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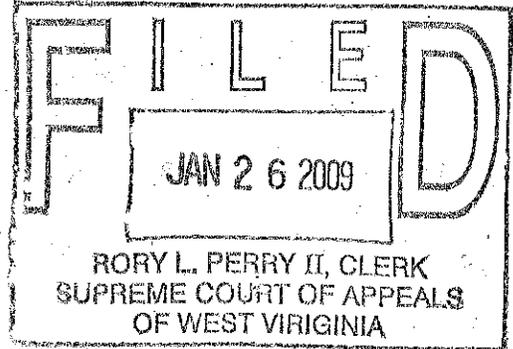
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA

IN RE THE MARRIAGE/CHILD OF:

JASON L. GALLOWAY,
Petitioner/Appellant,

and

TIFFANY D. GALLOWAY,
Respondent/Appellee.



APPELLEE'S BRIEF
FILED ON BEHALF OF
TIFFANY D. GALLOWAY

On Appeal from the
Circuit Court of Wood County, West Virginia
The Honorable J.D. Beane, presiding
Wood County Case #03-D-142

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In West Virginia, the lead case on disestablishing paternity allows a legal father to rebut the presumption of paternity only when a guardian *ad litem* finds it to be in the child's best interest. Should Jason Galloway be permitted to disestablish his daughter's paternity, despite a guardian *ad litem*'s finding, affirmed by three judges, that it is not in the child's best interest?

Response of Appellee

Ivy Lynn Galloway believed for a number of years that Jason Galloway was her father. The findings of the guardian *ad litem*, the Family Court, and Circuit Court of Wood County were that Jason Galloway held himself out to be the child's father for a sufficient time that undeniable harm would result to Ivy if paternity was disestablished. The findings and conclusions are neither clearly erroneous or an abuse of discretion.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34588

IN RE: THE MARRIAGE/CHILD OF :

JASON L. GALLOWAY,

Petitioner Below and Appellant,

and

TIFFANY D. GALLOWAY

Respondent Below and Appellee.

On Appeal from the Circuit Court
of Wood County, WV
Civil Action No. 03-D-142

APPELLEE'S BRIEF

This case is about protecting IVY LYNN GALLOWAY. The judges below steadfastly guarded Ivy's interests during attempts to disestablish her legal father's paternity, while weighing the equities of her parents' situation. The family court judge was present through the entire course of the case; the first filing and dismissal, the second divorce action and its completion, the appointment and reports of two guardians *ad litem*, the remand and rehearing on paternity disestablishment. The only person with legal training who has observed the parties, assessed their credibility and imposed the procedures laid down by this Court in Michael K.T. v. Tina L.T., 182 W.Va. 399, 387 S.E.2d 866 (1989), from 2000 to 2008, is the person whose decisions are now being questioned as either clearly erroneous interpretations of the facts, or as abuse of discretion in applying the law to those facts, the review standard set out in Lucas v. Lucas, 215 W.Va. 1, 592 S.E.2d 646 (2003). Two different circuit judges have allowed her findings to stand. This Court now has opportunity to close the issue of Ivy's paternity.

I. PROCEEDINGS BELOW

On February 14, 2008, the Honorable J.D. Beane denied the appellant's appeal to the

Circuit Court of Wood County, determining that Family Court Judge Annette L. Fantasia had not abused her discretion or made clearly erroneous findings when she determined it was not in the best interests of the parties' child, **IVY LYNN GALLOWAY**, to have paternity disestablished. The family court had conducted hearings on paternity disestablishment after the parties voluntarily moved to remand the case from this Court, for additional findings by the family court consistent with the rulings in Michael K.T. The prior appeal had been filed after the Honorable George W. Hill denied the appellant's appeal of the family court's previous ruling that paternity should not be disestablished in the parties' divorce. The Guardian *ad litem* appointed by the family court in the divorce proceedings and retained for the remanded proceedings was **JOSEPH P. ALBRIGHT, JR.** His conclusion throughout the proceedings was that paternity should not be disestablished.

