

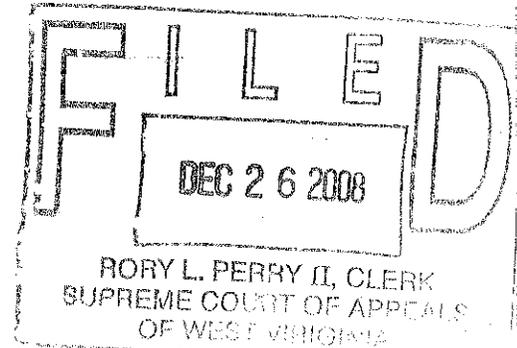
**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
at  
CHARLESTON, WEST VIRGINIA**

**IN RE: THE MARRIAGE/CHILD OF:  
JASON L. GALLOWAY,  
Petitioner,**

**and**

**No. 34588**

**TIFFANY D. GALLOWAY,  
Respondent.**



**OPENING BRIEF  
ON BEHALF OF  
JASON L. GALLOWAY**

**On Appeal from the Wood County Circuit Court  
The Honorable J. D. Beane Presiding  
Wood County Family Court Case No. 03-D-594)**

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**OPENING BRIEF**  
**ON BEHALF OF JASON L. GALLOWAY**

Now comes JASON L. Galloway, the Petitioner below and herein, by and through his counsel, MICHELE RUSEN and pursuant to Rule 10 of the Rules of Appellate Procedure for West Virginia hereby files the within "*Opening Brief*" appealing the ruling of the Wood County Circuit Court, the Honorable J.D. Beane presiding. This ruling affirmed the decision of the Wood County Family Court, the Honorable Annette L. Fantasia presiding, directing the Petitioner to support a child found not to be his biological child and denying the Petitioner's attempt to disestablish paternity for this child.

**I. Nature of the Proceedings Below**

This appeal stems from a divorce proceeding filed in the Family Court of Wood County, West Virginia on February 21, 2003 by JASON L. GALLOWAY, (03-D-594). This divorce action was the second such divorce action filed by the parties; the first divorce was filed by TIFFANY GALLOWAY in July 2000 (00-D- 530) and was dismissed in November 2001 when TIFFANY GALLOWAY did not appear at the final hearing.<sup>1</sup>

A final divorce was granted to these parties on May 9, 2005 in the instant case (03-D-594) following a very brief final hearing on December 6, 2004. In the *Final Order of Divorce*, the Family Court ruled that JASON L. GALLOWAY must support IVY LYNN GALLOWAY, a

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<sup>1</sup> On July 10, 2000, TIFFANY GALLOWAY filed a pro se Petition for Divorce from JASON L. GALLOWAY in case 00-D-530. That case was dismissed for failure of TIFFANY GALLOWAY to appear at a final hearing on November 16, 2001 to prosecute this action. The issue of the child's paternity was also raised in that proceeding, and a *Guardian Ad Litem* was also appointed in that case. While the Family Court Order stated that the Petitioner, JASON L. GALLOWAY did not appear at this hearing, this is not accurate.

child that DNA tests performed within six months of the child's birth determined was not his biological child. JASON L. GALLOWAY thereafter appealed the Family Court's ruling denying his request to disestablish paternity and refusing to consider DNA evidence which irrefutably established he was not the father of the child. The Family Court's ruling was subsequently affirmed by the Wood County Circuit Court in June, 2005.

JASON L. GALLOWAY sought an appeal to this Court. in January 2006 (No. 060050). After the State of West Virginia acknowledged error in the case, this matter was remanded to the Wood County Family Court in March 2006 by agreement of the parties for further proceedings. Following proceedings conducted on remand, the Wood Family Court again ruled that JASON L. GALLOWAY must continue to pay support for a child not his own by Order entered October 16, 2007. Following a second appeal to the Wood County Circuit Court, that ruling was again affirmed. Accordingly, JASON L. GALLOWAY for a second time appeals from the adverse rulings of the Wood County Family Court and Circuit Court, and emphasizes that this Court has never considered the issues in this case on the merits.

