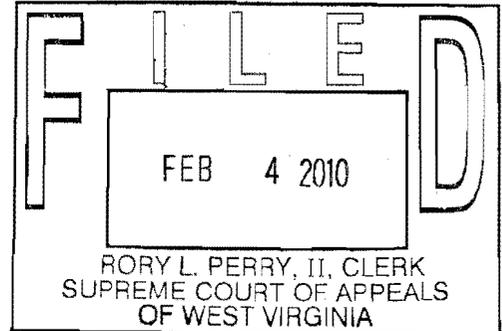


No. 35445

IN THE  
SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA

\_\_\_\_\_  
CHARLESTON  
\_\_\_\_\_



**CHARLES D. KITTLE,**  
Petitioner/Appellee,

vs.

**APPELLANT'S BRIEF**

**SUSAN R. BURKE,**  
Respondent/Appellant.

---

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

---

**APPELLANT'S BRIEF**

**Of Counsel for the Respondent/Appellant**

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**APPELLANT'S BRIEF**

**TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF  
APPEALS OF WEST VIRGINIA:**

## PROCEEDING AND RULING

This appeal arises from a Family Court proceeding wherein the Family Court denied Appellant Mother, Susan Burke, continued primary residential status of her children with whom she had spent their entire lives, simply by reason of her new husband relocating for a substantial employment opportunity to Columbia, South Carolina.

The basis for the Family Court's ruling was that "the relocation [wa]s not reasonable in light of the substantial adverse impact it w[ould] have on the father's parent/child relationship, the effective stripping away of the bond between father and the daughters, the substantial travel between the parties' respective households and the costs thereof, the adverse impact upon the continuity of the children's schooling." (Final Order, Conclusion of Law #2). The Family Court found that despite the Appellant Mother introducing unrefuted evidence of the lack of a similar job within a 60 mile radius of Wheeling, West Virginia, her failure to produce evidence of similar employment in Columbus, Cleveland, Akron, or Cincinnati was fatal to her motion to relocate to South Carolina with her spouse and children.

The Appellant Mother appealed the Family Court's ruling based upon a clear abuse of discretion in applying West Virginia's Relocation Statute codified at West Virginia Code, Section 48-9-403(d)(2) which states that "a move with a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving or by moving to a location that is substantially less disruptive of the other parent's relationship to the child." The Family Court was bound to evaluate this matter upon the evidence presented within the record created at

the trial. Instead, the family court went beyond the record created at trial and imposed, as its own findings of fact, a ruling without regard as to the evidence presented. The Family Court abused its discretion in substituting its own judgment on factual matters and erred as a matter of law on the issues.

Most peculiar in this case is that the Family Court made absolutely NO findings that either parent was unfit and ignored the children's long standing relationship with their mother as the primary caretaker for their entire lives. At the time of the hearing, Kayla was 12 and Hailee was 8. In fact, the Family Court made a specific finding that IF mother chose to remain in Wheeling, West Virginia and NOT relocate, then she would remain the primary residential parent of the children. As such, and in no uncertain terms, the Family Court's decision operated to punish Appellant Mother for moving to South Carolina with her spouse and the children born of the marriage. In fact, even the guardian appointed to represent the children in this matter stated that it was not fair to the father daughter relationship that mother should be permitted to take the minor children with her to South Carolina. Specifically, the guardian testified that "the parent whose actions precluded the continuation of the equal allocation of parenting time should not be rewarded. To him, it was a 'fairness issue' with consideration to all the matters including the children's relationships, their ties to the community, the extended family, the continuity of their schooling, etc." (Finding of Fact #89). Ironically, the guardian in this case made an analysis based upon fairness without ever having independently interviewed his own clients. The record clearly demonstrates that the guardian NEVER spoke independently with his clients, the children affected in this case.

In this appeal, Appellant Mother respectfully requests the appropriate legal standard be used to determine whether her relocation with her spouse met the standards as required by West Virginia Law such that her daughters should have been permitted to relocate to South Carolina with her.

