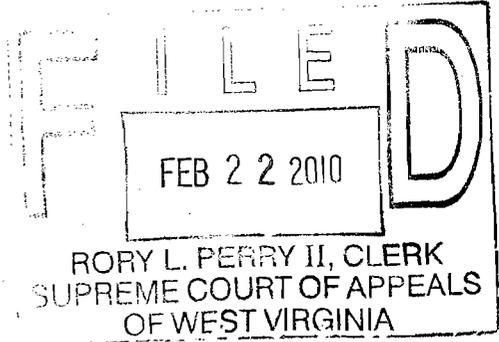


No. 35445

COPY

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON



CHARLES D. KITTLE,
Petitioner/Appellee,

vs.

ON PETITION FOR APPEAL

SUSAN R. BURKE,
Respondent/Appellant.

FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

REPLY BRIEF

Of Counsel for the Respondent/Appellant

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

I.

REPLY TO APPELLEE'S BRIEF

This Court has long held that non-lawyer, pro se litigants generally should not be held accountable for all of the procedural nuances of the law. When a litigant chooses to represent himself, it is the duty of the trial court to insure fairness, allowing reasonable accommodations for the pro se litigant so long as no harm is done an adverse party. . . . Most importantly, the trial court must strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. State ex rel. Dillon v. Egnor, 188 W.Va. 221, 227, 423 S.E.2d 624, 630 (1992) (internal quotations and citations omitted). **Of course, the court must not overlook the rules to the prejudice of any party.** The court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by inadvertent omission or mistake. **Cases should be decided on the merits,** and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. Blair v. Maynard, 174 W.Va. 247, 253, 324 S.E.2d 391, 396 (1984).

“In a long line of unbroken precedent, this Court has held that the responsibility and burden of designating the record is on the parties and that **appellate review must be limited to those issues which appear in the record presented to this Court.**” State v. Honaker, 193 W.Va. 51, 56, 454 S.E.2d 96, 101 (1994) (footnote omitted).

Appellee is pro se litigant in this appeal. Thus, the Court must strive to insure that his cause or defense if not defeated solely by reason of his unfamiliarity with procedural or evidentiary rules. However, this Court must likewise not overlook the rules to the prejudice of

Mrs. Burke. As such, in as much as appellate review is limited to those issues which appear in the record, the merits of this case must be decided on the same.

Throughout his brief, appellee misrepresents, conveniently omits, augments, and embellishes the record with facts which were simply not presented in court. More importantly, appellee insults this Court's intelligence by attempting to imply that the Family Court's ruling was based upon facts which were specifically rejected by the Family Court. Finally, the central theme to appellee's argument is an attempt to cast dispersions upon a mother who was specifically found to be fit, and whose actions as a full time stay at home mother since the children's' birth have been nothing short of exemplary.

A. Misrepresentations and Omissions

Sean Burke

The most significant misrepresentation throughout appellee's brief is that the Family Court's decision to deny Mom's request to relocate with the children was in fact related to Mom's current spouse's "addiction to drugs." At pages 11 -12, and 17 of appellee's brief, appellee highlights the Family Court's findings of fact related to mom's current spouse's addiction to drugs. At page 17, he goes as far to suggest that this Court should conclude that Mr. Burke's prior history of drug abuse in and of itself should be the sole basis for affirming the decision to deny relocation. However, appellee conveniently omits (as does the Guardian Ad Litem in his brief at pages 12-13) the ultimate finding and conclusion made by the family court on that issue. That is, the Family Court specifically stated the following in Findings of Fact #29 and #32:

29. The children have not been mistreated or treated inappropriately by their mother's new spouse, Sean Burke.

32. It does not appear that the subject children have been privy to or exposed to any domestic violence, if any, between the mother and her current spouse Sean Burke...It does not appear that the subject children have been privy to or exposed to any illegal drug activity engaged in by the mother's current spouse, Sean Burke.

The record speaks for itself, Sean Burke's drug addiction is NOT the reason for the Family Court's denial of the relocation. The record clearly states the children were NEVER exposed to Sean Burke's prior history. The record clearly states that Sean Burke is in successful recovery from his drug addiction.

Mrs. Burke testified to her husband's addiction as well as his recovery. Sean Burke's father testified to his addiction as well as his recovery. Once an addict, always an addict – the issue is whether an individual is in recovery. Sean Burke is and has been in recovery for a long period of time. He has overcome his addiction, reconciled his wrongs in his marriage, and obtained and maintains steady employment with great responsibility. Most importantly, neither Sean Burke nor Susie Burke has EVER exposed the children to the dangers of said addiction. The Family Court made such a finding. Any other twist to those findings is a clear misrepresentation, omission, and attempt to mislead this Honorable Court.