## II. Statement of the Facts

On February 21, 2003, JASON L. GALLOWAY filed a "Petition" with the Family Court of Wood County seeking a divorce from TIFFANY GALLOWAY.<sup>2</sup> TIFFANY GALLOWAY and JASON L. GALLOWAY were married on August 24, 1998 and separated on July 10, 2000. (*Petition at ¶3; Final Order of Divorce at ¶3.*) One child was born while the parties were married, namely, IVY LYNN GALLOWAY, born on October 28, 1998, two months after the marriage. (*Petition at ¶6; Final Order of Divorce at ¶5.*) In all, the parties resided together for only twenty months after the child was born, from October 28, 1998 until July 10, 2000.

Sometime before April 29, 1999, the parties and the child, IVY LYNN GALLOWAY were tested at DNA Diagnostics Center to determine whether or not JASON L. GALLOWAY was the biological father of the child. (*Exhibit 1.*) A report dated April 29, 1999, or six months after the birth of the child, states that "the alleged father, Jason L. GALLOWAY, is excluded as the biological father of the child named IVY LYNN GALLOWAY." *Id.* JASON L. GALLOWAY sought DNA testing *after* TIFFANY GALLOWAY informed him that IVY LYNN GALLOWAY might not be his child, despite her earlier representations that IVY was his child.

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<sup>2</sup> The Petitioner was represented in the divorce proceeding by Thomas Munchmeyer, Esq.

Based upon these facts, in his *Petition for Divorce*, JASON L. GALLOWAY alleged that IVY LYNN GALLOWAY, "was conceived before marriage and [that] the Petitioner [was] not the biological father of this said child." "*Petition*" at ¶6. As proof, the Petitioner submitted the "DNA Parentage Test Report" dated April 29, 1999 as an exhibit. (*Exhibits 1 and 2.*)

Due to the question of paternity raised by the Petitioner, the Family Court appointed a *Guardian Ad Litem* at a status hearing held on July 21, 2003 "to determine whether it was in the best interest of the minor child to disestablish paternity pursuant to the holding in *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989).<sup>3</sup> *Order from Status Hearing - July 21, 2003*, (*Exhibit 3.*) No support order was entered or established while the divorce action was pending presumably because of the question regarding paternity.

Two additional hearings were held before Judge Fantasia in the instant divorce: one on April 27, 2004 and one on either September 20 or 28, 2004. (*See, Order from Second Status Hearing - April 27, 2004* and *Order from Third Status Hearing - September 28, 2004.*) The *Order* from April 27, 2004 does not reflect the attendance of the *Guardian Ad Litem*. Further, this *Order* notes that ... no report had been filed by the *guardian ad litem* and a report was necessary before this action could be finalized." *Id.* Accordingly, the matter was scheduled for another status hearing to be held on September 20, 2004.

No hearing was held on September 20, 2004, or at least there is no audio-recording, record or order memorializing any hearing conducted on September 20, 2004. It is believed that the September 20, 2004 hearing was continued to September 28, 2004 at which time the *Guardian Ad Litem* apparently orally presented his findings to the Court. No written report from the *Guardian Ad Litem* was presented at September, 2004 hearing or at any hearing thereafter. Further, no audio recording exists for the hearing held on September 28, 2004. In fact, the recommendations and comments of the *Guardian Ad Litem* made at the hearing which occurred on September 28, 2004 were not memorialized in any manner whatsoever until June 10, 2005 when an *Order* reflecting the results of that hearing was entered. This was the day *after* the Wood County Circuit Court affirmed the Family Court's ruling for the first time (June 9, 2005). Thus, when the Wood County Circuit Court considered JASON L. GALLOWAY's first appeal in this matter, the sparse findings set forth in the *Final Divorce*

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<sup>3</sup> Attorney Robert Ellison was appointed as *Guardian ad Litem* in the first divorce action (00-D- 530), and Attorney Joseph P. Albright, Jr. appointed as *Guardian Ad Litem* in the instant case, the second divorce action (03-D-142).

*Order* contained the only information about the *Guardian Ad Litem's* investigation and findings, and those findings did not completely jibe with the *Order from Third Status Hearing - September 28, 2004*.

