the adoption. If the mother, Melissa A. A., assented and joined in the petition for adoption, then that is all that was necessary because her child's birth father was deceased. The provision of notice, it is submitted, was to let the grandparents know that their grandson, Jon, could possibly be getting a new court-ordered father and their rights, other than visitation, could be potentially

divested by a court ruling. What they got, instead, was the right to veto the parents' decision that the child's surname should be changed. This is beyond the authority statutorily granted the grandparents, and is an unconstitutional interference with the liberty interests of the parents.

**Prayer for Relief**

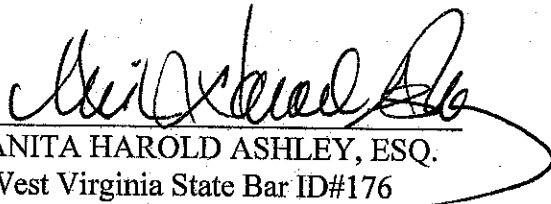
The appellants respectfully pray that this Court reverse the Circuit Court's ruling and order that the child's name be changed to either Jon Clayton L. or alternatively, to Jon L. A., and that an order be entered vacating that portion of his final adoption decree.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anita Harold Ashley, counsel for appellants Warren Lee A. and Melissa A. A., do hereby certify that I have served a true copy of the foregoing Brief of Appellants upon the other parties to this case by mailing the same, postage prepaid, addressed as follows, on the 28<sup>th</sup> day of June, 2005:

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