

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA**

IN RE: VISITATION AND CUSTODY OF SENTURI N. S. V.

MISTY C. V.,

**APPELLANT,
RESPONDENT BELOW**

v.

33334
No. 063450

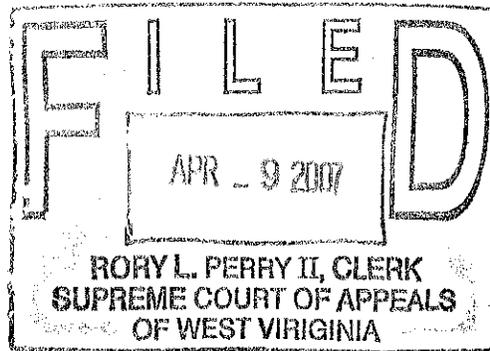
JOSHUA L. S.,

APPELLEE, PETITIONER BELOW

and

CHRISTOPHER and TANYA F.

APPELLEES, INTERVENORS BELOW.



BRIEF ON BEHALF OF APPELLANT, MISTY V.

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TABLE OF CONTENTS

	Page
Table of Authorities	-ii-
I. Kind of Proceeding Nature of Ruling in the Lower Court	1
II. Statement of the Facts	1
III. Assignments of Error Relied Upon and The Manner In Which They Were Decided In The Lower Tribunal	7
IV. Points and Authorities Relied Upon	7
V. Discussion of Law	9
A. Standard of Review	9
B. The Circuit Court clearly erred in affirming the Family Law Court's determination that Appellant and the Intervenor had a "shared parenting arrangement" because Misty V. did not consent to co-parenting with the Intervenor whom she considered the Child's babysitters.	9
C. The Circuit Court clearly erred in affirming the Family Court's finding that the Intervenor are "psychological co-parents" of the child and allowing them to intervene in this proceeding.	16
VI. Relief Prayed For	24

TABLE OF AUTHORITIES

<u>Reported Cases</u>	<u>Page</u>
<i>Carr v. Hancock</i> , 216 W.Va. 474, 607 S.E.2d 803 (2004)	7, 9
<i>Clifford K. and Tina B. v. Paul S.</i> , 217 W.Va. 625, 619 S.E.2d 138 (2005)	<i>passim</i>
<i>Overfield v. Collins</i> , 199 W.Va. 27, 483 S.E.2d 27 (1996)	7, 10
<i>In Re: Grandparent Visitation of Cathy M. v. Mark Brent R. and Carla Ann R.</i> 217 W.Va. 319, 617 S.E.2d 866 (2005)	7, 13
<i>In Re: Alyssa W. and Sierra H.</i> , 217 W.Va. 707, 619 S.E.2d 220 (2005)	8, 16
<i>In the Matter of William G. TT. v. Siobhan HH.</i> , 183 Misc.2d 162, 701 N.Y.S.2d 611 (N.Y. 1999)	19
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	13
 <u>Statutes</u>	
W.Va. Code § 48-1-232 (2001)	8,17
W.Va. Code § 48-1-235.3	9
W.Va. Code § 48-1-235.4 (2001)	7, 9
W.Va. Code § 48-9-103	10, 20
W.Va. Code § 48-9-103(a) (2001)	<i>passim</i>
W.Va. Code § 48-9-103(b)	8, 21
W.Va. Code § 48-9-201 (2001)	7, 9, 14
W.Va. Code § 48-9-208 (2001)	7, 14

I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

Your Appellant, Misty [REDACTED], appeals from the Cabell County Circuit Court's October 30, 2006 Order Affirming Family Law Judge's Order of June 28, 2006. The Family Law Judge's June 28, 2006 Order allowed the Intervening Appellees to participate in the custody proceedings below and determined that they had developed a relationship with the minor child sufficient to result in their becoming "psychological co-parents" with your Appellant. Cabell County Circuit Court Judge Alfred Ferguson's October 30, 2006 order affirmed the family law judge's order¹. Appellant seeks an Order from this Honorable Court reversing the Cabell County Circuit Court's October 30, 2006 order and granting her the same custodial rights of her three-year old daughter that she enjoyed before the Intervenors initiated the proceeding resulting in this appeal.

II. STATEMENT OF FACTS

Your Petitioner, Misty V., is the biological mother of the minor child, Senturi S-V., born on March 2, 2004. On April 5, 2004, Misty V. initiated this underlying custody action by filing her *pro se* "Petition for Support/Allocation of Custodial Responsibility," which Joshua S. accepted for service on April 9, 2004².

On May 5, 2004, Judge Patricia Keller of the Family Court conducted a hearing on Misty

¹Shortly after this Honorable Court granted Misty V.'s appeal, Judge Ferguson denied her motion for a stay by order entered March 27, 2007. By separate motion and for the reasons advanced in support of her appeal, Misty V. requests this Court to stay the order resulting in this appeal and restore her full custodial rights she enjoyed before the Appellees initiated the proceedings resulting in this appeal.

²On March 29, 2004, Misty V. also filed a domestic violence petition against Joshua S. in Cabell County Magistrate Court, which was docketed as action number 04D-254. On April 7, 2004, both parties appeared before this Court on Misty V.'s domestic violence petition and the family court found the allegations of domestic violence against Joshua S. had been proven and entered the DVP.

V.'s petition for custody, at which Misty V. appeared *pro se*. Joshua S. appeared in person and by counsel. After hearing testimony, the Family Court granted Misty V. custody of Senturi with visitation to Joshua S. on Wednesdays and "at other agreeable times." Neither party appealed.