The September 28, 2004 *Order from Third Status Hearing* stated that the *Guardian Ad Litem* did not believe it was in the best interests of IVY LYNN GALLOWAY to disestablish paternity because:

1. He saw no reason to disestablish the paternity of this child.
2. The parties were married when the child was born and Mr. GALLOWAY is on the child's birth certificate.
3. Paternity testing should not have been performed until after the Guardian's report had been received.
4. Mr. GALLOWAY had steady employment, while the alleged biological father of the child was reportedly in jail.
5. There was no reason to allow disestablishment of paternity in this case, as it would not be in the best interest of the child. *Id.*

The "*Order from Third Status Hearing*" went on to recite that JASON L. GALLOWAY objected to this recommendation as "paternity testing had clearing [sic] shown his client was not the biological father and therefore his client should not be legally responsible for her support and maintenance." *Id.* This objection was overruled, as the "Court stated its intention to adopt the recommendations in the report and cited the factors in the case of Michael K.T., in support thereof." *Id.*

The final divorce hearing was held on December 6, 2004; thereafter the "*Final Order of Divorce*" was entered on May 9, 2005. This *Final Order* noted somewhat different, but still sketchy information about the best interests of the child and the issue of paternity:

At the third [status] hearing, JOSEPH P. ALBRIGHT, JR. presented his report as *Guardian ad Litem*. The *Guardian* concluded that it was not in the best interest of IVY LYNN GALLOWAY to disestablish the paternity of the Petitioner, as the parties were married at the time the child was born, the Petitioner is on the child's birth certificate, is the only father she has known and the Petitioner has the capability of supporting the child. The Court accepted the report of the Guardian and adopted his findings and recommendations. *Final Order of Divorce, at p.2.*

The parties were granted a divorce on the basis of irreconcilable differences. With regard to the custody and parenting issues for the child, custody remained with the mother, and “due to the long period of time without contact between the Petitioner and the minor child, a phased-in visitation schedule is appropriate.” *Final Order of Divorce*, at ¶13, (emphasis added.) A record of the final hearing has been filed with the Circuit Court. This recording establishes that the Petitioner was at that time “undecided” as to whether he would exercise any visitation rights. (*Hearing of 12/6/04 at 9:52:54.*) He further confirmed that he’d had “hardly any” contact with the child for at least a year to eighteen months. (*Id.* at 9:52:56.)<sup>4</sup>

In the *Final Order of Divorce*, the Family Court further found “that paternity testing should not have been conducted in this case until after the report of the *Guardian ad Litem*” and that “the recommendations in the report of the *Guardian ad Litem* are in the best interest of the minor child.” *Final Order of Divorce*, at ¶17-18. The Family Court went on to conclude that “[t]he report of the *Guardian Ad Litem* regarding the best interest of the minor child, the passage of time, potential harm to the child and other factors cited in Michael K.T. v. Tina L.T., should be accepted by the Court and adopted as the Court’s findings and conclusions in that regard.” *Final Order of Divorce*, at ¶6, page 6. Once again, additional information (the passage of time, potential harm to the child) were haphazardly included within this *Order* without any further elaboration.

JASON L. GALLOWAY filed a *pro se* appeal from the Family Court’s rulings in the divorce order. This appeal focused almost entirely on the provision requiring him to support a child not his own. In this first appeal to the Circuit Court, JASON L. GALLOWAY noted that “the child, IVY LYNN GALLOWAY was conceived seven months before we were married.” *Petition for Appeal at p. 1.* He further stated that “Tiffany said the child was mine when she knew different and tried to hide the fact.” *Id. at p. 2.* Mr. GALLOWAY explained that two or three months after the child had been born, his ex-wife got around to telling him that the child “might not” be his. *Id.* This somewhat explains the fact that five to six months after the child’s birth, in April, 1999, Mr. GALLOWAY obtained a “DNA Parentage Test” which excluded him as the father. JASON L. GALLOWAY also noted that as of May, 2005, he and his ex-wife had been separated nearly five years, and that he “had been excluded from the

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<sup>4</sup> It is undisputed that the child has resided in the care of her mother since the parties separated.

child and further contact.” *Id.* The Petitioner’s lack of contact with the child is confirmed in JASON L. GALLOWAY’s in his testimony at the final divorce hearing, by the findings in the “*Final Divorce Order*” and by his testimony at the hearing following the remand of this matter.