### **STANDARD OF REVIEW AND SUMMARY OF ARGUMENT**

In syllabus point one of *Staton v. Staton*, 218 W.Va. 201, 624 S.E.2d 548 (2005), the West Virginia Supreme Court of Appeals explained as follows:

"In reviewing a final order entered by a circuit judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*." Syllabus, *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

In this case, the issues raised by appellant should be reviewed *de novo* in as much as the Circuit Court clearly erred in its analysis of the record presented for purposes of an application of the West Virginia Relocation Statute and the Family Court abused its discretion in creating a new standard for relocation by analyzing the effect of a relocation on a father to the exclusion of analyzing the best interests of the children and the effect of transferring custody to the other parent after having spent their entire lives with their mother as the primary residential parent and caretaker.

### Statement of Facts

Susan Burke, appellant herein, stayed at home to care for and raise the parties' children, K.K., born March 10, 1996, and H.K. born November 24, 1999, during her marriage to Charles Kittle, appellee herein. Charles Kittle worked full time during their marriage. The parties divorced in Martinsburg, West Virginia on October, 2002 and Susan Burke, was denominated the custodial parent. In October, 2002, Susan Burke moved from Martinsburg, West Virginia to Wheeling, West Virginia. Charles Kittle remained in Martinsburg. From October, 2002 until May 12, 2006, the minor children spent at least 70% of their time with their mother Susan Burke under a court ordered parenting plan.

On October 8, 2004, Susan Burke remarried and thereafter gave birth to P.B. and N.B. As with her first two children, Susan Burke continues to stay at home and raise her children. There are absolutely no allegations of Susan Burke's fitness as a mother, and the Family Court found her to be a fit mother. Prior to father's move back to the Wheeling area and the Court modifying the parenting plan *by agreed order* on May 12, 2006, Mother exercised a significant majority of custodial responsibility of the children (i.e. more than 70%).

On October 3, 2007, Susan Burke filed a Notice of Relocation seeking permission to relocate the children to Irmo, South Carolina with her. In her Notice of Relocation, Susan Burke provided all the pertinent information relating to the impending move. The Family Court denied Susan Burke's request to move with her children citing fairness to the father as the reason for the denial. The Circuit Court affirmed.

The pertinent facts are more fully detailed in the argument below.

## ASSIGNMENTS OF ERROR

The Circuit Court affirmed the Family Court's ruling. Appellant Mother appeals both rulings based upon several errors including:

- 1) The Family Court's focus on analyzing the effect of the relocation on the Father to the exclusion of analyzing the effect on the children and the mother.
- 2) The Family Court's consideration of facts not in evidence which was tantamount to making a ruling that ignored the evidence and substituted its own opinion on what evidence should have been presented.
- 3) The Family Court's failure to consider the best interests of the children.
- 4) The Guardian's failure to advocate for the children in lieu of advocating the father's interests.

## POINTS AND AUTHORITIES CITED

<i>Carr v. Hancock</i> , 216 W.Va. 474, 607 S.E.2d 803 (2004).....	5
<i>Hager v. Hager</i> ; 591 S.E.2d 177; 214 W.Va. 619 (2003) .....	12
<i>Staton v. Staton</i> , 218 W.Va. 201, 624 S.E.2d 548 (2005) .....	5
West Virginia Code, Section 48-9-101(b) .....	8
West Virginia Code, Section 48-9-102 .....	9, 11, 16
West Virginia Code, Section 48-9-102(a)(3) .....	13
West Virginia Code, Section 48-9-206 .....	13, 16
West Virginia Code, Section 48-9-209(a)(5) .....	12
West Virginia Code, Section 48-9-403 .....	8
West Virginia Code, Section 48-9-403(b)(1) .....	9
West Virginia Code, Section 48-9-403 (d)(1) .....	9, 17
West Virginia Code, Section 48-9-403(d)(2) .....	10

## DISCUSSION OF LAW IN SUPPORT OF APPEAL

### I.

#### **THE FAMILY COURT ABUSED ITS DISCRETION WHEN IT CREATED ITS OWN LEGAL STANDARD REGARDING RELOCATION AND IGNORED THE MANDATES OF THE WEST VIRGINIA RELOCATION STATUTE.**