No further action occurred in this custody case until May 2, 2005, when Misty V. filed a *pro se* "Petition For Modification," which sought to establish Joshua S.'s child support obligation, as well as to substitute Friday for Wednesday as his parenting day³. The West Virginia Department of Health and Human Resources (DHHR) also filed an action to collect child support (05-D-0004), which Judge Keller consolidated for hearing with Misty V.'s modification petition on July 18, 2005. Counsel for the DHHR, Misty V. and Joshua S. all appeared at the hearing. The Intervenor, who would later allege fitness issues with Misty V. and claim they were exercising time with the child then, did not enter any appearance or contest Misty V.'s custody.

Following presentation of evidence, the family court found Joshua S. had the ability to pay child support as ordered on April 7, 2004, but was in arrears in his support in the principal amount of \$172.11 and \$40.28 interest from April 1, 2004 to February 28, 2005. Misty V. and the subrogee, the State of West Virginia, were awarded a \$1,728 judgment for reimbursement child support principal and interest from November 1, 2004 to July 31, 2005. By Order dated August 17, 2005, the family court ordered Joshua S. to pay \$197 in child support to Misty V. for the minor child, Senturi. No party appealed this order.

In October, 2005, DHHR received a Child Protective Service referral that involved allegations of child neglect (including lack of supervision), lack of adequate physical care of the minor child, Senturi, and risk of neglect due to drug use by the caretaker, Misty V. Ms. Brenda

³According to Misty V.'s modification petition, Joshua S. "is off on Fridays so he requested the change."

Wright, LSW, interviewed several persons (including Misty V.'s other two minor sons, Dominique and Jacob⁴) and visited Misty V.'s home on October 18, 2005 and December 9, 2005. At the completion of the assessment, Ms. Wright concluded that the allegations were not substantiated and risk was rated at minimal to low. (When she testified at a later hearing on March 29, 2006, Ms. Wright offered testimony consistent with her report.)

On February 27, 2006, Misty V. filed her "Notice of Relocation" pertaining to the court-ordered parenting plan for Senturi. Misty V. advised of her plan to move to 314 Belmont Drive, Corpus Christi, Texas on or after March 17, 2006 and, as she had done with her earlier pleadings, provided advance notice to Joshua S. In her relocation petition, Misty V. outlined her support network and opportunities awaiting her in Texas.

On March 7, 2006, Joshua S., now joined for the first time in this proceeding by the Intervenor Christopher and Tanya F., filed a "Motion For Ex Parte Order For Emergency Temporary Custody[,] Respondent's and Intervening Petitioners' Verified Petition For Custody and Response To Notice Of Relocation" seeking "exclusive custody" of the infant child, [Senturi]. Joshua S.'s and Christopher and Tanya F.'s *ex parte* motion alleged, in part, that Senturi had been living with Christopher and Tanya F. "for the past fourteen months, from Christmas 2004 to the present date, with only limited visitation with the Petitioner. . . ." Respondent/Petitioner's and Intervening Petitioners' Motion For Ex Parte Order, paragraph 4. Respondents Joshua S. and Christopher and Tanya F. also challenged Misty V.'s fitness and alleged that the best interests of the minor child supported her remaining in West Virginia with them. Misty V.'s response denied these allegations and moved to dismiss the Intervenor from this case based on their lack of

⁴The custody of Misty V.'s two minor sons has not been challenged by the Respondent Intervenor.

standing.

On March 7, 2006, Family Court Judge Keller entered an Order Granting Ex Parte Relief to Joshua S. and Christopher and Tanya F. That order did not, however, grant Misty V. any parenting time with her child, and Misty V. filed her "Motion For Ex Parte Order To Set Aside the March 7, 2006 Order." In her motion, she alleged that Tanya F. had babysat the child and, in fact, received payments from the West Virginia Department of Health and Human Resources LINK Child Care Resource & Referral for the same⁵.

On March 14, 2006, the family court held a brief hearing on Misty V.'s motion to vacate that challenged Christopher and Tanya F.'s standing to maintain their action for custody. The family court allowed the Intervenors to maintain custody of the minor child with only two hours of supervised visitation on Monday, Wednesday, Friday and Saturday to Misty V. at a local McDonald's. The Court also ordered both Misty V. and Joshua S. to submit to drug testing following the hearing.

On March 29, 2006, Judge Keller proceeded to hear the merits of this case, and began taking evidence from Appellee Intervenors in support on their custody petition. In support of their case, the Intervenors offered their own testimony, as well as testimony from several witnesses. Misty V. presented testimony from Mary Bridgette, a LINK worker, as well as Brenda Wright, but given the court's scheduling considerations, she could not present any additional witnesses or evidence. Judge Keller then invited counsel to submit a brief addressing the issue of standing as it involves the matter of intervention, and on May 4, 2006, the family court held an additional

⁵The Respondents' motion for an *ex parte* order did not disclose the matter of the LINK payments, and, in fact, Tanya F. agreed to reimburse LINK for payments only after Misty V. raised this matter in court.

hearing in this case.

At the hearings, Misty V. maintained Christopher and Tanya F. were the child's babysitters, and she presented evidence of her parenting of her daughter Senturi since her birth. The undisputed record reveals no written document executed by anyone that transfers custody of Senturi from Misty V. to the Intervenors. Christopher and Tanya F. also admitted they were not involved in the planning of Senturi's birth, nor did they claim that they exercised time with her for the first nine months after her birth. They simply maintained Misty V. allowed them to care for the child for fourteen months preceding the filing of their *ex parte* petition for custody. Their witnesses claimed that the child spent several days a week with them, while Misty V.'s witnesses testified that she exercised the majority of the time with her child.