In rejecting JASON L. GALLOWAY’s *pro se* appeal, the Circuit Court concluded that “in the present case, [the] *Guardian Ad Litem* ... concluded that it was not in the best interests of the minor child to disestablish paternity of the Petitioner, as the parties were married at the time the child was born, the Petitioner is on the child’s birth certificate, is the only father the child has ever known and the Petitioner has the capability of supporting the child.” *Order and Opinion Regarding Family Law Appeal, at page 2. (June 10, 2005)* Citing *Michael K. T. v. Tina L.T.*, the Circuit Court concluded that “a trial judge should refuse to admit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.” *Id.* Finding this decision “clearly ... applicable to the one at hand...,” the Circuit Court determined that “the minor child lived under the care of her father and mother jointly for almost two years.” *Id.* Further, the Circuit Court concluded that “it is clear that the best interests of the child would include receiving financial support from the Petitioner” since “the biological father is not present to support the child financially or have a relationship with the child on a consistent basis.”

Following the Circuit Court’s rejection of his appeal, JASON L. GALLOWAY then filed the first “*Petition for Appeal*” with this Court on January 13, 2006 (No. 060050.) On or about March 13, 2006, JASON L. GALLOWAY, TIFFANY GALLOWAY and the West Virginia Bureau of Child Support Enforcement filed a “*Joint Motion to Remand*” this case to the Wood County Family Court. This Court acted upon the *Joint Motion* by refusing the “*Petition for Appeal*” and remanding this matter to Wood County Family Court. (*Exhibit 4.*)

After the case was remanded by agreement of the parties, the Honorable Annette L. Fantasia again conducted hearings on May 16, 2006 and January 30, 2007. At the first hearing, the Petitioner sought information from the *Guardian* and presented his “*Motion for Updated and Written Guardian Ad Litem’s Report or Alternatively for Appointment of New Guardian Ad Litem*” insofar as the Petitioner requested that the *Guardian Ad Litem* file “a written report of his findings with this Court before the final hearing in this matter.” The

Petitioner's purpose in seeking a written report or a new guardian was to attempt to determine more specifically the basis for the conclusions made in this matter. While this motion was granted, no written report was ever received from the *Guardian*. The Family Court finally entered a final Order on October 16, 2007. (*Exhibit 5*.)

TIFFANY GALLOWAY did not appear in person at the January 30<sup>th</sup>, 2007 hearing, but her attorney was permitted to proffer certain information. (*Exhibit 5, Order of 10/6/07 at 2-3, ¶ 22.*) TIFFANY GALLOWAY maintained that IVY LYNN GALLOWAY had called JASON L. GALLOWAY "daddy" until she was four, and that IVY LYNN GALLOWAY had also visited with her "nanny," JASON L. GALLOWAY's mother until she was four and "did have a wonderful relationship with her." (*Transcript of 1/30/07, p. 6.*)<sup>5</sup> However, TIFFANY GALLOWAY admitted that the parties had "split" in July of 2000, and it was clear that JASON L. GALLOWAY had had very little to do with IVY LYNN GALLOWAY after that. (*Id.*) TIFFANY GALLOWAY's lawyer stated that "I think honestly she believed that the child was his and then questioned it." TIFFANY GALLOWAY's lawyer also opined that "...my argument is at eight years old, it is probably too late for this child to form an attachment to anyone new." (*Id.*)

On the other hand, JASON L. GALLOWAY testified that he "...believed that TIFFANY GALLOWAY was carrying his child when he married her; he continued in that belief until the child was approximately three months when TIFFANY GALLOWAY informed him the child might not be his." (*Order of 10/6/07 p. 3, ¶ 25.*) He then "had blood testing privately performed." (*Id. at ¶ 26.*) The Court noted that Ronald Housey had also been identified as a potential biological father for the child, but that he "was presently incarcerated for a period of time, and was not a source of child support." (*Id. at 2, ¶21.*)

At the January 30, 2007 hearing, the Petitioner strenuously objected to the lack of a written report from the *Guardian Ad Litem*:

Ms. Rusen: And I would like to place on the record my objections to the guardian's failure to file a report before this hearing.

