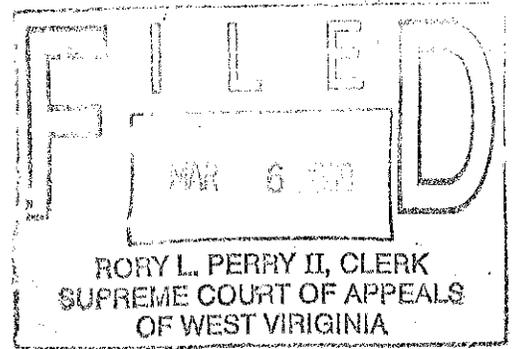


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
at
CHARLESTON, WEST VIRGINIA
No. 34588

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

and

TIFFANY D. GALLOWAY
Respondent.



REPLY BRIEF
ON BEHALF OF
JASON L. 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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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 "*Reply Brief*."

In urging this Court to affirm the findings of the Wood County Family Court and Wood County Circuit Court, the Appellee minimizes her own part in creating this situation, just as the Family Court did. In fact, during these proceedings there have been no less than two other men named by the Appellee as possible biological fathers for IVY GALLOWAY. One such man was in fact tested and ruled out as IVY's father. The whereabouts of the other possible father were unknown in January 2007, although it came to light that his identity was apparently known to the *Guardian Ad Litem* before the initial appeal and remand of this case. Thus, it is apparent now that TIFFANY GALLOWAY was not an innocent, blameless victim taken advantage of by JASON GALLOWAY when he married her in 1998.

It is undisputed that JASON GALLOWAY knew TIFFANY GALLOWAY was pregnant when they married in August, 1998. However, JASON GALLOWAY has always maintained that before they were married, TIFFANY GALLOWAY told him the child she was carrying was his child. As he testified at the January 30, 2007 hearing:

Attorney Rusen: Did you believe that [IVY] was your child at the time you got married?

Jason Galloway: Yes.

Attorney Rusen: And why did you believe that?

Jason Galloway: Because Tiffany told me it was. (Tr. 13.)¹

Indeed, it would be quite strange if the parties did not discuss the paternity of the child Tiffany Galloway was carrying as they anticipated their marriage! However, in addition to her deception about the paternity of the baby, Tiffany Galloway was not forthcoming with the fact that it was possible that others were IVY's father.

Attorney Rusen: Mr. Galloway during the time period leading up to your marriage of Tiffany Galloway, did you have any reason to believe that she was having sexual intercourse with other individuals?

Jason Galloway: No.

Attorney Rusen: I mean you didn't know that?

Jason Galloway: No.

Attorney Rusen: So did it occur to [you] that the baby might not be yours until you were told that by [Tiffany Galloway]?

Jason Galloway: No. (Tr. 19-20.)

Three months after IVY's birth, TIFFANY GALLOWAY got around to telling JASON GALLOWAY that IVY "might not" be his child. Accordingly, JASON GALLOWAY acted on that information and obtained a blood test which confirmed the child was not his.²

By contrast, IVY GALLOWAY's attorney proffered that "[a]t sixteen years old, I, I think honestly she believed that the child was his and then questioned it. I asked her that specific point you know. Well I just kept looking at her and I thought, you know, I had better tell Jason that maybe she isn't his." (Tr. 6.) This is the only information about that issue the Family Court and the Circuit Court had from IVY GALLOWAY. No written report from the

¹ The transcript filed with the Court is not an official transcript but was prepared from the compact disc recording of the hearing, which is also filed with the Court. There are, as the Appellee has noted, a few minor inaccuracies which are apparent. This transcript was prepared and offered to assist a reviewing Court. The compact disc in fact represents the official record of those proceedings.

² This report was issued on April 29, 1999 when IVY was approximately six months of age.

Guardian Ad Litem was presented, thus whether he ever interviewed IVY GALLOWAY remains a mystery.

As the parties agree, 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.*

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 (the second such divorce action between the parties) and so a *Guardian ad Litem* for the child was quite properly designated in this action as occurred in the first divorce action filed by IVY GALLOWAY. 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.”

In his investigation, the *Guardian Ad Litem* should consider and focus upon the following factors:

- 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 changes 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.

