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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.

No. 063450

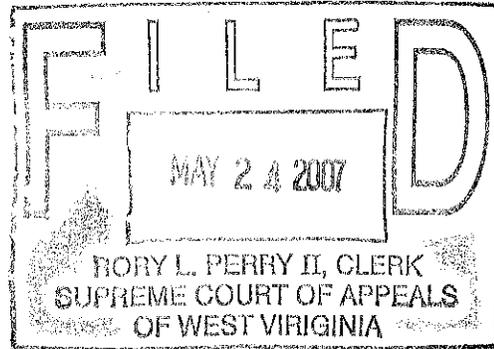
JOSHUA L. S.,

APPELLEE, PETITIONER BELOW

and

CHRISTOPHER and TANYA F.

APPELLEES, INTERVENORS BELOW.



REPLY BRIEF ON BEHALF OF APPELLANT, MISTY V.

Submitted by:

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I. ARGUMENT

THE TRIBUNALS BELOW FAILED TO GIVE SIGNIFICANT WEIGHT TO MISTY V.'S PREFERENCES INVOLVING THE APPROPRIATENESS, IF ANY, OF THE INTERVENORS' VISITATION TIME WITH HER DAUGHTER, SENTURI AND COMMITTED CLEAR ERROR REQUIRING REVERSAL OF THEIR DECISIONS.

In *Troxel v. Granville*, 530 U.S. 57 (2000), the United States Supreme Court determined a parent has a protected liberty interest in the care, custody and control of her child. This is a fundamental right that both the West Virginia Constitution and the United States Constitution protect. See, W.V. Const. Article III, § 10. It is a fundamental right that encompasses the presumption that a fit parent will act in the best interest of her child.

While the Respondents have raised concerns about Misty V.'s fitness, no tribunal has ever deemed Misty V. an unfit parent, and she has never abandoned, abused or otherwise neglected any of her children. As a matter of due process, therefore, our law presumes Misty V. acts in the best interests of Senturi when she makes decisions about those third persons, if any, who will associate with her child. In this case, Misty prefers to remain the primary, caregiving custodial parent of Senturi without interference from the Appellee Intervenors. The below tribunals, however, obviously failed to apply the proper "parental presumption" in Misty V.'s favor not only by allowing the Appellee Intervenors to participate in this case, but also by ultimately allowing them to exercise the majority of custodial time with Senturi.

In their response brief, the Intervenors suggest that *Troxel*'s analysis applies to "grandparent visitation" cases, and, furthermore, contend "the decisions of the courts below were not only based on the best interests of the child, but . . . upon a best interest analysis coupled with the fact that with the consent of Misty V.[,] Christopher and Tanya F. had formed an attachment

to the child.” Response Brief of Appellees, Christopher and Tanya F. at pp. 11-12. But in the context of intervention, a “best interests” analysis cannot trump *Troxel*’s presumption in favor of a fit parent’s visitation preferences. To the contrary, the preferences of Misty V., as a fit parent, predominate in her favor and should prevent a court from imposing its decisions about parenting in place of hers. Whether or not Misty V. wished for the Appellees to exercise some time taking care of Senturi in the past, the record clearly reveals that she does not wish for them to exercise visitation with her child now. Moreover, Misty V.’s prior consent involving Senturi’s care cannot supercede her present wishes involving the parenting of her daughter. In short, whatever arrangement Misty V. and the Appellees may have had involving the care of her daughter, the law establishes that if Misty V. has certain preferences involving care of her daughter that the courts should oblige her decision unless she is not fit. Both tribunals below committed clear legal error by failing to accord significant weight to Misty V.’s parental preferences.

The Appellees’ brief also offers no real explanation why this case qualifies as “exceptional” such that they should even be allowed to participate in this action. In essence, the Appellees’ argument goes “Misty V. let the Intervenors spend time with her child, as a result the Intervenors became Senturi’s psychological parents, and that makes this an ‘exceptional case’ for intervention.” But a “psychological parent” does not have an automatic right to participate in a case, and, moreover, the mere presence of a “psychological parent” does not make a case “exceptional.” The Appellees’ argument does not contend otherwise, and, to repeat, this Honorable Court has decided a psychological parent does *not* automatically have superior rights to a natural parent such as Misty V.:

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.

Clifford K. and Tina B. v. Paul S., 217 W.Va. 625, 619 S.E.2d 138, 157 (emphasis added).

In short, the decisions below allowing the Appellees custodial rights lack are simply unprecedented in West Virginia jurisprudence. No abuse and neglect proceeding has ever been filed against Misty V. And no tribunal or agency has opined Misty V. is an unfit parent. Yet under the current custodial arrangement, your Appellant—the natural mother who has parented her daughter since her birth—receives only two overnight visits with her own child, while she continues to parent her other two sons full-time. For these reasons, and the reasons previously advanced in support of her appeal and motion for a stay, Misty V. again asks that this Honorable Court grant her request for relief and restore her full custodial rights to Senturi that she enjoyed before the Appellees' filed their petition for custody.

CONCLUSION

Based on the foregoing reasons, as well as those arguments advanced in her previously filed appeal brief and motion for stay, your Appellant, Misty V., respectfully requests that this Honorable Court 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; 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 award such other and further relief as this Court deems meet and proper

Petitioner/Respondent, Misty C.V.

By Counsel



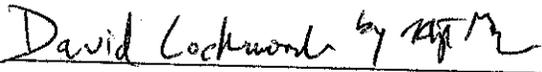
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CHRISTOPHER and TANYA F.

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CERTIFICATE OF SERVICE

I, Hoyt E. Glazer, counsel for Appellant, hereby certify that I have served a true copy of the foregoing and hereto annexed *REPLY 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 23rd day of May, 2007, addressed as follows:

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