Judge: Well, he will follow up with his written report.

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<sup>5</sup> For ease of reference, the Petitioner has caused a transcript of the proceedings held before the Wood County Family Court on January 30, 2007 to be prepared and it is filed as part of the original record of this matter along with the disc containing the recording of this hearing.

Ms. Rusen: Well, but that's not the point. The point is we wanted the report at the hearing so we could discuss it, so we could rebut it, so we could question it. That has not happened and it was specifically in the Court's Order and I am not, this is nothing personal because I have been in the same shoes and my reports have been late but I think in this particular case being remanded from the Supreme Court as it was, it was important to us and to Mr. GALLOWAY for the right to have that report here today so we object to that. (Tr. 1/30/07 p. 9.)

Without specifically ruling on this objection, Judge Fantasia later again directed that the *Guardian* file a report:

Judge: Well, what I was going to do is have you submit your report in writing and then if either party requests an additional hearing, we will do that.

GAL: That is fine.

Judge: I won't sign the Order until I get your report.

GAL: That's fine.

Judge: That was my thought. Instead of scheduling it, waiting three months. You issue your report. The parties will have an opportunity to ask for a hearing on your report and if they haven't, we will say within twenty days that should give you plenty of time. And if they haven't I will go ahead and sign the Order.

GAL: Okay.

Judge: But I am going to have Ms. Adams (counsel for TIFFANY GALLOWAY) do the Order. (Tr. 1/30/07 at 24-25.)

As previously stated, no report was ever filed by the *Guardian Ad Litem*, nor was an *Order* ever prepared by TIFFANY GALLOWAY's counsel. The case remained unresolved until the Court prepared and issued its own *Order* following receipt of a *Notice of Presentation of Order* from the undersigned counsel for JASON GALLOWAY.

The Wood County Family Court once again ruled that it was not appropriate to disestablish paternity in this case. Despite the fact that there was again no *Guardian Ad Litem's* report upon which to base this *Order*, and even though two *Orders* from the Family Court specifically required the *Guardian Ad Litem* to file a report, JASON L. GALLOWAY was

provided no report from the *Guardian* to review and no opportunity to request another hearing after receipt of that report.

The Family Court attempted to sidestep this glaring omission, stating that “[t]he primary issue in this matter has been whether to rebut the presumption of paternity in the Petitioner.” The Family Court concluded that “[n]ot only were the parties married at the time of the birth of the minor child, the child bears the Petitioner’s last name. There is some dispute as to whether he believed he was the father of this child at the parties’ marriage but it is clear that he was told there was some doubt shortly after the birth of the child. Mr. GALLOWAY held himself out to be the father of this child until she was four years of age, according to his testimony, or for some period prior to the filing of this divorce action.” (*Id.* at 4, ¶3, *emphasis added.*) Accordingly, the Wood County Family Court determined that paternity had not been rebutted. *Id.*

JASON L. GALLOWAY filed a second appeal of the Family Court’s ruling to the Wood County Circuit Court. The Circuit Court focused on the fact that JASON L. GALLOWAY had continued to live with IVY LYNN GALLOWAY and TIFFANY GALLOWAY in his home “for around twenty months after the child was born, and over one year” after he found out he was not her biological father. (*Exhibit 6, Order of 2/14/08 at 3.*) The Circuit Court concluded that based upon the factors outlined in Michael K.T. v. Tina L.T., 182 W.Va. 399 (1989), the evidence of the blood test results obtained by JASON L. GALLOWAY when IVY LYNN GALLOWAY was six months old should not have been admitted to disestablish paternity in this case. In so ruling, the Circuit Court characterized the twenty months between the birth of the child and the separation of the parties as a “lengthy” period of time. In fact, the pertinent time period was only fourteen months beginning in April, 1999 when JASON L. GALLOWAY learned definitively that IVY LYNN GALLOWAY was not his child until July, 2000 when the parties separated after the first divorce action was filed. Thus, not only did the Circuit Court overstate the time period at issue, it also mischaracterized this time period as “lengthy”.