West Virginia Code recognizes that relocation after divorce is often inevitable and consistent with the legislature's intent to focus on the best interests of the children, West Virginia Code, Section 48-9-101(b), has enacted a relocation statute in West Virginia Code, Section 48-9-403. The legislature recognized that one parent's ability to see their child(ren) will **always** be affected in relocation. As such, it created a statute to define the rights of the parties while keeping the best interest of the children as the polar star which should guide the Court in making its decision regarding a modified parenting plan.

While the Family Court is meticulous in making its findings of fact, there is nothing within those findings which demonstrate that the Family Court considered the best interest of the children. Both the Court and the guardian failed to focus on the children and instead made a decision based upon fairness to the father as opposed to the best interest of the children. The Family Court placed emphasis on the secondary objective of fairness between the parents and completely disregarded the primary objective of West Virginia Code, Article 48. The record is replete with factual and legal error and the Family Court's decision should be reversed.

A.

## WEST VIRGINIA LAW REQUIRES AN ANALYSIS OF THE BEST INTEREST OF THE CHILDREN

To understand West Virginia's priority regarding children, one must look to West Virginia Code, Section 48-9-102 which specifically states:

### §48-9-102. Objectives; best interests of the child.

- (a) The primary objective of this article is to serve the child's best interests ...
- (b) A secondary objective of article is to achieve fairness between the parents.

In this case, it is blatantly obvious that both the Guardian and the Court made its primary focus the "fairness to the father," and thus clearly abused its discretion in rendering a decision to deny mother's petition for relocation.

Based upon the recommendation of the guardian, the Family Court made the following conclusion of law:

"While the mother's relocation is in good faith and for a legitimate purpose as the same is defined by West Virginia Code §48-9-403(b)(1)<sup>1</sup>, **the relocation is not reasonable in light of the substantial adverse impact it will have on the father's parent/child relationship, the effective stripping away of the bond between father and the daughters, the substantial travel between the parties' respective households and the costs thereof, the adverse impact upon the continuity of the children's schooling.**" (Final Order, Conclusion of Law #2)

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<sup>1</sup> The Family Court's conclusion of law #2 cites West Virginia Code §48-9-403(b)(1) as the statute which defines a "legitimate purpose" for relocation. Said citation is factually incorrect in as much as it is West Virginia Code §48-9-403(d)(1) which defines a legitimate purpose. This error is likely a typographical error which nonetheless should be corrected.

In its one and only conclusion of law regarding the relocation, the Court fails to make a legal analysis based upon the best interest of the children, rather its focus is on the “substantial adverse impact it will have on the father’s parent/child relationship.” This is the ONLY conclusion which the Family Court made and this conclusion is contrary to West Virginia Law and adverse to the best interests of the children. Such a ruling cannot stand and must be reversed.

In this appeal, mother respectfully requests that the correct legal analysis be applied based upon the appropriate legal standard, with focus on the best interest of the children, as mandated by the West Virginia relocation statute and West Virginia case law.

**B.**

**The best interest of the children in this case is to permit relocation to South Carolina with their mother.**

**BEST INTERESTS OF THE CHILDREN.** West Virginia’s relocation statute is codified in Section 48-9-403(d)(2) and states that:

(2) If a relocation of the parent is in good faith for legitimate purpose and to a location that is reasonable in light of the purpose and if neither has been exercising a significant majority of custodial responsibility for the child, **the court shall reallocate custodial responsibility based on the best interest of the child, taking into account ALL relevant factors including the effects of the relocation on the child.**

In as much as there is no factual or legal dispute that the relocation was in good faith, for a reasonable purpose, and neither party was exercising 70% of the custodial responsibility for the children at the time the Notice of Relocation was filed, the Court must analyze the evidence under the legal standard of best interest of the children taking into account ALL relevant factors

which affect the children. Unfortunately in this case, the Court used only one factor in making the life altering decision to strip minor children from their mother who had been the children's primary caretaker and custodian for 12 and 8 years respectively.