Regarding 70% parenting time

At page 16 of appellee's brief, he states:

"The Court found that the relocation was in good faith... In addition, neither parent has ever solely had the children seventy (70%) or more in their lives."

The representation that the Court made a finding that NEITHER parent has EVER solely had the children seventy (70) or more in their lives is a blatant misrepresentation. The

finding made by the Court was that at the time the Notice of Relocation was filed, neither party exercised 70% of parenting time with the children. (See Finding of Fact #17)

Regarding the Children's Testimony

Appellee Father's most blatant misrepresentation is found at pages 22 and 23 of his brief where he states:

"The Appellant asks this Court to conduct an independent interview of the children's in camera interview...One would presume that the Appellant Mother would not know this unless she coached the children on what to say, asked the children what they did in fact say, or the Appellant and/or her counsel watched the in camera interview that was accidentally mailed to them by the Family Court of Ohio County, West Virginia."

The Family Court of Ohio County, West Virginia did in fact accidentally mail the in camera interview to counsel – however, the Family Court did not mail it to undersigned counsel, the in camera interview was mailed to Father's then counsel, Mark Blevins, who was thereafter disbarred by this Court. Undersigned counsel has never received, had access to, or reviewed any such interview of the children – much less disclose the same to mother for her review and interrogation of the children. It was Mark Blevins who was accidentally mailed the children's interview and under whose control the recording of the children's interview was placed.

B. Augmentation and Rebuttal to Argument that the Relocation to SC would have a substantial adverse affect on the father/daughter relationship.

Throughout both the Guardian's brief and that of the Appellee, a central theme, defending the eventual demise of father's relationship with his daughters, pervades their arguments to justify the Family Court's one sided analysis and decision. In appellee's disingenuous attempt to augment the record for his benefit, he in actuality advocates

Appellant's position that it is in the best interest of the children to relocate to South Carolina and that doing so will not undermine the father/daughter relationships.

At pages 4-5 of appellee's brief, he enumerates details of his parenting time with his children while he was in Martinsburg, WV and the girls were in Wheeling, WV living with their mother. He goes through great pains to augment the record with facts which were not in the record. Interestingly enough and accepting facts as true for his benefit, appellee clearly establishes that prior distance between the parties did NOT minimize or affect the father/daughter relationship in as much as he would parent on "holidays, birthdays and extended weekends from school, ... [that the children] would stay overnight with Appellee at a relative's home in Moundsville, West Virginia...and at his residence in Martinsburg, West Virginia for several weeks at a time during the summer months of 2003, 2004, and 2005." He did not testify to these facts at the hearing. Had he done so, the Family Court would have been forced to make a finding that these facts, if accepted as true, bolster and reinforce Mrs. Burke's position that relocation to South Carolina would not "have a substantial adverse affect on the father's parent-child relationship." These facts clearly demonstrate that mom has always cooperated with Mr. Kittle in maintaining his relationship with the girls despite the distance – a fact which would inevitably continue if the Family / Circuit Court decision is reversed and the relocation would be granted. By contrast, the parenting plan proposed by Mr. Kittle and adopted by the Court gives mom a mere 3 days, every other year, for Christmas. This was HIS proposal, it was the one adopted by the Family Court and the one affirmed by the Circuit Court. When one considers the eight hour drive between the parties, allocating 3 days of Christmas every other year clearly demonstrates action that requires the non-custodial

parent to exercise Christmas outside of their home and is NOT in the best interest of the children.

Father presents new facts for the court's consideration in this appeal. Mother submits that doing so is indicative of Father's disingenuous, self serving and illegal actions throughout this case. This time, the augmentation of the record brings forth the truth and that is, the best interest of the children requires them to relocate to South Carolina with their mother.

C. Embellishments

At page 24 of his brief, Appellant takes a simple fact that Mother relocated to South Carolina prior to the entry of the final order and embellishes the fact by making statements which are clearly NOT accurate. He states,

“However, by the Appellant relocating eight hours away before the Final Order was even established, she in essence forfeited her emotional attachment between herself and her children and her ability to meet the children's daily needs.”

Mother's actions have been nothing but appropriate and commendable given the circumstances presented to her. She has abided by all court orders, fought for her family, trusted in the court system to enforce the law, all while fighting a system which has protected a Deputy Sheriff's illegal actions in hacking into her email account (obtaining privileged marital and legal communications) -- all while continuing to simultaneous fight Appellee to see her children since the ruling was issued.

II.

REPLY TO GUARDIAN'S BRIEF

In his brief, the Guardian attempts to defend his position and that of the Court. Specifically he uses the Court's Conclusion of Law #2 to support the proposition that the Court "clearly considered the totality of circumstances in determining the best interests of the children." A review of Conclusion #2 clearly shows the contrary.