The Circuit Court also focused on the “age discrepancy” of the parties in making its ruling, noting that TIFFANY GALLOWAY was only sixteen when the parties married, while JASON L. GALLOWAY was twenty-two. The Circuit Court cryptically noted that “[t]he age of the parties could clearly have been a contributing factor in the short period of time that passed before the Petitioner was informed by the Respondent that he ‘might not’ be the father of the child.” The Circuit Court concluded that JASON L. GALLOWAY had “continued to

hold himself out as the father of the child and the child had always considered him her father until at least the age of four.” Thus, this completely inaccurate characterization of the testimony of JASON L. GALLOWAY was stated first by the Family Court and then regurgitated by the Circuit Court.

In fact, JASON L. GALLOWAY testified that he had believed TIFFANY when she told him the child was his before they married, and that once he learned that IVY LYNN GALLOWAY was not his child in April, 1999, his relationship with the child “wasn’t very good.” (*Tr. 1/30/07 at 12-14.*) He did not see the child much as he worked and attended college. (*Id. at 13.*) He stated that he had remained in the marriage for the fourteen months following the DNA test because he loved TIFFANY GALLOWAY and wanted to make the marriage work. (*Id.*) However, the parties separated in July 2000 when TIFFANY GALLOWAY filed the first divorce. (*Id. at 15.*) Paternity was disputed in that matter, a *Guardian Ad Litem* was appointed, and another individual was tested. (*Id.*) As of January 30, 2007, JASON L. GALLOWAY had not seen the child for “probably ... four years.” (*Id. at 16.*)

Significantly, many of the other factors which should have been investigated and should have been reflected in the Family Court’s findings and conclusions are not mentioned at all, or the references are so convoluted that their meaning cannot be determined. For instance: Is the putative father of the child in jail or not? No effort was ever made by anyone other than the Petitioner to find Ronald Housey. Nevertheless, the Circuit Court concluded that “the chances of establishing paternity and a support obligation in a natural father in favor of the child have been diminished and reduced.” (“*Order*” of February 14, 2007 p. 6.) Of course, any “passage of time” which may have “diminished” the chances of finding IVY LYNN GALLOWAY’s biological father has not been caused by the Petitioner. The Circuit Court also noted that “[a]t this point, the child will never be able to form any meaningful bond with another father and it is unlikely that the paternity of another will ever be established.” (*Id. at 6.*) However, the fact that the Petitioner has no meaningful bond with the child and has not seen her for an extended period of time is simply overlooked.

These conclusory findings have no factual underpinning to either support or undermine them. By contrast, the fact that paternity DNA testing was done within six months of this child’s birth is completely discounted and ignored as a factor indicating that the Petitioner acted to promptly to establish he was not this child’s biological father. The

Petitioner accordingly contends that the Family Court has abused its discretion in requiring him to support this child. Further, the Petitioner asserts that the factual findings underlying the ruling of the Family Court as affirmed by the Wood County Circuit Court are clearly erroneous, and are not supported by the record and he therefore seeks a reversal of those rulings.

### **III. Issues Presented**

***Did the Wood County Circuit Court properly affirm the ruling of the Wood County Family Court which Ordered JASON L. GALLOWAY to pay support to TIFFANY GALLOWAY for a child not his own?***

***Did the Wood County Circuit Court err by not ensuring that the Guardian Ad Litem fulfilled his duties?***

### **IV. Appellant's Response**

***The Family Court's ruling, affirmed by the Circuit Court, that JASON L. GALLOWAY must support a child not his own is not supported by the record and is clearly erroneous. Further, the Court should have replaced the Guardian Ad Litem if he was not willing to perform his duties as required.***

### **V. Standard of Review**

***"In reviewing challenges to findings made by a family court judge that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to de novo review." Syl. Pt. 2, Lucas v. Lucas, 215 W.Va. 1, 592 S.E.2d 646 (2003).***