II. RESPONDENT'S STATEMENT OF THE FACTS

The Respondent/Appellee, **TIFFANY GALLOWAY**, does not dispute the dates of marriage, birth of the child and other proven matters of record recited by the appellant. The appellee takes issue with classification of allegations made in Jason Galloway's appeal to the Circuit Court as "facts", particularly his allegation that Tiffany earlier represented to him that she was carrying his child and the inference that she did so knowing the child was not his.

Throughout these proceedings, it is clear Jason Galloway had assumed his self-help remedy of obtaining private paternity testing would be sufficient to insulate him from any financial responsibility for the daughter born during his marriage to an underage teen with whom he had sexual relations despite her incapacity to consent, CODE OF WEST VIRGINIA,

SECTION 61-8B-2 (c)(1). The video recording of the hearing on July 21, 2003 shows the Court patiently explaining the law to Mr. Galloway and beginning the entire guardian *ad litem* process over a second time, *Status hearing at 3:07.06 p.m.* The Court stated that paternity testing should not be conducted until after the report of the Guardian *ad litem*, *Status hearing at 3:09.24 p.m.* Jason was represented at that hearing, Tiffany was not. The hearing held April 27, 2004, was not attended by the Guardian *ad litem* because Mr. Galloway's counsel, Thomas Munchmeyer, had not entered the order from the July 21, 2003 hearing appointing Mr. Albright. At a hearing on the 28th of September, 2004, both parties, their respective counsel and Mr. Albright appeared. Both parties had an opportunity to question the Guardian *ad litem* on his findings and the reasons therefore and neither party objected to **JOSEPH P. ALBRIGHT, JR.** being excused from further attendance or duties as Guardian *ad litem*. Appellant's divorce counsel did not request a written report of the Guardian *ad litem*. The Family Court's *Final Order on Remand* explains that no recording was made because it was a pretrial hearing. Pretrial hearings are not normally recorded in Wood County Family Court. Mr. Galloway's counsel attempts to ascribe some nefarious meaning to the fact that the Order from that hearing was entered the day after the Circuit Court appeal was denied. A revised version of that Order, reflecting changes requested by Mr. Munchmeyer, was forwarded to Mr. Munchmeyer on December 9, 2004, (Respondent's Exhibit A, First Appeal), but Mr. Munchmeyer overlooked forwarding the Order. The omission was pointed out by the family court. Mr. Galloway was not prejudiced, as the Circuit Court had access to the findings in other documents.¹

1. The Final Order of Divorce recited the findings from the Third Status Hearing, the Petitioner's Appeal disputed the issue of paternity and the Respondent's Response to Petitioner's Appeal and Memorandum in Response, (Respondent's Exhibits B and C, First Appeal), reiterated the Guardian *ad litem*'s findings.

The Appellant's summary of the proceedings and rulings of the Circuit Court of Wood County reflects the Circuit Court's opinion, including its upholding of the Family Court's conclusion that nearly two years, including a period of over a year where the Petitioner knew the results of the paternity test, was , "...a sufficient period of time such that disproof of paternity would result in undeniable harm to the child.", Michael K.T. v. Tina L.T., 182 W.Va.399, 387 S.E.2d 866 (1989) at 871.