C.

**West Virginia Code, Section 48-9-102 sets forth SIX factors the Court must consider in determining the best interest of the children. The Family Court abused its discretion both in placing emphasis on the secondary objective and considering only one of the six factors.**

In order to determine what constitutes the best interest of the children, West Virginia sets provides guidance within Section 48-9-102, which specifically states:

**§48-9-102. Objectives; best interests of the child.**

- (a) The **primary objective** of this article is to serve the **child's best interests**, by facilitating:
  - (1) Stability of the child;
  - (2) Parental planning and agreement about the child's custodial arrangements and upbringing;
  - (3) Continuity of existing parent-child attachments
  - (4) Meaningful contact between a child and each parent;
  - (5) Caretaking relationships by adults who love the child, know how to provide for the child's needs, and who place a high priority on doing so;
  - (6) Security from exposure to physical or emotional harm;
  
- (b) A **secondary objective** of article is to **achieve fairness** between the parents.

In this case, both the guardian and the Court rendered its decision based ONLY upon "fairness" to the father. In doing so, both the guardian and the Court failed the children miserably by failing to consider the affect of their decision on the children. They failed to consider the stability of the children in staying with their mother. They failed to consider the need for continuity of the existing mother-child attachments. They failed to consider that mother is a stay at home mother. They failed to consider the significance of father's false allegations of child abuse, domestic violence, and neurotic actions in abusing his authority as a Deputy Sheriff

and committing a crime to further his own agenda, all of which should have been considered as actions within this custodial litigation which rises to the need for parental limitations under West Virginia Code, Section 48-9-209(a)(5).

Rather than applying the correct legal standard to the evidence presented, the Court concluded that based upon all the testimony and evidence presented, as well as the guardian's report, that it was not fair to the father daughter relationship that mother should be permitted to take the minor children with her to South Carolina. Specifically, the guardian testified that "the parent whose actions precluded the continuation of the equal allocation of parenting time should not be rewarded. To him, it was a 'fairness issue' with consideration to all the matters including the children's relationships, their ties to the community, the extended family, the continuity of their schooling, etc." (Finding of Fact #89). In doing so, both the guardian and the Court:

- 1) ignored the best interest of the children;
- 2) elevated school, community, third parties and extended family above the children's need to be with their mother who had stayed at home to raise them for their entire lives;
- 3) the statutory mandates of the relocation statute,
- 4) punished mother for making a decision to relocate to the prosperous city of Columbia, South Carolina, with her current spouse, who had obtained a secure, well paying job, in an area where the cost of living was lower than Wheeling, West Virginia – all as set forth in her Notice of Relocation which was admitted as an exhibit at trial.

The Family Court's ruling in this case clearly violates the West Virginia Supreme Court's holding in *Hager v. Hager*; 591 S.E.2d 177; 214 W.Va. 619 (2003), that "[t]he award of child custody, [ ], should not be an exercise in the punishment of an offending spouse. In punishing the

offending spouse one may also punish the innocent child, and our law will not tolerate that result."

D.

**The shared parenting statute requires an analysis of the history of past performance of caretaker functions of the child prior to the parties' separation. In this case, the evidence at trial demonstrated that prior to the parties' separation, Mother performed the majority of the caretaker functions and continued to do so from the children's birth in March 10, 1996 and November 24, 1999 respectively until approximately February 22, 2006.**

The family court absolutely failed to consider the history of past performance of caretaker functions of the child prior to the parties' separation, a fact which was clearly in evidence and undisputed. A fact which is directly relevant to the best interest of a child in maintaining continuity of existing parent-child attachments, West Virginia Code, Section 48-9-102(a)(3).

In making a decision to reallocate custodial responsibility between parents, the Court must conduct an analysis of the evidence under West Virginia Code, Section 48-9-206. The Family Court failed to do so in this case. An analysis of the evidence and the pertinent subsections of this statute follows.