### **VI. Argument**

#### **A. Disestablishment of Paternity**

In West Virginia, the presumption of legitimacy that arises when a child is born or conceived during a marriage is rebuttable. Syl. Pt. 1, Michael K.T. v. Tina L.T., 182 W.Va. 399, 387 S.E.2d 866 (1989). This is based "upon the inherent inequity which results when a man is forced to bear the financial burden of child support when he did not father the child or knowingly hold the child out to be his own." Id., 182 W.Va. at 404; 387 S.E.2d at 871. Accordingly, "when the individual attempting to disestablish paternity has held himself out to

be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child," then blood test evidence should be refused. *Id.*

Based upon these principles, the Supreme Court has outlined the following factors to be considered in determining whether evidence of a blood test disproving paternity should be admitted are as follows:

- 1) the length of time following when the putative father first was placed on notice that he might be the biological father before he acted to contest paternity;
- 2) the length of time during which the individual desiring to challenge paternity assumed the role of father to the child;
- 3) the facts surrounding the putative father's discovery of nonpaternity;
- 4) the nature of the father/child relationship;
- 5) the age of the child;
- 6) the harm which may result to the child if paternity were successful disproved;
- 7) the extent to which the passage of time reduced the chances of establishing paternity and a child support obligation in favor of the child;
- 8) all other factors which may affect the equities involved in the potential disruption of the parent / child relationship or the chances of undeniable harm to the child. *Michael K.T. v. Tina L.T., supra*, 182 W.Va. at 405.

Additionally, the Supreme Court has stated that a guardian ad litem should be appointed to represent the interests of the minor child whenever an action to disprove paternity is filed. In the instant case, since the Petitioner sought to disprove paternity of the child from the date his divorce was filed and so a *Guardian ad Litem* for the child was quite properly designated. According to *Rule XIII of the West Virginia Rules for Trial Courts of Record* The *Guardian's* role, is to "make a full and independent investigation of the facts involved in this proceeding and [to] make his or her recommendations known to the court."

***B. The Family Court's findings on the issue of paternity are clearly erroneous, are not supported by the record and are not in the best interests of the child.***

While the *guardian's* recommendations may have possibly been known and understood by the Family Court, it is impossible upon the state of the record herein to divine the scope of his investigation, the results of the investigation, the facts determined by the investigation, or the basis for the recommendations made by the *Guardian Ad Litem*. Beyond the fact that the

child was born in wedlock and the Petitioner has the financial means to support the child, little else can be discerned about the basis for the *Guardian's* recommendations and the Family Court's subsequent reliance upon the same. This is particularly true as no accurate record exists of the source of the *Guardian's* recommendations beyond the findings set forth in the *Final Order of October 16, 2007*. In other words, there is no means to evaluate this recommendation, and consequently, the rulings of the Family Court and in turn, the Circuit Court remain questionable.

In truth, the only apparent facts relied upon by the *Guardian Ad Litem* in making his recommendations which are clearly and consistently documented are:

- (#1) that the child was born in wedlock;
- (#2) that the petitioner's name appears on the child's birth certificate and
- (#3) that the petitioner can support the child.

The virtually non-existent record of the *Guardian's* investigation and findings in this proceeding, leaves far too much in question. It is completely unclear as to what, if anything, the *Guardian Ad Litem* did in order to reach the conclusion he did. This absence of specific information, facts and details from the *Guardian Ad Litem* has forced the Family Court and the Circuit Court to overreach in terms of inferring information from the testimony received in the hearings held while ignoring other pertinent testimony.

Looking at the factors that this Court has previously stated should be evaluated, with regard to the length of time before the Petitioner acted to dispute paternity, the *Guardian* placed no significance on the fact that in the prior divorce action paternity was first disputed in the legal arena in July, 2000. Thus, how JASON L. GALLOWAY can be described as "holding himself out to be the father" of the child after he had raised the issue in court is difficult to fathom. All that can be said is that this young child saw him very rarely at his mother's home and called him "dad." Although the Family Court states that the Petitioner "is the only father the child has known", the quality or nature of the child's relationship with the Petitioner appears non-existent and very fleeting. While this child is now ten years old she was only 20 months old, less than two years old when the parties separated and JASON L. GALLOWAY exited her life. While the Family Court and the Circuit Court conclude that IVY LYNN GALLOWAY has (present tense) a relationship with her grandmother, the undisputed evidence is that this relationship no longer exists and if it ever existed, it ended a long time ago. (*Tr. of 1/30/07, p. 18-19.*)