By Order entered June 23, 2006, the family court designated Misty V. the primary residential parent of the child and ordered her to share parenting time with Christopher and Tanya F. In so doing, the family court made several findings of fact and conclusions of law. These include, but are not limited to, the holdings that Christopher and Tanya F. were not paid to babysit the child and were not babysitters (Findings of Fact numbers 15, 16, and 17); that the Petitioner and the Respondent Intervenors had a "shared parenting arrangement" (Finding of Fact number 18); that Joshua S. was not an independent participant in the parenting of the child (Finding of Fact number 19); that Christopher and Tanya F. have formed an attachment to the child with the consent of the Petitioner (Finding of Fact number 20); that Christopher and Tanya F. have become "psychological co-parents" of Senturi (Finding of Fact number 25) and that it is not in the best interests of the child to deprive her of the love and stability provided by Christopher and Tanya F. (Finding of Fact number 26). The Court also indicated that if the parties cannot agree on a

schedule, then the Court will set a future hearing to set the visitation schedule for the Respondent Intervenor⁶. On June 28, 2006, the family court entered a "Corrected Order."⁷

Your Petitioner timely appealed the family court's order to the Circuit Court of Cabell County. On August 30, 2006, Misty V. also sought writs of prohibition and mandamus from this Honorable Court because she submitted in part that if further delay occurred depriving her of the custody of Senturi that it would not be correctable on appeal. See, SER Misty C.V. v. Hon. Patricia Keller, Family Law Judge, Supreme Court No. 062353. By Order entered on August 31, 2006, this Court denied your Petitioner the requested writs without prejudice to re-file in the circuit court.

On October 30, 2006, Judge Alfred Ferguson of the Circuit Court of Cabell County entered the "Order Affirming Family Law Judge's Order." That order finds:

- 1) That the family law judge's decision is supported by the testimony and other evidence offered to the court;
- 2) That said decision is warranted by the facts;
- 3) That said decision is not arbitrary nor capricious; and
- 4) That the family law judge's decision is based on a correct application of the law.

Your Appellant contends that the circuit court judge clearly erred as a matter of fact and law in affirming the Family Law Court's order. On March 14, 2007, this Honorable Court heard

⁶Since the May 4, 2006 hearing, the parties have tried to adhere to an informal visitation arrangement that is consistent with the Family Court's directives and rulings. The Intervenor now spend time with Senturi from approximately 8:30 a.m. Friday until 6:00 p.m. on Monday. Misty V. spends time with her daughter from Monday evening until Wednesday morning when the Intervenor have the child. They then return the child on Wednesday evenings and Misty spends time with the child until Friday morning.

⁷Other than the correction of Christopher's first name, the June 28, 2006 Order does not differ from the June 23, 2006 Order.

oral presentation of Misty V.'s petition for appeal, and on March 27, 2007, Misty V. received this Court's Order granting her petition and setting the briefing schedule. On the same day, Judge Ferguson entered the "Order Denying Application for Stay of October 30, 2006 Order Affirming Family Law Judge's Order." Misty V. has filed a separate motion with this appeal seeking a stay from this Court, and in support thereof, incorporates the same arguments now advanced in this appeal brief seeking reversal of the October 30, 2006 order.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

The Circuit Court clearly erred in affirming the Family Law Court's June 30, 2006 Order because neither the law or the facts support the Family Law Judge's finding of a shared parenting agreement between your Appellant and the Intervenors.

The Circuit Court clearly erred in affirming the Family Law Court's June 30, 2006 order because neither the law or the facts support the Family Law Judge's decision allowing the Intervenors to participate in this custody proceeding.

IV. POINTS AND AUTHORITIES RELIED UPON

A. In reviewing a Final Order entered by a Circuit Court Judge upon a review of, or upon a refusal to review, a Final Order of a Family Court Judge, [the Court] reviews the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. [This Court] reviews questions of law *de novo*. Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

B. "Permanent parenting plan" means a plan for parenting a child that is incorporated into a final order or subsequent Modification Order in a domestic relations action. The plan principally establishes, but is not limited to, the allocation of custodial responsibility and significant decision-making responsibility and provisions for resolution of subsequent disputes between the parents. West Virginia Code § 48-1-235.4 (2001).

C. If the parents agree to one or more provisions of a parenting plan, the Court shall so order, unless it makes specific findings that: (1) The agreement is not knowing or voluntary; or (2) The plan would be harmful to the child. West Virginia Code § 48-9-201 (2001).

D. If provisions for resolving parental disputes are not ordered by the Court pursuant to parenting agreement under section 9-201 [§ 48-9-201], the Court shall order a method of resolving disputes that serves the child's best interest in light of: (1) The parents' wishes and the stability of the child; . . . West Virginia Code § 48-9-208 (2001).

E. If a natural parent intends a temporary transfer of a child to a third party, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child. When a natural parent transfers permanent custody of a child to a third person, the burden of proof rests on the parent to prove by clear and convincing evidence that (1) he or she is fit; and (2) that a transfer of custody so as to disturb the child's environment would constitute a significant benefit to the child. Syl. Pts. 2 and 3, *Overfield v. Collins*, 199 W.Va. 27, 483 S.E.2d 27 (1996).

F. A judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests 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. See, *In Re: Grandparent Visitation of Cathy M. v. Mark Brent R. and Carla Ann R.* 217 W.Va. 319, 617 S.E.2d 866, 875 (2005)(adopting analysis in *Troxel v. Granville* 530 U.S. 57 (2000)).