The Court cannot "clearly consider the totality of circumstances in determining the best interests of the children," without making a single finding or conclusion regarding the children's long standing relationship with their mother. The guardian points out to this Court that 98 Findings of Fact and 25 Conclusions of Law are delineated within the final order. Unfortunately, not one of the 98 findings, nor one of the Conclusions performs an analysis on what effect a denial of the relocation would have on the children's' relationship with their mother.

A. The Guardian's reliance on Conclusion of Law #2 to support a totality of circumstances analysis is legally and factually flawed.

1. The relocation was not reasonable in light of the substantial adverse impact it would have on the father's parent-child relationship. (Final Order, Conclusion #2).

If a totality of circumstances analysis had been made, the Conclusion should have included a provision that "denying the relocation would not have a substantial adverse impact on the mother's parent-child relationship." Such a conclusion does not exist within the Final Order.

2. The effect of stripping away the bond between the father and the daughters. (Final Order, Conclusion #2)

If a totality of circumstances analysis had been made, the Conclusion should have included a provision that "denying the relocation would not strip away the bond between the mother and her daughters" Such a conclusion does not exist within the Final Order.

B. The Guardians support of the Family Court's rationale regarding substantial travel, adverse affect on extended family, and impact on the children's schooling is likewise factually and legally flawed.

3. The substantial travel between the parties' respective households and the costs thereof; (Final Order, Conclusion #2)

The Family Court, Circuit Court, and Guardian's reliance on the substantial travel between the parties' respective households and costs thereof as a reason to deny the relocation is redundant and rhetorical.

Whether the children remained with dad or relocated with mom, substantial travel still exists between the parties' respective households and costs thereof still remained the same. In as much as mother always offered to assume the responsibility of transport and costs, citing these factors as a basis to deny the relocation is rhetorical.

4. The adverse impact upon the children's relationship with extended family; (Final Order, Conclusion #2) and,

Whether the children remained with dad or relocated with mom, impact upon relationships with extended family is similarly rhetorical. If they stayed in Wheeling, the girls' relationship with the immediate family is impacted by a lack of contact with their mother and siblings. If permitted to relocate to South Carolina, the girls' relationship with their father and extended family is impacted. Unfortunately the converse analysis was never made by the Family Court, hence the error.

5. The adverse impact upon the continuity of the children's schooling. (Final Order, Conclusion #2)

The Court's analysis and guardian's support thereof regarding the continuity of the children's schooling is a trivial reason to use as a basis to ignore children's relationship with their mother. In supporting this reason, the guardian advocates schooling as a higher priority that a long standing relationship with a mother.

C. The Guardian's Justification for Not Speaking with his clients is flawed.

In support of his failure to interview his clients, the guardian relies on two justifications.

First, he claims that children are uncomfortable speaking with strangers. Second, he claims that interviewing the children prior to the court hearing would result in the parties learning what the children said in a report.

Following through on this flawed analysis, the Guardian instead chose to subject the children to an interview with two strangers (the Judge and the Guardian), at the same time, and for the first time during the litigation. In as much as the children had met neither the Judge nor the guardian prior to the day of the hearing, and the parties eventually learned of what the children said within the context of the Final Order, the Guardian's justification for NOT conducting an independent interview of the children outside a courtroom setting failed to protect the children's interest and instead heightened their anxiety by subjecting them to an interview in a litigation setting.

CONCLUSION

Almost three long years have passed since Appellant filed her Notice of Relocation. West Virginia has a relocation statute which clearly defines a standard and balancing test which analyzes the best interests of the children, and it is that interest which should drive decisions in family court. In as much as the best interest of the children did not drive the lower courts' decisions in this matter, and a totality of circumstances analysis was not made on behalf of the children's relationship with their mother, Appellant respectfully asks that the appropriate legal standard be applied to the facts of her case, that the lower courts' decision be reversed, that her children be permitted to relocate with her to South Carolina, and that attorneys' fees be awarded for the prosecution of this appeal.

Respectfully Submitted,



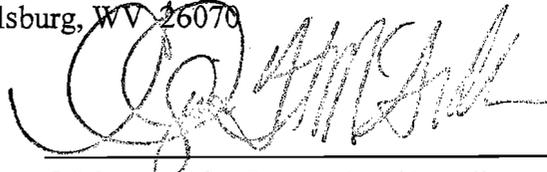
Of Counsel for Respondent/Appellant

CERTIFICATE OF SERVICE

I CERTIFY that on the 20th day of February, 2010, a true and correct copy of the foregoing REPLY BREIF was served upon the Petitioner/Appellee below first class mail, as follows:

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