The parties and the Court had requested a written report from the Guardian *ad litem* on remand. Judge Fantasia ordered it a number of times. At the hearing on the Guardian *ad litem*'s report, held January 30, 2007, Jason Galloway was present and testified. Tiffany Galloway did not appear because she could not get transportation to Parkersburg from Boone County and could not find the notary-plus-phone combination needed to testify telephonically. This is why counsel was allowed to proffer on her behalf. There are a number of errors and inaudible sections in the transcript of that hearing, (e.g. *bereft transcribed as "as a raft"*, p. 7), however, it is clear Jason testified that he dated Tiffany from the time she was thirteen or fourteen years old, (*Transcript of 1/30/07, p. 16*), had sexual relations with her when she was 15 or under, (*Transcript of 1/30/07, p. 13*), told Ivy not to call him Daddy when she was about four years old, (*Transcript of 1/30/07, p. 15*), and that Ivy had a relationship with his mother at least through 2003, (*Transcript of 1/30/07, p. 19*). Judge Fantasia also noted that had Mr. Albright recommended admitting blood test results, new testing would have to have been performed, as the circumstances of the test Mr. Galloway obtained were unknown, (*Transcript of 1/30/07, p. 22*). Had the self-serving assertions in Jason's testimony been made part of the Guardian *ad litem*'s report, there would have been a request for additional hearing to submit Tiffany's testimony on the issues of her relationship with

Jason, his knowledge of the possibility that the child she was carrying might not be his, the length of time he held himself out to be Ivy's father and to refresh his memory on the issue of whether and when he was Tiffany's legal custodian, (*Transcript of 1/30/07, p. 16, line 23*), as permitted by the Court's order. Mr. Albright testified at this hearing about the basis of his recommendation and offered to explain further his reasoning, (*Transcript of 1/30/07, p. 8*). Both parties spoke directly to Mr. Albright and had opportunity to present their positions to him both on first impression and upon remand. The Guardian *ad litem* perceived the enumerated factors as, "fairly neutral in this case." (*Transcript, p. 5*). He also explained that he believed the his decision had to be made in the child's best interest and that disestablishing paternity in Jason Galloway would have the effect of bastardizing Ivy, as well as robbing her of any source of support, (*Transcript, p. 2*). Mr. Albright agreed at the hearing to submit his written report. Judge Fantasia assured both parties that they would be able to request an additional hearing after receipt of the report.² The request for an order from that hearing appeared on the late order list issued in May, 2007.³ Ms. Rusen's office called to say they had done the Galloway orders, including one from the previous year. The orders were received June 27, and were inspected, signed and delivered to Judge Fantasia's office on June 29, 2007. Ms. Rusen tendered the order again at the hearing on September 19, 2007. Judge Fantasia announced at that hearing that she had decided to do and enter the order herself. In it, she decided the lack of a written report should not cause the case to languish in the judicial system and finalized the remand proceeding with a detailed series of Findings and Conclusions only she could make, based upon her long experience with this case.

² In addition to waiting for the anticipated report, counsel expected to put the next hearing date into the Order, which was a requirement for any Order submitted to Judge Fantasia.

³ The Family Court Judges in Wood County traditionally generate a list of outstanding orders every several months. Counsel responsible for the Orders are fined \$25 per day after the deadline if the Orders are not submitted. Attorneys frequently do the Orders regardless of who was originally assigned. I did Orders for others at that submission and was grateful Ms. Rusen did one of mine.

III. RESPONDENT'S ISSUE PRESENTED

In West Virginia, the lead case on disestablishing paternity allows a legal father to rebut the presumption of paternity only when a guardian *ad litem* finds it to be in the child's best interest. Should Jason Galloway be permitted to disestablish his daughter's paternity, despite a guardian *ad litem*'s finding, affirmed by three judges, that it is not in the child's best interest?

IV. RESPONSE OF APPELLEE

Ivy Lynn Galloway believed for a number of years that Jason Galloway was her father. The findings of the guardian *ad litem*, the Family Court, and Circuit Court of Wood County were that Jason Galloway held himself out to be the child's father for a sufficient time that undeniable harm would result to Ivy if paternity was disestablished. The findings and conclusions are neither clearly erroneous or an abuse of discretion.

V. STANDARD OF REVIEW

The appellee agrees that the standard of review is that set forth in Lucas v. Lucas, 215 W.Va. 1, 592 S.E.2d 646 (2003).

VI. ARGUMENT

1. Neither Court abused its discretion in declining to disestablish paternity. Both courts examined what was in the child's best interests and kept that to the forefront of its decision.