**§48-9-206. Allocation of custodial responsibility.**

Unless otherwise resolved by agreement of the parents under section 9-201 or unless manifestly harmful to the child, **the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation** or, if the parents never lived together, before the filing of the action, except to the extent required under section 9-209 or necessary to achieve any of the following objectives:

**(1) To permit the child to have a relationship with each parent who has performed a reasonable share of parenting functions;**

While the Court made a finding that the Mother had performed the majority of the parenting functions for these children for the majority of their lives, and made a finding that it was the father's significant other that provided and would continue to provide the majority of parenting functions, the Family Court nevertheless stripped custody from mother. Such a finding violates Mother's constitutional right to raise her own children by giving those privileges to father's "significant other."

**(2) To accommodate the firm and reasonable preferences of a child who is fourteen years of age or older, and with regard to a child under fourteen years of age, but sufficiently matured that he or she can intelligently express a voluntary preference for one parent, to give that preference such weight as circumstances warrant;**

The Family Court heard, but gave no weight, to the children's in camera testimony in this matter. While the children are under the age of fourteen, Mother believes their testimony was more probative than any other testimony presented by either party at the hearing. Petitioner Mother urges this appellate court to conduct an independent review of the children's testimony.

**(3) To keep siblings together when the court finds that doing so is necessary to their welfare;**

The Family Court recognized but ignored the fact that the minor children in this matter have half-siblings who reside in South Carolina. Again, the Court recognized, but ignored, evidence that the guardian had testified that the sibling relationship is paramount to the relationship the minor children may have with any other extended family members in the Wheeling area.

**(4) To protect the child's welfare when, under an otherwise appropriate allocation, the child would be harmed because of a gross disparity in the quality of the emotional attachments between each parent and the child or in each parent's demonstrated ability or availability to meet a child's needs;**

The Family Court's ruling failed to protect the children's welfare because it failed to consider the gross disparity in the quality of the emotional attachment the girls have with their mother and the mother's demonstrated ability and availability to meet the children's needs.

Instead, it reallocated custodial responsibility to the father who delegated the children's daily needs to his significant other. The Court drew this faulty conclusion despite the evidence presented that mother performed the majority of the caretaking functions for the children prior to the parties' separation and had served as the primary residential parent for the seven (7) years since the parties' separation. Such a finding was clearly erroneous and contrary to statutory mandates.

**(5) To take into account any prior agreement of the parents that, under the circumstances as a whole including the reasonable expectations of the parents in the interest of the child, would be appropriate to consider**

The Court, in concluding that Mother should not maintain her primary residential status and be permitted to relocate to South Carolina with the minor children, did not take into account Father's failure to object to Mother's relocation from the Martinsburg area at the time of the separation and divorce, or the physical separation between father and his children for a period of at least three years while he lived in Martinsburg and mother lived in Wheeling with the children.

The Court failed to consider that but for mother's acquiescence in a 50/50 shared parenting arrangement upon Father's relocation to Wheeling in 2005, father would not have been entitled to the same under West Virginia law.

The Court failed to consider that mother acted in the children's best interest in acquiescing to a 50/50 shared parenting plan.

The Court failed to consider that since the parties divorce in 2002, father has never sought primary custody but rather has always sought to modify his child support obligation.

**(8) To consider the stage of a child's development.**

The children at issue are girls who are nine and twelve. The Court failed to consider or even remark on the girls' current stage of development. If failed to consider that they are at a crucial physical and emotional developmental stage during which their Mother is more appropriate to address developmental concerns.

A review of the Court's opinion clearly demonstrates that the facts support primary custody remaining with mother and relocation to South Carolina under West Virginia Code, Sections 48-9-102 and 48-9-206. Unfortunately, the Court never made the appropriate legal analysis to reach that conclusion. Instead, it imposed its own legal "fairness to dad" and "not rewarding mom" standard for determining the appropriateness of relocation. Neither is the correct legal standard and ignoring the mandates of West Virginia law was an abuse of discretion.