G. A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian.... Syllabus Point 3, *Clifford K. and Tina B. v. Paul S.*, 217 W.Va. 625, 619 S.E.2d 138 (2005).

H. A "close emotional bond" between an adult and a child "generally takes several years to develop." *In Re: Alyssa W. and Sierra H.*, 217 W.Va. 707, 619 S.E.2d 220, 224 (2005).

I. Persons who have a right to be notified of and participate as a party in an action filed by another in a custody proceeding are:

- (1) A legal parent of the child, as defined in section 1-232 [§ 48-1-232] of this chapter;
- (2) An adult allocated custodial responsibility or decision-making responsibility under a parenting plan regarding the child that is then in effect; or
- (3) Persons who were parties to a prior order establishing custody and visitation, or who under a parenting plan, were allocated custodial responsibility or decision-making responsibility.

West Virginia Code § 48-9-103(a)(2001).

J. In exceptional cases, the court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child's best interests. The court may place limitations on participation by the intervening party as the court determines to be appropriate. Such persons or public agencies do not have standing to initiate an action under this article. West Virginia Code § 48-9-103(a)(2001).

K. [T]he mere existence of a psychological parent relationship, in and of itself, does not automatically permit the psychological parent to intervene in a proceeding to determine a child's custody pursuant to W.Va. Code § 48-9-103(b). Nothing is more sacred or scrupulously safeguarded as a parent's right to the custody of his/her child. In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions. *Clifford K. and Tina B. v. Paul S.*, 217 W.Va. 625, 619 S.E.2d 138, 157.

IV. DISCUSSION OF LAW

A. STANDARD OF REVIEW

In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a Family Court Judge, this Court reviews the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. This Court review questions of law *de novo*.

Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

B. THE CIRCUIT COURT CLEARLY ERRED IN AFFIRMING THE FAMILY LAW COURT'S DETERMINATION THAT APPELLANT AND THE INTERVENORS HAD A "SHARED PARENTING ARRANGEMENT" BECAUSE MISTY V. DID NOT CONSENT TO CO-PARENTING WITH THE INTERVENORS WHOM SHE CONSIDERED THE CHILD'S BABYSITTERS.

Under West Virginia Code § 48-1-235.3, a "parenting plan" means a "temporary parenting plan" or a "permanent parenting plan." West Virginia Code § 48-1-235.4 defines "permanent

parenting plan” as:

a plan for parenting a child that is incorporated into a final order or subsequent modification order in a domestic relations action. The plan principally establishes, but is not limited to, the allocation of custodial responsibility and significant decision-making responsibility and provisions for resolution of subsequent disputes between the parents.

“If the parents agree to one or more provisions of a parenting plan,” then West Virginia Code §48-9-201 requires a court to order it, unless it makes specific findings of fact that (1) the agreement is not knowing or voluntary; or (2) the plan would be harmful to the child.

In this case, *the undisputed evidence reveals Misty V. and Christopher and Tanya F. never agreed to a parenting plan.* And the Intervenors made *no* showing that they took the child to seek medical treatment—nor did they present any document that would have allowed them to do so.

Before Christopher and Tanya F. sought to intervene in this case, the undisputed evidence reflects:

- 1) Not a single document or order transferred custody of Senturi from Misty V. to Christopher and Tanya F.;
- 2) Misty V. had parented Senturi since her birth; and
- 3) Christopher and Tanya F. never claimed they were Senturi’s psychological parents until *after* Misty V. filed her notice of relocation on February 27, 2006.

Contrary to the family court’s decision, nothing in the West Virginia Code provides for a *de facto* shared parenting “*arrangement.*” Nor does anything in our statutes create the concept of a “psychological co-parents.” If anyone could claim that his or her exercise of time with a child has developed into a shared parenting “arrangement” with a parent who, like Misty, was actively parenting her child, then any non-parents—like the Appellee Intervenors—could intervene in a custody proceeding and thwart the legal process designed to provide stability in custody

determinations⁸. No West Virginia precedent supports this result.

In *Overfield v. Collins*, 199 W.Va. 27, 483 S.E.2d 27 (1996), this Honorable Court outlined the burden of proof and formalities involved in the voluntary transfer of the custody of child from a natural parent to a third party. The Court formulated two separate syllabi on the standard of proof. When a natural parent transfers permanent custody of a child to a third person, the burden of proof rests on the parent to prove by clear and convincing evidence that (1) he or she is fit; and (2) that a transfer of custody so as to disturb the child's environment would constitute a significant benefit to the child. Syl. Pt. 3, *Overfield v. Collins*. If a natural parent intends a temporary transfer of a child to a third party, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child. Syl. Pt. 2, *Overfield v. Collins*.

Unlike the present case, *Overfield v. Collins* involved a *written* transfer of custody that did not address whether it was temporary or permanent. The only question of the parties' intent in *Overfield v. Collins*, therefore, considered the *duration* of the transfer. The question of the custody transfer, itself, was not at issue. This crucial fact distinguishes *Overfield v. Collins* from this case and reveals that the family court clearly erred when it determined that "[f]or all intents and purposes, Misty [V.] and [Christopher and Tanya F.] had a shared parenting arrangement." See,

⁸As discussed below, this reveals why West Virginia Code § 48-9-103 limits participation in intervention and why this case does not even remotely resemble an "exceptional" situation allowing for intervention by Christopher and Tanya F.

June 23 and 28, 2006 Orders at Finding of Fact 18.