A. Neither the circuit or family court left Ivy bereft of a legal father.

Ivy Galloway is the legitimate issue of a valid marriage. Historically, this presumption was considered "one of the strongest at law" and had only two common law defenses, See State v. Reed, 107 W.Va. 563, 566, 149 S.E. 669,671, as cited in Michael K.T. at p. 869. Although the stigma of illegitimacy is not what it used to be, every child is entitled to be legitimized through marriage or other means. Legal father is defined in the adoption statutes. West Virginia Code Section 48-22-110 states:

"Legal father" means, before adoption, the male person having the legal relationship of parent to a child: (1) Who is married to its mother at the time of conception; or (2) who is married to its mother at the time of birth of the child; or (3) who is the biological father of he child and who marries the mother before an adoption of the child.

Jason Galloway knew Tiffany was pregnant when he married her. He testified at the hearing upon remand in January, 2007 that he believed he was the child's father, but also knew within a couple months of her birth that he might not be. Tiffany was fifteen years old at the time of Ivy's conception and obviously didn't know for certain. When a paternity proceeding was filed in 2001, a Michael Stevens was named. (*Final Order on Remand, Finding #16*). Jason Galloway had already procured self-help DNA testing, but admitted in his testimony that he definitely could have been Ivy's father, thereby admitting sexual relations as an adult with underage Tiffany. (*Transcript of 1/30/07, p. 13*). Later, counsel for the appellant moved to have testing done on a Ronnie Housey and the Guardian *ad litem* confirmed that man could possibly have fathered Ivy (*Transcript, p. 2*). A court should not be casting about for alternate fathers when a child's legal father has already been established. This is not a case where an adult woman has sexual relations while her husband is on military maneuvers in Germany, as in Michael K.T. This is a confused teenage girl who is pregnant after being with several men and marries an adult man she has dated since she was thirteen years old. No one disputes that Jason Galloway

voluntarily married Tiffany and placed his name on the child's birth certificate when the child was born. Michael K.T. contemplates *in camera* examination of, "...whether the equities surrounding the particular facts and circumstances of the case warrant admission of blood test results.", Michael K.T., Syllabus point 2. In Ivy Galloway's case, the father lived with the child until she was 20 months old and knew she was not his child for at least 14 months of that time. Counsel for Mr. Galloway argues in her brief that the act of obtaining paternity testing amounts to legally contesting paternity, but this court cited from a Pennsylvania case in its opinion, saying, "...the law cannot permit a party to renounce even an assumed duty of parentage when by doing so, the innocent child would be victimized. Relying upon the representation of the parental relationship, a child naturally and normally extends his love and affection to the putative parent.", Commonwealth ex rel. Gonzalez v. Andreas, 245 Pa.Super. 307, 369 A.2d 416 (1976) at 419. The case continues by discussing the effect the passage of time has on establishing parentage in someone else, like Mr. Housey or others. The child in West Virginia's controlling case had lived with the father till she was 13 months old, he did not know he was not her father until the court proceedings, when he acted to contest paternity and this Court remanded the case for specific findings. In Ivy's case, Mr. Galloway could have asked that his paternity be disestablished at any time after he discovered he was not Ivy's biological father, but instead, he assumed the duty of parentage by electing to continue being her dad. He did not take affirmative, independent action to file divorce and contest paternity until he filed this action in 2003. While the passage of time in this case is not as long as that in William L.v. Cindy E.L., 201 W.Va. 198, 495 S.E.2d 836, the situation is similar.

B. The legal parents of a child owe that child maintenance and support. The best interests of Ivy Galloway include receipt of child support from her father.