**II.**

**The Court abused its discretion in making a ruling based upon facts not in evidence.**

The Court found that Mother's relocation was in good faith and for a legitimate purpose in that it was to be with her husband who pursued and attained significant employment.

However, the court abused its discretion in making a finding that the relocation was not reasonable because “it was substantially achievable by moving to a location that was substantially less disruptive of the other parent's relationship to the child.” The Court made this finding based upon facts which were not in evidence. In essence, the Court ignored the evidence and substituted its own opinion on what evidence should have been presented.

West Virginia Code, Section 48-9-403(d)(1) states that “a move with a legitimate purpose is reasonable unless its purpose is shown to be substantially achievable without moving or by moving to a location that is substantially less disruptive of the other parent's relationship to the child.” In this case, the Family Court found that while legitimate, mother’s purpose for relocating was unreasonable. The pertinent findings of fact on this issue are found between paragraphs 34 and 38 within the Court’s order, which specifically state,

35. Prior to their relocation in May, 2008, the mother’s current spouse, Sean Burke was employed by a law firm known as Orrick, Herrington and Sutcliffe, LLP as a Level III Applications Engineer. On October, 2007, Geoffrey Zodda, a recruiter, approached Sean Burke, the mother’s current spouse, concerning an employment opportunity with Nelson, Mullins, Riley and Scarbrough as a manager of a team of Application Engineers in Columbia, South Carolina.
36. Sean Burke testified that his efforts to locate employment in management within the Wheeling – Pittsburgh area proved unsuccessful. His testimony is corroborated both by a notarized statement from Geoffrey Zodda, a personnel recruiter, indicating that this job opportunity was not available to Mr. Burke in the Wheeling-Pittsburgh area. As well, the Guardian ad Litem interview with Orrick, Herrington, and Sutcliffe’s Human Resources Department indicated that there were no management jobs for which Sean Burke was qualified in October, 2007, when he left that firm. Nor were such jobs available for him at his former employer [ ] as of the time of this hearing on August 18, 2008. Orrick, Herrington, and Sutcliffe advised the Guardian ad Litem that Sean Burke would be eligible for a management position in the future if a position became available.
37. The employment opportunity in Columbia, South Carolina is a promotion for Mr. Burke. The position pays an annual income of [ ] \$95,000 with a signing bonus of [ ]\$2,000, and other merit bonuses. At the time Sean Burke left employment with

Orrick, Herrington, and Sutcliffe, Mr. Burke was not in a management job but rather a line engineer making approximately [ ] \$82,000 per year.

38. The father presented no evidence in his case in chief that Mr. Burke could obtain similar employment in the Wheeling-Pittsburgh area. **Likewise, the mother presented no evidence in her case in chief to indicate that Mr. Burke could not retain similar employment by moving to a location that would be substantially less disruptive of the other parent's relationship with the children such as Columbus, Ohio; Akron, Ohio; Cleveland, Ohio and Cincinnati, Ohio (all within 2 to 4 hours of the Wheeling, West Virginia area).**

These findings demonstrate that mother met her burden in providing that similar employment could not be obtained in a location which would have been substantially less disruptive. Father presented no evidence to rebut the same. As such mother met her burden of proof. Nevertheless, in paragraph 38, the Court substitutes its own opinion on what evidence should have been presented and independently assumes and draws conclusions based on facts not presented. It independently concludes that a move within a 2-4 hour driving radius would have produced a "substantially less disruptive" course for the parties' parenting plan. Those assumed facts include:

- jobs are available with a 2 to 4 hour radius of Wheeling,
- Sean Burke could have gotten those jobs,
- those jobs were of similar nature to Sean Burke's credentials,
- the pay would have been equal to or surpassed his income,
- that the cost of living was lower than Wheeling
- Sean Burke and Susie Burke desired to live in any of those areas
- The children's father's ability to see his children would *not* have been substantially impaired.