Since her child's birth, Misty V. has consistently parented her daughter Senturi. She initiated this custody proceeding. She also has two sons, and they, too, have spent time with the child since her birth. They are a family and nothing in the record reveals Misty V. intended to parent only her sons and allow any third parties to parent her daughter⁹. That is why she never signed any documents or made any written agreement with the Intervenors to transfer custody of Senturi. She considered them Senturi's babysitters. And, in fact, the record reveals Tanya F. applied for and received payments from LINK¹⁰ for at least a couple months at the end of 2005.

Tanya F. claims she has since reimbursed LINK for its payments. She also contended that the LINK records supported her position that she "was caring for the child too much," which is why she had to reimburse the payments. Intervenor's Response To Motion of Misty [V.] To Dismiss Intervening Petitioners For Lack Of Standing, April 25, 2006, at p. 2. This contention ignores the obvious: If Tanya F. really thought that she wasn't babysitting, then why involve LINK at all? The answer is simple: She *was* babysitting because Misty V. had not consented to co-parenting with her and her husband. Only after Misty V. notified Joshua S. of her intention to relocate did the Intervenors seek to transform the character of their babysitting arrangement into a "co-parenting" one. But parents aren't paid to babysit. Babysitters are.

Throughout this proceeding, Misty V. has maintained that she never relinquished custody

⁹Appellant also submits that it is not in the best interests of Senturi to deprive her of the companionship of her siblings, Dominique and Jacob. The family court's and circuit court's failure to consider Misty V.'s preference to parent Senturi with her brothers Dominique and Jacob represents additional clear legal error supporting reversal of their decisions.

¹⁰Link Child Care Resource and Referral Service is funded through the West Virginia Department of Health and Human Resources, Bureau for Children and Families, Division of Early Care and Education. Day care providers participating with Link, therefore, receive their payments from the State of West Virginia.

of her child to anyone. As this case's procedural history reveals, Misty V.—the primary residential parent—has been active and involved in this custody litigation since shortly after Senturi's birth. Until she obtained counsel for the recent relocation hearings, Misty V. litigated this case *pro se* while her ex-boyfriend, Respondent Joshua S., had counsel assist him with the initial custody determination. If, as the family court believes, she wanted to enter into a "shared parenting agreement" with anyone, Misty V. would have executed a parenting plan and obtained the court's approval. She didn't.

At a previous hearing, Tanya F. admitted that neither she or her husband filed to intervene in this case when the family court considered Joshua S.'s child support arrearage in July, 2005. Yet the Intervenors claim that they were exercising substantial time with Senturi in 2005. Even if the Intervenors' claim were true, however, their exercise of time with the child cannot determine their claim that they had a shared parenting agreement. The issue of Misty V.'s consent must instead resolve the matter.

In *Troxel v. Granville* 530 U.S. 57, the Supreme Court of the United States ruled that a Washington state statute providing that any person could petition for visitation at any time, and allowing the court to order visitation rights for any person when visitation served the best interests of the child, violated the substantive due process rights of the child's mother. The mother had objected to the court's order permitting paternal grandparents to exercise visitation rights, following the death of the children's father. 530 U.S. at 1. The United States Supreme Court observed that the Washington statute did not accord proper deference to a parent's decision that visitation would not be in the child's best interest. *Id.* at 67. "The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to

[the mother's] determination of her daughters' best interests." *Id.* at 69.

In the context of grandparent visitation, this Court recently adopted the *Troxel* analysis.

This Court held:

a judicial determination regarding whether grandparent visitation rights are appropriate may not be premised solely on the best interests 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.

See, *In Re: Grandparent Visitation of Cathy L. M. v. Mark Brent R. and Carla Ann R.* 217 W.Va. 319, 617 S.E.2d 866, 875 (2005).

Even if Christopher and Tanya F. exercised the time with the child as they claim, that period—fourteen months before the filing of their petition—cannot result in a *de facto* co-parenting agreement as a matter of law. Absent a written transfer of custody and/or approved “parenting plan” from Misty V., the family court (and the circuit court by adopting the family court’s findings and conclusions) should *not* have inferred a co-parenting arrangement here given Misty V.’s wishes as the child’s legal mother. To infer a co-parenting arrangement here is to violate Misty V.’s due process rights as a natural parent.

In the context of the “[c]riteria for parenting plan” and “dispute resolution,” West Virginia Code § 48-9-208(a)(1) provides, in part, that if the provisions for resolving parental disputes are not ordered by the court pursuant to parenting agreement under section 9-201 [§ 48-9-201], the court shall order a method of resolving disputes that serves the child best interests in light of:

(1) *The parents’ wishes and the stability of the child; . . .*

[Italics added].

Read *in pari materia* with West Virginia Code § 48-9-103(a)(2001)—our custody statute on

intervention--West Virginia Code § 48-9-208(a)(1) evinces a legislative intent to protect the due process rights of Misty V. as it involves her wishes for the care and custody of her daughter¹¹. Nothing in our custody statutes should allow the family court or circuit court to conclude that Misty V. had consented to a co-parenting plan with a third party in the absence of a written agreement or court-ordered parenting plan. Not only is that inconsistent with our statutes defining a "parenting plan," but it subverts the legal process designed to protect Misty V's rights to parent Senturi with her sons, Dominique and Jacob.

From Senturi's birth until this dispute began last year, Misty V. has primary custody of her daughter. During previous litigation of Senturi's custody, nobody--not Joshua, the Intervenors or the DHHR--ever challenged Misty's parental fitness. To the contrary, in the months preceding the filing of the Intervenors' *ex parte* custody petition, the Intervenors contentedly accepted money from the State of West Virginia for babysitting Misty's daughter, Senturi. Only after Misty V. filed her notice of relocation, did the Intervenors assert they were the child's "psychological parents."