Jason Galloway held himself out to be the father of Ivy Galloway, supported her and took responsibility for her from October 28, 1998 until July 10, 2000. Over fourteen months of this time was spent with full knowledge that Ivy was not his biological child. At least three more months was spent with the knowledge she might not be. By his own admission, he knew Ivy was not his child from age three months, but wanted to be her father because he loved Tiffany. He willingly maintained his duty to support. When the appellee filed the first divorce proceeding, shortly after her eighteenth birthday, he began waving the privately-obtained paternity test results like a talisman to ward off child support. Just like many biological parents, it seems he no longer cared whether his child was well, comfortable and had the opportunities child support could provide. He willingly relegated her care to the taxpaying public and whatever income her disabled mother could scrape together to get by. The burdens of disestablishing paternity in Ivy's case absolutely fall upon the State. The Bureau for Child Support Enforcement is involved in this case because tax money has paid a considerable sum for Ivy's medical support, food, clothing and maintenance. However, the Family Court's response to the assertion of Appellant's counsel at the hearing January 30, 2007 that, "... this is just about child support.", states the problem well:

"Well, it is more than that. You know we've got an eight year old who had a family until it was about child support. I don't want to pay for you. You are not my kid." (*Transcript of 1/30/07, p. 7*).

The appellant maintains that child support is the linchpin on which this case rests; that his ability to pay was the sole reason for the Guardian *ad litem*'s findings. Yet, the appellant was unemployed at the time the full verbal report of the Guardian was updated after submission of additional evidence by the appellant's counsel. The Guardian's recommendation that the child's best interests would not be served by rebutting the presumption of paternity was unchanged. Child support was set at a mere ninety dollars a month. Ivy has received no child support at all

from her father for months. Money is a legitimate consideration, but was obviously not the only thing the Guardian considered.

C. Ivy's interests were best served by continuing her bonds and family relationships as she knew them.

The Family Court's emphasis was on Ivy. She bonded with Jason, believed he was her father and was close to her grandmother, enjoying regular visits until at least 2003. At age 4 or 5, while visiting her grandmother, she was upbraided by the appellant, who, because of the divorce litigation, told her not to call him "Daddy". (*Transcript of 1/30/07, p. 15*). We can only imagine her reaction and the effect this admonition had on Ivy. The appellant made a decision to spurn the affections of his daughter and turn himself into the resentful child support check to which his counsel alludes. The Court made his mother the contact person and supervisor for the Petitioner's parenting time, *Final Order of Divorce, p. 4*. The Petitioner admitted to this bond when he told the Court, "Yeah I was living with my mother and when she would want to see her, (Ivy), I couldn't like move out just because she wanted to see her.", (*Transcript of 1/30/07, p. 19*). These actions place the appellant in the same posture as any other parent who chooses not to exercise parenting time. He is free to make that choice, but still owes a duty of support to his child. The Family Court Judge, on page four of her Final Order on Remand, recalls this scenario as a sad, but common, circumstance:

'In the experience of this court, it is not unusual for a man to be in love with a woman who is carrying another man's child and agree to be the father of that child. This may result in a marriage or the signing of an acknowledgment of paternity. It is also not unusual that when the two adults fall out of love that same man no longer wants to be obligated to raise and support that child. This case is very typical of what happens: the parties, outside any court proceedings, tell the child and try to avoid the paternity issue. The resulting confusion, trauma and conflict to the minor child is immaterial to the adults...'

The appellant's decision to deprive both his daughter and his mother of a very special

bond and to take it upon himself to inform Ivy of her paternity was not done with either of their best interests in mind.

D. Ivy Galloway's best interests include certainty and finality in the determination of her paternity and preclude disestablishment in her legal father.

