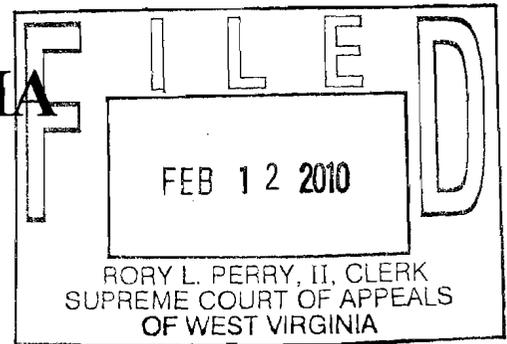


NO. 35445

**IN THE
SUPREME COURT OF APPEALS
OF**

WEST VIRGINIA

CHARLESTON



CHARLES D. KITTLE,

Petitioner/Appellee

vs.

BRIEF OF GUARDIAN AD-LITEM

SUSAN R. BURKE,

Respondent/Appellant

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

BRIEF OF GUARDIAN AD-LITEM

**David B. Cross
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Wellsburg WV 26070**

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

PROCEEDINGS AND RULING

This appeal arises from a proceeding in the Family Court of Ohio County, West Virginia wherein the Family Court denied a motion filed by the Appellant Mother seeking modification of parenting time based upon a relocation to provide the Appellant's new husband an employment opportunity in Columbia, South Carolina. Prior to the filing of the Notice of Relocation in October, 2007, an Order had been entered on the 12th day of May, 2006 wherein the Court made a finding that both parties were fit and proper persons to share in the decision-making and custodial responsibilities for the subject children and the Court had approved a proposed agreed upon Parenting Plan which constituted an equal allocation of custodial responsibility for the children.

The Court conducted hearings with regard to the Mother's Petition to Modify a Parenting Plan due to Relocation on April 15, 2008 and on August 18, 2008 and conducted a telephonic conference call for the purpose of receiving the Court's ruling on the 29th day of August, 2008. On the 18th day of August, 2008 the Court interviewed both minor children of the parties in the absence of the parties and counsel, but in the presence of the Guardian Ad-Litem, David B. Cross. The Honorable William F. Sinclair thereafter entered an Order on the 18th day of December, 2008 containing 98 Findings of Fact and 25 Conclusions of Law after hearing over eighteen hours of testimony. The Court then ordered that the Mother's Petition to Modify Parenting Time Based Upon a Relocation was denied and that the Mother was not permitted to relocate to South Carolina with the minor children, K.K. and H.K.

Judge Sinclair concluded that, while the mother's relocation was in good faith and for a legitimate purpose as the same is defined by West Virginia Code Chapter 48, Article 9, Section 403(b)(1), the relocation was not reasonable in light of the substantial adverse impact it would have on the father's parent-child relationship, the effective stripping away of the bond between

the father and the daughters, the substantial travel between the parties' respective households and the costs thereof, the adverse impact upon the children's relationship with extended family, and the adverse impact upon the continuity of the children's schooling (Final Order, Conclusion of Law No. 2). The Family Court found that the father presented no evidence that the Appellant's new husband could obtain similar employment in the Wheeling-Pittsburgh area and, 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 two to four hours of the Wheeling, West Virginia area). (Finding of Fact No. 38). The Family Court clearly considered the totality of the circumstances in determining the best interest of the children.

The Appellant Mother appealed the Family Court's ruling to the Circuit Court of Ohio County, West Virginia alleging that the Family Court abused its discretion when it created its own legal standard regarding relocation, that the Court abused its discretion in making a ruling based upon facts which were not in evidence, that the Guardian Ad-Litem failed to perform his duties to protect the children's interests in this matter, and that the Family Court abused its discretion in attributing income to a mother who chose to stay at home to raise children of tender years. The Honorable Ronald Wilson, Judge of the Circuit Court, thereafter entered an Order adverse to the allegations set forth in the appeal with remand for reconsideration on the calculation of child support.

At the time of the hearing, K.K. was 12 years of age and H.K. was 8 years of age. At the time of the final hearing both parties were subject to the Court Order entered on May 12, 2006 which established equal parenting time with the minor children. The Final Order issued by Judge Sinclair ordered that should the mother choose to remain in the Wheeling-Ohio County,

West Virginia area, the Parenting Plan entered by Order of May 12, 2006 would remain in place. It further ordered that should the mother elect to relocate to South Carolina, the father's proposed Parenting Plan which had been previously filed would be implemented. The mother relocated to South Carolina.