Misty V. never legally transferred custody to the Intervenors. Nor did the Intervenors or Joshua S. present a "parenting plan" to the family court for its approval before the instant proceedings began. The circuit court and family court both refused to consider the obvious preferences of Misty V. to relocate with her daughter Senturi and her sons without input into that decision from the Intervenors¹². That violates Misty's due process rights as a parent. The below

¹¹As noted below, your Appellant submits that intervention is not proper here not only for due process reasons but also because this is not an exceptional case.

¹²Misty V. withdrew her relocation petition to remain near her father, who is ill.

tribunals also failed to apply West Virginia's well-settled law on the transfer of custody in holding that Christopher and Tanya F. were not babysitters who had a "shared parenting arrangement" with Misty, that they had formed an attachment to the child with the consent of Misty V., and that it was not in the best interests of the child to deprive her of the love and stability from Christopher and Tanya F. All these findings and conclusions constitute clear legal error requiring immediate remedy by this Honorable Court and a stay of the order denying Misty V. full custody of her daughter, Senturi.

C. THE CIRCUIT COURT CLEARLY ERRED IN AFFIRMING THE FAMILY COURT'S FINDING THAT THE INTERVENORS ARE "PSYCHOLOGICAL CO-PARENTS" OF THE CHILD AND ALLOWING THEM TO INTERVENE IN THIS PROCEEDING.

The family court determined that—"for all intents and purposes"—the parties had a "shared parenting arrangement," that [Christopher and Tanya F.] had formed a bond with the child with Misty V.'s consent, and that [Christopher and Tanya F.] have become "psychological co-parents" of Senturi. See, June 23, 2006 Order, Findings of Fact 18, 20 and 25. Neither the facts or the law support these determinations, and, at the very least, this is not an exceptional case allowing the Intervenor to participate in this custody matter.

First, throughout this proceeding, Misty V. has contended Christopher and Tanya F. lack standing to intervene. To repeat: Misty V. *never* consented to a legal and binding shared parenting plan and/or co-parenting with the Intervenor. That crucial fact should settle this matter in Misty's favor because without her consent no person can qualify as Senturi's "psychological co-parents":

A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent,

or any other person. *The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. . . .*

Syllabus Point 3, Clifford K. and Tina B. v. Paul S., 217 W.Va. 625, 619 S.E.2d 138

(2005)(Italics added)(Citation omitted).

Second, the record reveals that any asserted relationship between the child and the Intervenor does not rise to the “substantial” level required for a bond to develop. In the case of *In Re: Alyssa W. and Sierra H.*, 217 W.Va. 707, 619 S.E.2d 220, 224 (2005), this Court stated that its previous cases reveal that a “close emotional bond” between an adult and a child “generally takes several years to develop.”

In Re: Alyssa W. and Sierra H. considered a father’s right to post-termination visitation with his daughter, who was about a year and two months old when allegations of abuse arose against him, and this Court reversed the circuit court’s decision allowing the father visitation. In so doing, the Court noted that “the possibility of post-termination visitation is usually considered in cases involving children significantly older than Sierra H.” *Id.*

In Re: Alyssa W. and Sierra H. reveals Senturi is not old enough to have established the bond with Intervenor that they claim. If their allegation that Senturi had spent substantial time with them for fourteen months by early March, 2006 were true, by that time Senturi was only a few days past her second birthday (March 2, 2004). Misty V. submits that her daughter is not of sufficient advanced age to have formed the necessary, emotional bond with Intervenor that the Family Court found. (June 28, 2006 Order, Finding of Fact 20.) Given the due process rights of your Appellant, the family and circuit courts should not have presumed that the child was similarly bonded with the Intervenor here. *Id.*

The family court's determination that the Intervenors satisfied the definition of "psychological co-parents," of course, resulted in their continued participation in this action—which is another reason why your Appellant had sought writs last year from this Honorable Court. But neither the family court or the circuit court explained why this case qualifies as exceptional. In fact, *nothing in either the family court's or circuit court's orders even addresses the alleged exceptional nature of this case!*

West Virginia Code § 48-9-103(a) (2001) governs the determination of "[p]ersons who have a right to be notified of and participate as a party in" a custody proceeding:

(1) A legal parent of the child, as defined in section 1-232 [§ 48-1-232] of this chapter;

(2) An adult allocated custodial responsibility or decision-making responsibility under a parenting plan regarding the child that is then in effect; or

(3) Persons who were parties to a prior order establishing custody and visitation, or who under a parenting plan, were allocated custodial responsibility or decision-making responsibility.

(b) In exceptional cases, the court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child's best interests. The court may place limitations on participation by the intervening party as the court determines to be appropriate. Such persons or public agencies do not have standing to initiate an action under this article.

The Intervenors are not the legal parents of the minor child, Senturi. Nor have they been allocated any custodial responsibility or decision-making power under a parenting plan. They are obviously not parties to a prior order establishing custody and visitation. Of the four enumerated classes that *might* allow them to participate in this action, only subsection (b)—involving "exceptional cases"—purports to offer a basis for intervention—and even that basis cannot avail the Intervenors.

Clifford K. and Tina B. v. Paul S., 217 W.Va. 625, 544, 619 S.E.2d 138 (2005) provides an example of a truly “exceptional” case for intervention. In *Clifford K.*, Tina B. and Christina S., the biological mother, planned the birth of the minor child, Z.B.S. They enlisted the help of Clifford K. only for the purpose of impregnating Christina S., and Tina and Christina planned to raise Z.B.S. as a family. Tina accompanied Christina to almost all her prenatal appointments from April, 1999 to December, 1999. Following birth of Z.B.S. in December, 1999, Tina and Christina raised Z.B.S. until the death of Christina in June, 2002. The opinion then noted that but for Chris’ tragic death that she and Tina would have continued to raise Z.B.S. as they had from his birth, and that Tina was and is Z.B.S.’ second mother by design and actuality.