A properly appointed, independent Guardian *ad litem* concluded it was in the best interest of IVY GALLOWAY not to disestablish paternity in JASON GALLOWAY. This Court reinforced the necessity of this appointment in Cleo A.E. v. Rickie Gene E., 190 W.Va. 543, 438 S.E.2d 886. Syllabus Point 3 in that case states, "A child has a right to an establishment of paternity and a child support obligation, and a right to independent representation on matters affecting his or her substantial rights and interests." The Guardian *ad litem* investigated the case, contacted and spoke with both parties and made his recommendations known to the court, as required. Both parties and their counsel were present at the time the report was made initially, on September 28, 2004, and again on January 30, 2007. There was ample opportunity to question the recommendations and establish the reasons the Guardian *ad litem* reached his conclusions. It is undisputed that he made his recommendations known to the Court and that he believed them to be in the child's best interest. He unequivocally stated that he saw no reason to disestablish paternity in this case. The rule regarding Guardians *ad litem* does not require that the report be written, *Trial Court Rules, Rule 21.01*.

An *in camera* hearing to preliminarily weigh the whether blood test evidence should be admitted to disprove paternity was what the Family Court Judge did on September 28, 2004 and again on January 30, 2007. On the latter occasion, the date-related facts were already of record with regard to the first and second factors enumerated. Evidence was adduced on the other five factors to be considered, particularly item number (8) from the list, which allows the trial court to

consider, "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. at 872. The Circuit Court's opinion gathers the facts found throughout the record and applies them to its findings in the format of the opinion in Michael K.T., *Appellant's Exhibit 6 on this Appeal*, pp. 4-6.

Jason Galloway had sexual relations with a person legally incapable of consent. He admitted dating Tiffany Galloway two and a half or three years before he married her when she was barely sixteen, (*Transcript of 1/30/07, p. 16*). He was an adult almost eight years older than she. For him to accuse her of fraud and deception under these circumstances is reprehensible. By his own admission, this issue of fraud was not raised until his first appeal. From the standpoint of legal capacity to determine a correct course of action, Jason, as an adult, is presumed to have known more about his options to marry or not to marry than Tiffany. This is particularly true, given her age at the time of the child's conception (15), and the history of her relationship with Mr. Galloway. The Court's pronouncement regarding fraud in Michael K.T. is:

'...However, absent evidence of fraudulent conduct which prevented the putative father from questioning paternity, this Court will not sanction the disputation of paternity if there has been more than a brief passage of time. We make this ruling, recognizing as the Andreas court did so eloquently, that the law favors the innocent child over the putative father in certain circumstances.'

387 S.E.2d at 872.

There was no evidence of fraudulent conduct which prevented Mr. Galloway from questioning paternity, other than his assertions she told him the child was his prior to their marriage, a statement she likely believed was true. She is the one who questioned paternity and openly shared her concern with her husband. No authority is cited which disputes the Family Court's decision that holding oneself out as the father of a child for twenty-one months,

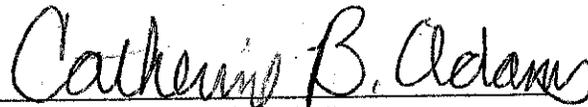
especially in the face of evidence to the contrary, is sufficient to legally solidify that link to the child and that the child's best interest would be served by its preservation. These facts are not disputed and, with other evidence, form the basis of the Family Court's conclusion, and the Circuit Court's holding, that her rulings were not clearly erroneous.

VII. CONCLUSION AND REQUEST FOR RELIEF

TIFFANY GALLOWAY, respectfully requests that this appeal be dismissed and the decision of the Wood County Circuit Court be upheld. Her daughter, **IVY LYNN GALLOWAY**, was born during marriage and is entitled to certainty and legitimacy under the paternity laws of West Virginia. This child would have best been served if the appellant had chosen to continue her bonding with him, to nurture her excellent relationship with his mother, and continue to support her emotionally as well as financially. He chose to harshly disabuse her of her belief in him, cut her ties with his family and deny her all types of support. Countless men enjoy a lifetime of love and loyalty from children they did not father biologically. The appellant squandered his opportunity.

TIFFANY D. GALLOWAY

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CERTIFICATE OF SERVICE

The undersigned, Counsel for the Respondent-Appellee certifies that she served the foregoing Response to Petition for Appeal upon the following persons this 26th day of January, 2009, by mailing, postpaid a true copy thereof to:

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