The Guardian Ad-Litem filed a Report with the Family Court Judge on April 10, 2008. The Report noted that it was clear that the requested relocation constituted changed circumstances which would render it impractical to maintain the same proportion of custodial responsibility as that being exercised by each parent and that the Court would be required to modify the Parenting Plan under the circumstances. The Report noted that under the provisions of Chapter 48, Article 9, Section 403(d) of the West Virginia Code a relocation of a parent would be in good faith for legitimate purpose and to a location that is reasonable in light of the purpose and if neither party has been exercising a significant majority of custodial responsibility for the children, and that the Court would be responsible for reallocating custodial responsibility based on the best interest of the child, taking into account all relevant factors including the effects of relocation on the children. The Report further noted that the statute indicated that a move with a legitimate purpose was 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 Report noted that the new husband of the mother, Sean Burke, was employed in Wheeling, West Virginia as a senior applications engineer with the international law firm of Orrick, Harrington and Sutcliffe, LLP. The Report noted the enclosure of a resume of Sean Burke and what was described as multiple positions in "our geographic area for which Mr. Burke is qualified". The Guardian Ad-Litem opined in the Report that an individual with Sean Burke's education and experience should be able to find a job in the geographic area near Wheeling, West Virginia including the Pittsburgh vicinity, which would

provide him with the same or better job advancement opportunities as have been made available in the position he had accepted in South Carolina. The Guardian noted that such conclusion appeared to be relevant because the statute in question would render relocation unreasonable if its purpose could 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 Guardian concluded that the requested relocation would not be considered reasonable and would not be considered to be in the best interest of the children, taking into account that the geographic distance between the father and children would undermine the stability in the stable loving relationship between the children and their father. The Guardian further noted that closer proximity to the non-relocating parent is likely to promote a more stable and involved relationship and that the children of the parties were entitled to have stability in the parenting arrangement with both mother and father and should have the best opportunity for an ongoing loving relationship with both parents. The Guardian Ad-Litem opined that the requested relocation, if granted, would undermine the emotional attachment of the children to their father, reduce the availability of the father to assist in meeting the children's needs, and deny the children the opportunity to continue to have the benefit of love and support from extended family members of both the mother and the father. The Guardian Ad-Litem recommended in said Report that it would be appropriate for the Court to approve the proposed Parenting Plan filed with the Court by Charles D. Kittle on November 5, 2007 in the event that Susan Burke chose to relocate to South Carolina with Mr. Burke. West Virginia Code 48-9-403(d)(2) states that if neither party is exercising a majority of the custodial responsibility, the Court shall reallocate custodial responsibility based on the best interest of the child.

The Guardian Ad-Litem refused the requests of counsel for the Appellant Mother to conduct interviews with the two children. The Guardian Ad-Litem expressed to the parties and

Court the concern of the Guardian Ad-Litem that, should such interviewing take place by the Guardian Ad-Litem prior to the final hearing, that the Guardian's Report would necessarily set forth the opinions expressed by the children and that the knowledge of the parents of such expressed opinions might create undue emotional pressure on the children and be detrimental to them. The Guardian Ad-Litem pointed out the right of the Family Court Judge to conduct an in-camera inquiry with the children in the presence of the Guardian Ad-Litem and without the presence of the parents or their counsel to assist the Court in the matter. Judge Sinclair conducted such in-camera hearing as noted with the Court interviewing the children in the absence of the parties and counsel, but in the presence of the Guardian Ad-Litem at the time of the hearing on August 18, 2008.

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

In Syllabus Point 1 of *Staton v. Staton*, 218 W.Va. 201, 624 S.E.2d 548 (2005), the West Virginia Supreme Court of Appeals noted as follows:

“In reviewing a final order entered by a Circuit Judge upon a review of, or upon a refusal to make 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).