The facts here stand in sharp contrast with those of *Clifford K.*, where the biological mother *consented and encouraged* her partner to share co-parenting duties with her. This distinction serves crucial importance here because, as noted earlier, without Misty V.’s consent, a third-party couple cannot serve as Senturi’s “psychological co-parents.” And to hold that the actions of Misty V. in allowing the Respondent Intervenors to spend time with her daughter created a legal and binding “parenting arrangement” between them violates both our legal framework for resolving custody disputes and the mother’s due process rights. Cf. *In the Matter of William G. TT. v. Siobhan HH.*, 183 Misc.2d 162, 701 N.Y.S.2d 611 (N.Y. 1999)(denying under New York law the motion to intervene of a biological mother’s former partner who had resided with her and the children since their birth and who claimed to have shared all custodial and parental duties with mother since then).

In contrast to *Clifford K.*, the uncontested facts here reveal nothing “exceptional” about this case. To the contrary, the Intervenors neither planned, nor participated in the decision involving the

birth of the minor child. Neither were they present for the child's birth or the first nine months of the child's life. When Misty V. filed for modification of the parenting plan and support in the summer of 2005, the Intervenor--who claim they were substantial exercising time with the child then--did not assert any right to participate in the proceeding. Only after Misty V. sought to relocate did the Appellees raise their fitness challenge and oppose Misty's primary and full custodial rights to Senturi that she had exercised for almost two years.

Although Misty V. does not deny that the Intervenor have spent time with her child, she does take issue with their depiction of their relationship with the child as one where Misty V., in essence, gave them her child to raise. See, Intervenor's Response To Motion of Misty V. To Dismiss Intervening Petitioners For Lack Of Standing, April 25, 2006, p. 4. That is *not* the character of her consent. To infer that it is disregards Petitioner's due process rights, West Virginia Code § 48-9-103(a) (2001) and our other related custody statutes. It also disregards the reality of modern life: In order to provide for her children, a mother must sometimes arrange for a third party to take care of her child¹³.

West Virginia Code § 48-9-103(a) (2001) allows parties to a "parenting plan" or a prior custody proceeding the right to participate in a custody proceeding. This is because the parenting plan (or court order) establishes their legal rights to a child's custody. In contrast, when someone has not executed a "parenting plan" or is a party to a court order involving a child's custody, he or she has no legal rights to custody of that child. And it does not make either legal or practical sense

¹³As additional example of "modern reality," consider a hypothetical raised by Justice Maynard during oral presentation of the petition for appeal. A single mother who serves in our military overseas for an extended time may return from her duty and face potential custody litigation filed by non-parents who now claim parental rights to her child based on the time they exercised during the mother's military service.

to allow someone who is not a party to a parenting agreement to participate in a custody proceeding based on the alleged time she has spent with a child. If it did, then anyone who spends time with a child—a daycare provider, a kindergarten teacher or a volunteer—could intervene in a custody matter by simply alleging 1) that he or she spent substantial time with the child and, 2) that the mother consented to his or her establishment of a co-parenting relationship with the child. That absurd result cannot follow from a correct application of West Virginia Code § 48-9-103(a) (2001)¹⁴.

The uncontested facts reveal Misty V., the biological mother of Senturi, initiated this custody proceeding shortly after the birth of her child, and that the family court granted her custody. Over the next year, Misty V. continued to exercise custody of Senturi, and she even obtained a support order from the family court in 2005 that found Joshua S. in arrears of his child support obligation. Although they claim the minor child has lived with them for the fourteen months preceding their filing for *ex parte* relief, the record proves Intervenors did not seek to intervene in this case or otherwise assert a custodial interest until March, 2006. Only after Misty V. filed her Notice of Relocation did they assert their claim to custody of Senturi.

Misty denies the Intervenors have exercised the time with Senturi that they claim. She

¹⁴In *Clifford K. and Tina B. v. Paul S.*, 619 S.E.2d 138, 147, this Court explored the companion statutes to West Virginia Code § 48-9-103 and found they “make it abundantly clear that the primary aim of this legislation is to secure custodial placements of children that serve their best interests and to promote stability and continuity with those parents or parental figures with whom such children have from an emotional attachment bond.” The Court then enumerated specific factors under West Virginia Code § 48-9-102 (2001) that “are essential” to promoting and safeguarding the best interests standard. *Id.* The second factor seeks to serve the child’s best interests by facilitating “[p]arental planning and agreement about the child’s custodial arrangements and upbringing,” while factors three and four seek to safeguard “[c]ontinuity of existing parent-child attachments” and “meaningful contact between a child and each parent.” Your Petitioner submits that in promoting the best interests of a child, these statutes nevertheless acknowledge a parent’s due process right to parent her child and do not in any way diminish her constitutional rights to determine who spends time with her daughter.

contends that any time that they have exercised with the child involved babysitting. Tanya F. has admitted in her testimony at a previous hearing that she was not present for the child's birth, nor did she spend time with the child for the first nine months of her life. There are no documents or other legal memoranda revealing that Misty V. has granted any third parties custodial rights to Senturi.