Dealing with these interrelated factors, JASON GALLOWAY, who had married TIFFANY GALLOWAY in the belief she was carrying his baby, acted quite promptly. He was put on notice that IVY "might not" be his child when she was only three months of age. When the child was only six months of age, he took the next logical step: to have a test done to find out whether or not he was the father. Thus, IVY GALLOWAY was almost exactly six months of age when that question was definitively answered – JASON GALLOWAY was not the child's father. Notwithstanding this discovery, JASON GALLOWAY attempted to make the marriage work. However, by July 10, 2000, it is undisputed that the parties went their separate ways. Thus, the parties lived together as husband and wife for only twenty months following IVY's birth, and the issue of IVY's paternity was raised in the first divorce action.

Accordingly IVY was less than two (2) years of age when JASON GALLOWAY exited her life. As JASON GALLOWAY testified, after he learned that the child was not his, he felt no bond with her any longer and had little to do with her. (Tr. 17.) TIFFANY GALLOWAY admitted that JASON GALLOWAY had very little to do with the child while they were living together. (Tr. 5) After he separated from TIFFANY GALLOWAY, he did not see the child at all except in passing when the child visited his mother, a practice that stopped in 2003. (Tr. 19)

Exactly in what manner and how a man has acted "to hold himself" out as a father has not been specified by this Court. JASON GALLOWAY denied that he allowed other people to believe IVY was his child after he learned she was not. (Tr. 15) However, in the instant case, the sketchy information available about that factor provides little more information than was available to this court in Michael K.T. v. Tina L.T., 182 W.Va. 399, 387 S.E.2d 866 (1989). The only information available is that IVY GALLOWAY called JASON GALLOWAY "daddy," and that he lived with her mother for the first twenty months of her life.

As to the fact that IVY GALLOWAY referred to JASON GALLOWAY as "daddy," in the world today, it is not uncommon for children to refer to several persons as "daddy" regardless of any biological connection they may or may not have. Indeed, many biological fathers are distraught when mommy's boyfriend or husband are referred to as "daddy" by their children.

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 failure of the *Guardian Ad Litem* to carry out any meaningful investigation in this matter is frustrating and problematic, particularly in view of the efforts made to obtain another *Guardian Ad Litem* or to extract a report and basis for his findings. As this Court has recognized, a guardian ad litem serves a dual role. "In addition to serving as an advocate for the child[ren], they must also fulfill their duty to fully inform themselves of the child[ren]'s circumstances and determine and recommend the outcome that best satisfies the child[ren]'s best interests." In Re Christina W., 219 W.Va. 678, 684, 639 S.E.2d 770, ____ (2006).

"During the proceedings in an abuse and neglect case, a guardian ad litem is charged with the duty to faithfully represent the interests of the child *and* effectively advocate on the child's behalf." In re Elizabeth A., 217 W.Va. 197, 204, 617 S.E.2d 547, 554 (2005). "Furthermore, Rule XIII of the *West Virginia Rules for Trial Courts of Record* provides that a guardian *ad, litem* shall make a full and independent investigation of the facts involved in the proceeding, and shall make his or her recommendations known to the court. Rules 1.1 and 1.3 of the *West Virginia Rules of Professional Conduct*, respectively, require an attorney to provide competent representation to a client, and to act with reasonable diligence and promptness in representing a client." In Re Christina W., *supra*, 219 W.Va. at 684, quoting in part, Syl. Pt. 5, In re Jeffrey R.L., 190 W.Va. 24, 435 S.E.2d 162 (1993).

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. It appears that he never interviewed the child. It is unclear if and/or when he interviewed TIFFANY GALLOWAY. It is clear that he did nothing whatsoever following the various hearings held in this matter after remand. 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.

The Family Court's observations that this situation frequently occurs is well taken. However, the Family Court entirely missed the point that JASON GALLOWAY was not a person who signed up to raise someone else's child from the inception of his marriage to TIFFANY GALLOWAY. He married TIFFANY GALLOWAY because he believed he would be raising their (as in his/hers) child. That distinguishes this case from those described by the Family Court. (See Family Court Order 13, pages 4-5.)

This child is absolutely blameless and should not be punished for her mother's conduct. However, this child's untenable position has come about largely because of her mother's choices. Michael K.T. v. Tina L.T., 182 W.Va. 399, 387 S.E.2d 866 (1989).

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,



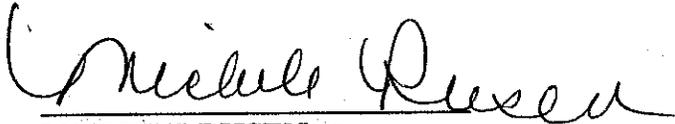
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CERTIFICATE OF SERVICE

This 27th day of February, 2009 the undersigned certifies that the enclosed *Reply 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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