The Guardian Ad-Litem states that the issues raised by the Appellant should be reviewed *de novo*. The Guardian Ad-Litem is of the opinion that the Circuit Court did not clearly err in its analysis of the record presented for the purposes of an application of the West Virginia Relocation Statute and the Guardian Ad-Litem further advocates that the Family Court did not abuse its discretion in this matter but, contrary to the representations of Appellant, that the Family Court applied the appropriate legal standards and analyzed the best interests of the children and the effect of modifying the Parenting Plan in an appropriate fashion.

STATEMENT OF FACTS

The parties to this action are the parents of two children, K.K., born March 10, 1996 and H.K., born November 24, 1999, during their marriage to one another. The parties were married in 1994 in Marshall County, West Virginia and were divorced in Berkeley County, West Virginia in October of 2002. Susan Kittle, now Susan Burke, moved from Martinsburg, West Virginia to Wheeling, West Virginia following the divorce. Charles Kittle returned to live in the Wheeling area in 2005 to be closer to his children and obtained a position as a deputy sheriff in Ohio County, West Virginia. Upon the return of Mr. Kittle to the Wheeling area, the parties agreed to a Parenting Plan which provided substantially equal parenting time to each parent and the Parenting Plan was approved by the Family Court of Ohio County, West Virginia.

The Appellant Mother and Sean Burke were married to one another on October 8, 2004. Susan Burke and Sean Burke became the biological parents of two other children, P.B., born May 16, 2004 and M.J.B. who was born December 7, 2007. The Appellee has maintained employment since returning to the Wheeling area in the same position and the Appellant is engaged in staying with and raising her children without engaging in employment outside of the family home. There have been no allegations that either the Appellant or Appellee are not fit parents.

On October 3, 2007, the Appellant, Susan Burke, filed a Notice of Relocation seeking permission to relocate the children to Irmo, South Carolina with her. This appeal arises as a result of the Order of the Family Court of Ohio County, West Virginia entered the 18th day of December, 2008 denying the Mother's Petition to Modify a Parenting Plan Due to a Relocation filed on October 5, 2007 and the subsequent Order of Circuit Judge Ronald E. Wilson refusing the Appeal of Susan Burke and affirming the Order of the Family Court Judge.

GUARDIAN’S RESPONSE TO ASSIGNMENTS OF ERROR

The Circuit Court affirmed the Family Court’s ruling. The Guardian Ad-Litem responds as follows to the Assignments of Error made by the Appellant.

1. The Guardian Ad-Litem states that the Family Court gave appropriate consideration to the effect of the proposed relocation on the children, the father and the mother contrary to the allegations of Appellant in her First Assignment of Error.
2. The Guardian Ad-Litem states that the Family Court did not make a ruling that ignored the evidence or substituted its own opinion on what evidence should have been presented contrary to Appellant’s Second Assignment of Error.
3. The Guardian Ad-Litem states that the Family Court did consider the best interests of the children contrary to the Third Assignment of Error of the Appellant.
4. The Guardian Ad-Litem states that he did not fail to advocate for the children in lieu of advocating the father’s interest as set forth in Appellant’s Fourth Assignment of Error.

POINTS AND AUTHORITIES CITED

Carr v. Hancock, 216 W.Va. 474, 607 S.E.2d 803 (2004).....5

West Virginia Code, Section 48-9-1.....8

West Virginia Code, Section 48-9-102.....9

West Virginia Code, Section 48-9-403.....8

West Virginia Code, Section 48-9-403(d).....3, 13

Trial Court Rule 21.03.....8

DISCUSSION OF LAW IN REGARD TO APPEAL

I

ALLEGATION OF APPELLANT THAT FAMILY COURT ABUSED ITS DISCRETION WHEN IT CREATED ITS OWN LEGAL STANDARD REGARDING RELOCATION AND IGNORED THE MANDATES OF THE WEST VIRGINIA RELOCATION STATUTE

Chapter 48, Article 9, Section 1 of the West Virginia Code sets forth that the Legislature finds and declares that it is the public policy of this state to assure that the best interest of children is the Court's primary concern in allocating custodial and decision-making responsibilities between parents who do not live together. The statute declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children, to educate parents on their rights and responsibilities and the effect their separation may have on children, to encourage mediation of disputes, and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or divorced. The provisions of Chapter 48, Article 9, Section 403 of the West Virginia Code, dealing with relocation of a parent, set forth the legal standard to be followed in matters pertaining to the relocation of a parent following a divorce.