Even if Misty V. had consented to Respondent Intervenors becoming "psychological parents" --and she did not-- proof of such status still cannot permit them to intervene in this proceeding under subsection (b). In *Clifford K. and Tina B. v. Paul S.*, 217 W.Va. 625, 619 S.E.2d 138, 157 (emphasis added), this Court announced:

we also wish to make it abundantly clear that the mere existence of a psychological parent relationship, in and of itself, does not automatically permit the psychological parent to intervene in a proceeding to determine a child's custody pursuant to W.Va. Code § 48-9-103(b). Nothing is more sacred or scrupulously safeguarded as a parent's right to the custody of his/her child.

In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions.

In this case, allowing the Intervenors to exercise custody of the minor child is tantamount to allowing a psychological parent to have greater due process rights than the biological parent. This Court has cautioned against such result and noted that "the limited rights of a psychological parent cannot ordinarily trump those of a biological or adoptive parent to the care, control, and custody of his/her child." *Clifford K. and Tina B. v. Paul S.*, 619 S.E.2d at 157. For this reason, the amount of alleged time the Intervenors have spent with the minor child cannot result in a finding that this is

an “exceptional case” allowing them to intervene, nor should it deprive Misty V. of her due process right to custody of her child¹⁵. As a matter of law, Misty V.’s consent and preferences should be determinative of her child’s relationship with any third parties and the undisputed records reveals that she never sought to establish any third parties as Senturi’s co-parents.

The Appellees, of course, challenged the fitness of Misty V. as a mother, and among their allegations, claim that she has had problems with drugs. The evidence of record does not prove their fitness challenge. Before her drug screen, which was positive for cannabinoids¹⁶, Misty V. gave a written statement that she never used such substance around her children. Rather, in hoping to achieve a “clean start,” Misty V. filed the relocation petition that—ironically--resulted in the grant of custodial rights to the Intervenors.

The previous CPS investigation allegations of maltreatment by Misty V. in December, 2005 found no problems with her home, and Ms. Wright’s report reveals Senturi *was there*. There is no abuse and neglect case that was ever filed against your Appellant, nor has anyone ever alleged—nor any of the tribunals below found-- that Misty V. abandoned her child. As a matter of law, the claims against Misty V. that she is not fit do not support unusual circumstances making this case “exceptional,” nor did the family court or circuit court make any such specific finding.

The facts of this case should not strike this Court as anything extraordinary, but the findings

¹⁵The Respondent intervenors called several witnesses to testify about the extent of alleged time they spent with Senturi, and their counsel proffered that they could have called many more. Misty V. also called witnesses to testify on this issue, but she submits that the number of witnesses called by either party should not determine who shall exercise custody of Petitioner’s child because she never consented to co-parenting with the intervenors.

¹⁶During the proceedings in family court, Petitioner later underwent a voluntary drug screen that was negative for drugs. A copy of this screen was provided to opposing counsel at a previous hearing, but a copy is not in the record.

of fact and conclusions of law reached by the tribunals below should. There is simply no precedent that supports a *de facto* "psychological co-parenting" agreement between the biological mother who was parenting her daughter with her other two sons and the babysitters who received money from the State of West Virginia to take care of one of those three children. And if this case satisfies the definition of "exceptional," then Misty V. submits that anyone who is not a legal parent who spends time with a child—such as a day care provider, a school counselor, a coach, a volunteer, or, as here, a babysitter-- would have rights to intervene in a custody proceeding and oppose the natural parent's right to relocate and/or exercise custody. To repeat: No precedent supports this result. Both the circuit court and the family law judge committed clear legal error when they allowed the Intervenors the right to participate in the below proceeding and receive custodial rights to Senturi.

RELIEF PRAYED FOR

WHEREFORE, Appellant Misty V. prays for the following relief and asks that this

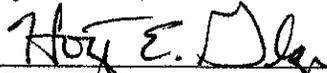
Honorable Court allow her counsel to present oral argument in support of her appeal and:

1. Grant her motion for a stay and reverse the Cabell County Circuit Court's March 27, 2006 Order denying the same;
2. Reverse the Cabell County Circuit Court's October 30, 2006 decision allowing Christopher F. and Tanya F. to participate in Civil Action Number 04-D-357 and to exercise "co-parenting" duties of the minor child, Senturi;
3. Reverse the Cabell County Circuit Court's October 30, 2006 decision and restore Petitioner Misty V.'s exercise of primary custodial rights of Senturi that she had been awarded before the filing of her relocation notice on February 27, 2006; and

4. Award such other and further relief as this Honorable Court deems meet and proper.

Misty V.,

By Counsel,



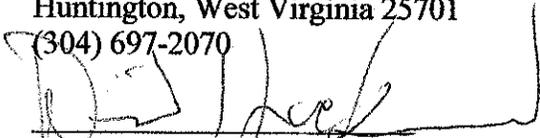
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

IN RE: Visitation and Custody of Senturi N.S.V.

MISTY C. V.,

APPELLANT,
RESPONDENT BELOW

v.

Supreme Court No. 063450

JOSHUA L. S.,

APPELLEE, PETITIONER BELOW

and

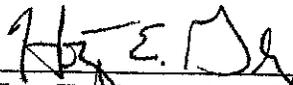
CHRISTOPHER and TANYA F.

APPELLEES, INTERVENORS BELOW.

CERTIFICATE OF SERVICE

I, Hoyt E. Glazer, counsel for Respondent, hereby certify that I have served a true copy of the foregoing and hereto annexed BRIEF ON BEHALF OF APPELLANT, MISTY V., upon the following person by placing a true copy thereof in the United States mail first class, postage prepaid, this the 9TH day of April, 2007, addressed as follows:

Steven M. Bragg, Esq.
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