The fact of the matter is that mother presented the requisite evidence to establish that the relocation was not substantially achievable without moving or by moving to a location that was substantially less disruptive of the other parent's relationship to the child when she presented evidence that no jobs were available within a 60 mile radius of Wheeling. Even a sixty-mile relocation away from father would have affected the 50/50 parenting time. For the Court to mandate the exclusion of all cities within a 2 to 4 hour driving radius of Wheeling, and then somehow assume and impose its opinion that such a relocation would not be "unreasonable" is a clear abuse of discretion and an imposition of its own opinion.

The Family court was bound to evaluate this matter upon the evidence presented within the record created at the trial. Instead, the family court went beyond the record created at trial and imposed, as its own findings of fact, a ruling without regard as to the evidence presented. The Family Court abused its discretion in substituting its own judgment on factual matters and erred as a matter of law on the issues. Accordingly, the order must be reversed.

### III.

#### **The Guardian failed to perform his duties to protect the children's interests in this matter.**

The guardian was given the duty to determine the best interest of the children. He failed to do so. Of great import to note in this appeal is that **the guardian NEVER independently or privately spoke to the children at issue in determining what the best interests of the children were before the hearing which decided their fate.** Instead, he concentrated his efforts in advocating a fairness to the father argument.

A guardian's role is to advocate the children's position. How can one begin to advocate a client's position without independently speaking to the client? It cannot be done. It was never done, and failure to do so was a failure to determine the best interest of the children.

The guardian in this case interviewed the parties themselves and the human resource person at Orrick. The investigation went no further. In fact, the guardian requested counsel for Father to conduct an investigation on jobs which were available in the Wheeling-Pittsburgh area. Said information appeared in and was used against mother without giving mother an opportunity to do the same. Nevertheless, when given the opportunity to properly dispute the "job opportunities," mother provided concrete evidence to the contrary.

By contrast, when the guardian was given information and opportunities to privately speak with Sean Burke or Susie Burke, the guardian did not do so. When given information regarding evidence of a crime committed by father, the guardian failed to follow up on the same.

The guardian's bill for services even charges for review of a supposed "relocation law" which was "new law" applicable to the facts of the case. In actuality, said proposed legislation never made it out of committee. Said "law" was provided to the guardian by counsel for the father.

Guardian was also directed by court order to make available his entire file to counsel for review prior to the final hearing. Counsel for mother even subpoenaed the same. Said file was never produced.

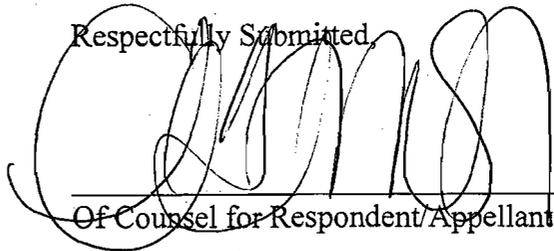
Appellant mother submits that the guardian did not properly advocate his client's interests. The only thing done by the guardian was to explore the possibility of Sean Burke

obtaining employment in Wheeling or someplace nearby. No further investigation was performed. Again, said actions only confirm that both the guardian and the court applied the wrong legal standard and disregarded the best interest of the children in this case.

**CONCLUSION**

Based upon the foregoing, Appellant Mother submits that a de novo review of the case can only result in a reversal.

Respectfully Submitted,



\_\_\_\_\_

Of Counsel for Respondent/Appellant

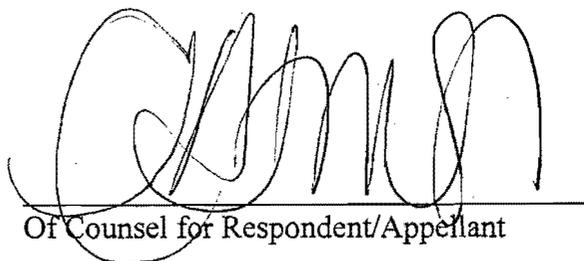
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CERTIFICATE OF SERVICE

I CERTIFY that on the 3<sup>rd</sup> day of ~~January~~ <sup>February</sup>, 2010, a true and correct copy of the foregoing APPELLANT'S BRIEF was served upon the Petitioner/Appellee and to the Guardian Ad Litem by first class mail, as follows:

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