The Guardian Ad-Litem asserts that the Family Court, in making its Findings of Fact, demonstrated that the best interest of the children was the primary concern of the Court in this matter. The Guardian asserts that it was the Court's concern of fairness to and the best interest of the children that guided the Court in making its decision rather than the asserted "fairness to the father" being the primary goal of the Court. The Guardian Ad-Litem asserts that the decision of the Family Court should be affirmed. The Guardian Ad-Litem, under Trial Court Rule 21.03 is to make a full and fair independent investigation of the facts and make recommendations to the Court. The Family Court Judge is not bound by the recommendations and may give such weight to them as the Court considers proper. Further, Appellant has no standing to assert error involving the role or functioning of the Guardian Ad-Litem.

FURTHER ARGUMENT REGARDING ASSIGNMENTS OF ERROR

Appellant is correct in stating that West Virginia Code, 48-9-102 specifically states, in regard to the best interests of a child, that the primary objective is to serve the child's best interests and the secondary objective of the law is to achieve fairness between the parents. The allegation, however, that the Court and Guardian Ad-Litem gave primary focus to "fairness to the father" is not correct. It is in the best interests of children to avoid the stripping away of the bond between both the father and children and the mother and children. The children of the parties, prior to the relocation of the mother in South Carolina, had the benefit of the love, support, and frequent contact of both parents under the shared parenting arrangement agreed upon the parties. While the requested relocation of the children of the parties to South Carolina would deprive the father of meaningful contact with the children, it also deprives the children themselves of the benefits of the joint parenting by both mother and father. The conclusion of the Family Court that the relocation was not reasonable in light of the substantial impact it would have on the father's parent/child relationship, stripping away the bond between father and daughters, the substantial travel between the parties respective households and costs thereof, which would negatively impact upon the children, and the adverse impact upon the continuity of the children's schooling reflect a consideration by the Court of the best interest of the children themselves. It is clear that the Court concentrated on the impact of the proposed move to South Carolina upon the children themselves. The Court considered that the children would not be able to enjoy their regular custodial interaction with their father in the event that they relocated to South Carolina. The Court considered the burden of the substantial travel that would be required of the children under a modified Parenting Plan with the mother residing in South Carolina. The Court considered the costs of such travel which would obviously reduce the amount of money the parties would have available to provide for the needs of the children. The Court may have

given consideration to the Guardian Ad-Litem's testimony that Mr. Burke's salary in Wheeling was substantial in that it was double the median income in West Virginia and therefore, economic gain was not essential to the family. Finally, the Court considered the adverse impact of removing the children from the Ohio County, West Virginia school system and necessary interruption of the continuity of the schooling of the children in the event that they were relocated to South Carolina. The focus of all of these matters is the children themselves. Such was the focus of both the Guardian Ad-Litem and the Family Court Judge.

The Family Court Judge noted that the Court heard the in-camera testimony of the parties' children and that due to the need to protect the children from disclosure of the substance of the interview, the Court would not identify in its findings which of the findings were based upon the children's testimony. (Finding of Fact 18). The Court noted, however, that the testimony of the children was recorded for review and was available for review by any Appellate Court. The Court noted that the testimony of the children was sealed for the reasons more particularly placed upon the record of August 18, 2008. The Guardian Ad-Litem advocates that any reviewing court should give consideration to the in-camera testimony of the children.

The Family Court noted that H.K. was eight years of age at the time of hearing and had been educated solely in the Ohio County, West Virginia school system. The Court noted that H.K. had completed second grade and was scheduled to attend the third grade in the same elementary school. The Court noted that K.K. was twelve years of age at the time of the hearing and had been educated in the Ohio County school system also. The Court noted that K.K. had completed the fifth grade at an elementary school in Wheeling and was to attend sixth grade during the next academic year (Finding of Fact No. 19 and Finding of Fact No. 20). The Court further noted that both of the children exhibited a high degree of maturity beyond their respective

ages and that both children were very intelligent and had received grades of “A” and “B” in their school work (Finding of Fact No. 21).