While the fact that the "alleged biological father is reportedly incarcerated" was noted by the *Guardian*, no investigation whatever was done to determine if he could or would support the child; if the "alleged biological father" was aware of this child, or if the "alleged biological father" wanted a relationship with this child. The record is unclear as to whether or why he was incarcerated. Further, based upon this very flimsy evidence, the Circuit Court drew the conclusion that the biological father would not have or want to have contact with the child, and could not or would not support the child!

Moreover, the fact that a blood test was voluntarily sought and performed by the parties within six months of the birth of the child was not addressed at all by the *Guardian*, by the Family Court or by the Circuit Court other than to state that the blood test should not have occurred until after the *Guardian's* report was received. How a suspicious husband and a layperson would know about such legal niceties is unclear at best. All in all, it is difficult, if not impossible to discern that there is any legitimate reason to enforce paternity upon the Petitioner other than the fact that he married the Respondent under the false belief that the child was his, and has the financial means to support the child.

It is further difficult to conceive how any but the most exceptional of men could be a loving, positive influence in this child's life under these circumstances. Had the investigation by the *Guardian Ad Litem* been properly documented on the record of these proceedings from the very beginning, it would have been apparent that there is no relationship between this child and JASON L. GALLOWAY, nor will there ever be. He will never be anything more than a child support check throughout this child's life, and a very resentful one at that. While the financial circumstances of this child are certainly important and are of concern, so are the psychological factors which will be inherently detrimental to this child - the primary one being, the Petitioner's inability to have any meaningful relationship. Moreover, this child is entitled to know the identity of her real father is and why he has not been included in her life. Undoubtedly, at an appropriate point in her life, she will be asking these questions, questions which could have already been answered in this proceeding.

There really is only one reason for the ruling at issue: that JASON L. GALLOWAY can support the child, period. This is the lynchpin of the courts' rulings and that comes through loud and clear in the history of this matter as detailed herein. Because JASON L. GALLOWAY has the financial means to support the child, it appears that he will be compelled

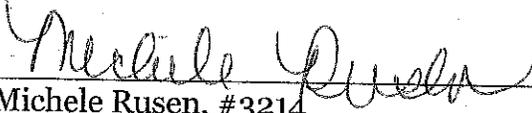
to do so, while the man responsible for the existence of the child bears no responsibility to her whatsoever.

It is certainly true that this child should not be blamed for the fact that her mother intentionally or unintentionally misled the Petitioner so he would marry her. However, this child is in this untenable position largely because of her mother's choices. It is also, however, disingenuous to assert that this case is about anything other than money. So the issue becomes, did this Court mean that the factors set out in *Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989) are only window dressing if "dad" can afford to support the child? The Petitioner asserts that the only fair answer is for these factors to be applied in his case, and to permit him to disestablish paternity, notwithstanding the obvious and unfortunate disadvantages to this child that her mother's behavior has caused.

**VI. Conclusion and Prayer**

For all of the reasons set forth herein, the Petitioner, JASON L. GALLOWAY respectfully prays that this Court enter an *Order* reversing the ruling of the Wood County Circuit Court and the ruling of the Wood County Family Court thereby permitting JASON L. GALLOWAY to introduce the evidence which establishes he is not the biological father of IVY LYNN GALLOWAY, to reverse the Family Court Order finding that he is the father of this child; and to rescind and set aside all Orders of Support; and for such further and other relief as this Court may deem appropriate.

JASON L. GALLOWAY  
By Counsel,

  
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**CERTIFICATE OF SERVICE**

**This 22nd day of December, 2008 the undersigned certifies that the enclosed *Opening Brief of Jason L. Galloway* in the case of *Jason L. Galloway v. Tiffany D. Galloway, No. 34588* was served upon the following persons, by mailing, first class postage prepaid, a true and accurate copy thereof to:**

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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**