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No. 33716

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At Charleston

IN THE MATTER OF:

Abbigail Faye B.

[REDACTED]

**FILED**  
JAN 11 2008  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

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FROM THE CIRCUIT COURT OF  
CABELL COUNTY, WEST VIRGINIA  
Civil Action No.: 07-CIGR-1

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BRIEF OF APPELLEES

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## KIND OF PROCEEDING AND NATURE OF RULING

The Appellees agree that petitioners filed a petition for Appointment of Guardian in the Family Court of Cabell County, West Virginia and subsequently amended their petition. Thereafter, the Family Court appointed a Guardian Ad Litem for the infant child and in March, 2007, the Family Court, by Order, removed this matter to the Circuit Court of Cabell County pursuant to Rule 48 (a) of the Rules of Practice and Procedure for Family Court.

The Circuit Court, Judge John L. Cummings, heard testimony and evidence on May 7, May 25, and June 28, 2007 and by Order entered July 9, 2007 the Court denied the petition for guardianship based upon his findings that "after having reviewed all of the testimony and the recommendations of the parties, this Court finds that the petitioners have failed to meet their burden in this matter to show that Abbigail ... is an abused or neglected child as defined by West Virginia Code, nor that Autumn..., the natural mother of Abbigail, is not capable of being a fit parent. There being no evidence at any point to prove that Autumn is an unfit mother or that Josh, the biological father, is an unfit father.

The Court further found that the longer the child stayed with her grandmother the harder the transition to her natural parents would be and the Court found that the parents must be given a chance, unless they are proven unfit, and there was no evidence of abuse or neglect shown or that either parent is unfit; nor there was there any evidence that the petitioner were more fit than the natural, biological parents.

On that basis, the Circuit Court placed the physical and legal custody of the infant child with the natural parents.

## STATEMENT OF FACTS

The infant child was born on August 3, 2006 in Cabell County, West Virginia to the Appellees, Autumn and Josh, who are now married to each other.

The Appellees will not contest the statement of facts as contained in the Appellants' brief but would state that the Appellants do overemphasize anything negative concerning the Appellees while overly grandizing any statements or actions attributed to the Appellants. The fact of the matter is that the Appellees, the natural, biological parents of the infant child, have had said infant child in their legal and physical custody since at least August, 2007 with very little, if any, visitation with

said infant child by the Appellants. Further, there have been absolutely no medical problems with the infant child since she was returned to the legal and physical custody of her natural, biological parents and the child seems to be thriving in her new environs.

POINTS AND AUTHORITIES

Case Law:

Troxel v Granvel 530 US 57.....6  
In re: Grandparent Visitation of Cathy L. M. v Mark Brent R.  
and Carla Ann R. 217 WVA 319, 617 S. E. 2d 866 (2005).....6  
Clifford K. and Tina B. V Paul S., 217 WVA 625, 619 S. E. 2d 138.....6  
In re Visitation and Custody of Senturi N. S. V. 652, S.. E. 2d (2007) .....6

Statutes:

West Virginia Code §44-10-3.....5

Rules:

Rule 48a *Rules of Practice and Procedure for Family Courts* .....5

## DISCUSSION OF LAW

### 1. STANDARD OF REVIEW ON APPEAL

As this Court has stated many times, there is a two-pronged standard of review when reviewing the Findings and Conclusions of a Bench Trial in Circuit Court. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and whether or not the Circuit Court decision was clearly erroneous.

### 2. The Circuit Court properly concluded that this matter was before it based upon Rule 48 (a) of the Rules of Practice and Procedure for Family Court.

Rule 48(a) of the Rules of Practice and Procedure for Family Court states and follows:

If a Family Court learns that the basis, in whole or part, of a petition for infant guardianship brought pursuant to WVA Code Section 44-10-3, is an allegation of child abuse and neglect as defined in WVA Code Section 49-1-3, then the Family Court before whom the guardianship proceeding is pending shall remove the case to the Circuit Court for hearing . . . at the Circuit Court hearing, allegations of child abuse and neglect must be proven by clear and convincing evidence . . .

The Circuit Court found that petitioners failed to meet their burden in this matter to show that the infant was abused or neglected nor that either of the natural, biological parents were not capable of being a fit parent.

The Appellees contend that the meaning and language of Rule 48 (a) is clear and that this matter was before the Circuit Court under this Section of the Rules of Practice and Procedure for Family Court. After three rather long hearings, and having the opportunity to observe all concerned in this matter, the Circuit Court correctly concluded that the Appellees were not unfit and that the infant child, in no way, was abused or neglected.

In their brief, the Appellants admit that the child was not abused or neglected and that would include by all concerned, including the Appellees.

The Appellants contend that the Circuit Court erred by failing to utilize certain procedures available under the Rules of Practice and Procedure for Family Courts but then goes on to say that the Court did not utilize these procedures because it was clear that the child was not abused or neglected.

Appellees contend that not only has there been no proof that they are unfit, and not only did the judge consider the child's best interest, but, also, the Court stated that the Appellant, Gala Pack

had “the grandmother syndrome” referring to the fact that the grandmother was trying to take the child as her own and was trying to control the entire affair. 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 allow visitation rights for any person when visitation served the best interest 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. 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. “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 daughter’s best interest.” Id at 69.

The West Virginia Supreme Court of Appeals has adopted the Troxel analysis and has held: A judicial determination regarding rather 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 parent’s preference, thus precluding a Court from intervening in a fit parent’s decision making on a best interest basis.

In re: Grandparent Visitation of Cathy L. M.v Mark Brent R. and Carla Ann R. 217 WVA 319, 617 S. E. 2d 866, 873 (2005).

This Court has shown that weight must be given to the natural parents’ preference and such should be applied before the Court.

In the case Clifford K. and Tina B. v Paul S., 217 WVA 625, 619 S. E. 2d 138, 157, This Court announced . . . “nothing is more sacred or scrupulously safeguarded as a parents’ right to his/her child.”

In the law concerning custody of minor children, no rule is more firmly established than 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 the recent case of In re: Visitation and Custody of Senturi N. S. V., 652 S. E. 2d 490 (2007). This Court once again restated the firmly established rule that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person and that it is a fundamental personal liberty protected and guaranteed by the due process clauses of the State of

West Virginia and the United States Constitutions. In this case this Court went on to say that a parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right, or by agreement or otherwise has transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts. Id page 500.

The Circuit Court did not find the Appellees to be unfit for any reason, much less the reason stated in the Senturi N. S. V. case and did, in fact, find that there was no evidence that either parent was unfit. Therefore, your Appellees urge this Court to recognize and enforce the rights of the parents to the custody of their infant daughter and to affirm the Order of the Circuit Court which had the benefit of three separate hearings and the observation of all parties concerned.

#### CONCLUSION

WHEREFORE, by the reasons given above and as may appear in the record of this case and as may be proper to this Court, the Appellees, would urge this Court to dismiss the Appellants' Petition for Appeal and to uphold the ruling by the Trier of Fact, the Circuit Court of Cabell County, West Virginia, said Circuit Court decision being that it is in the best interest of the infant child to remain with her natural, biological parents.

Respectfully submitted

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