The Family Court made a finding that the mother’s intended relocation had caused substantial anguish and emotional turmoil to both of the children and that the children found themselves in the proverbial middle (being caused to choose between their mother and their father). The Court further noted that it was abundantly apparent that both children loved both parents (Finding of Fact 23). The Court further made a finding that it was apparent that both children were somewhat hesitant to testify for fear of some unspecified retribution by one or the other of the parties and that this hesitancy was diminished significantly when the Court advised the children that their testimony would be sealed (Finding of Fact 25). The Guardian Ad-Litem, in deciding whether or not to interview the children prior to the final hearing, knowing that the information provided would be given to the parents, gave full consideration to the fact that children under such circumstances frequently suffer emotional trauma when they are placed in a position of having to talk to a stranger about the conduct of their parents and about their feelings of whether they want to move away to another state with one of the parents. It is not usual for such children to have a fear of some type of retribution or punishment imposed by one of the parties. Awareness of this phenomenon motivated the Guardian Ad-Litem to suggest that the children’s best interests might be served by any interviewing of them being conducted during an in-camera hearing without the parties and in the presence of the Family Court Judge and Guardian Ad-Litem with the information provided by the children being sealed. The failure of the Guardian Ad-Litem to conduct an independent interview with the children prior to the final hearing, knowing that the information obtained from the children would be placed in a report which would be read by the parents prior to the final hearing, is not neglect of responsibility by the Guardian Ad-Litem, contrary to the representations of the Appellant herein.

The Court made a finding that the children have a very close relationship with one another and that they speak frequently and considered themselves to be very good friends. The Court concluded that keeping the children together was necessary for their welfare (Finding of Fact 31). The Court further made a finding that at least one of the children had expressed to the Court a desire not to continually travel between West Virginia and South Carolina (Finding of Fact 32).

The Court made a finding that the Guardian Ad-Litem submitted various written questions to the mother's spouse, Sean Burke. The Court noted the testimony of the Guardian Ad-Litem that Mr. Burke failed to provide written answers to those questions, which included a question inquiring of efforts made by Sean Burke to locate a position within the Ohio County area in a managerial position and/or enhancing his income (Finding of Fact 53). The Court further noted in its findings (Finding of Fact 54) that there was a difference in the testimony of Sean Burke and the Guardian Ad-Litem, Mr. Burke having indicated that he had forwarded responses to the Guardian's questions via e-mail and the Guardian indicating that such responses had not been received from Mr. Burke or Appellant's counsel or filed with the Court. The Court made a finding that the Guardian Ad-Litem testified that the mother's spouse's pay increase from taking the new position in South Carolina was not a good reason to uproot the children from their present environment, community ties, family interactions, and their connection with their father (Finding of Fact 58). The Court further made a finding that the Guardian Ad-Litem testified that the reduction of parenting time to perhaps five percent of the parenting time previously enjoyed was not in the children's best interests (Finding of Fact 60). The Court made a finding in this matter that the mother admitted that she had filed a Divorce Petition on November 28, 2006 premised upon allegations of Mr. Sean Burke's drug use and/or abuse (Finding of Fact 62). The Court made a further finding that, in light of the totality of the evidence of Mr. Burke's problems

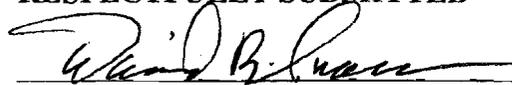
with drug abuse and addiction, the Court did not believe the mother's testimony that she was mistaken about seeking divorce on such grounds (Finding of Fact 63).

A review of the Findings and Fact and Conclusions of Law of Judge Sinclair, in the view of the Guardian Ad-Litem, clearly establishes that the Court gave as its primary objective consideration of the best interests of the children and that such consideration must be paramount in considering the requirements of Chapter 48, Article 9, Section 403 of the West Virginia Code regarding relocation of a parent.

CONCLUSION

Based upon the foregoing, the Guardian Ad-Litem submits that a de novo review of this matter must result in affirming the Order of the Family Court Judge.

RESPECTFULLY SUBMITTED



David B. Cross
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CERTIFICATE OF SERVICE

I certify that on the 10th day of February, 2010, a true and correct copy of the foregoing Brief of Guardian Ad-Litem was served upon the Respondent/Appellant by First Class Mail, as follows:

1. Elgine Heceta McArdle, 80 Twelfth Street, Ste 206, Wheeling, WV 26003
2. Charles D. Kittle, Petitioner/Appellee, RR 1 Box 157, Triadelphia, WV 26059.



David B. Cross