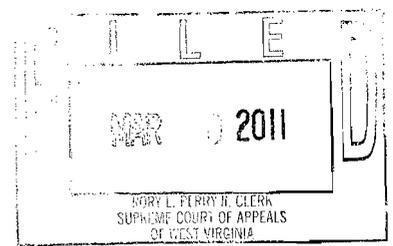


STATE OF WEST VIRGINIA



At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 8th of March, the following order was made and entered:

Sheila Carol Wilson, Petitioner Below, Petitioner

vs.) No: 101147

Robert Hickman, Matthew Earl Perdue and Sarah Beth Perdue, Respondents Below,
Respondents

SUMMARY RESPONSE BY THE GUARDIAN AD LITEM

INTRODUCTION

This Summary Response is filed by the Guardian Ad Litem and somewhat outlines the litigation below, addressing the material facts and case law which support the lower Court's ruling. It justifies the underlying decision placing Hailey, a minor child of the litigants, with her father, Robert Hickman.

It should be noted that the Guardian's follow-up regarding Hailey's placement since the Final Order entered by the Family Court of Boone County on April 12, 2010 supports this custodial arrangement; since Hailey has resided with her father, Robert Hickman, she was maintained regular contacts with her siblings and mother, Sheila Wilson. In this arrangement, Hailey has flourished; she has done well in school and other activities, her teachers have provided the Guardian with raving reviews indicating Hailey's a "happy, well-adjusted, and a much loved child." Her father shadows her with affection and has become her constant companion and a proud father. Under the approach offered by the Guardian Ad Litem to the lower Court below, "Dad deserves a chance to fail," this arrangement has exceeded any expectation the undersigned Guardian had by recommending Hailey's placement be with her father; she is enjoying a healthy, loving, well-adjusted life with her father, Robert Hickman.

Anything short of that in the follow-ups that the Guardian has reviewed, would have resulted in a prompt revisiting of the Parenting Plan in place by the lower Court's ruling. The most fortunate outcome for Hailey in this case is that she is now living in a stable home, with structure; absent now is the revolving door of paramours and residences she grew accustomed to while in her mother's care. Simply put, the lower Court got it right.

In brief summary to the assignment of errors made by Ms. Wilson, the Guardian Ad Litem responds as follows:

I. The lower Court's ruling was neither erroneous nor an abuse of discretion.

II. In the allocation of custodial responsibility, the lower Court followed all relevant statutes and case law.

III. The Guardian Ad Litem repeatedly advised on the record that Hailey was a six (6) year young child, and believed by the Guardian Ad Litem too immature to express opinions related to her custody and other issues before the Court. Interestingly, when Hailey was interviewed by the Guardian Ad Litem, she stated she wanted to stay or live with the Perdues which spoke volumes about her relationship with her mother, Ms. Wilson. Ms. Wilson was allowed to advance any factual theory she chose to continue Hailey's care with the Perdues, or alternatively with Ms. Wilson should the Court deny the Perdues claim to Hailey's custody. There was no proffer by Ms. Wilson as to the factual matters this interview might produce that was not put before the Court by other, and more credible means.

IV. The recommendations of the Guardian Ad Litem to the lower Court was as follows:

...“Therefore, it is the recommendation of the Guardian Ad Litem that the primary parenting time of Hailey Lynn Belle Wilson be granted to her natural, biological father, Robert Hickman. There is to be a transition period that by Order of this Court should involve the Child

Protective Services (through the Department of Health and Human Resources of the State of West Virginia) to oversee and implement this transition to dad; that department through this Order will contact the State of North Carolina in the relevant County where the child will be residing with her father to make periodic checks to determine the progress, emotional stability and well being of the child during this transition process. There will be reports made from the North Carolina agency to the West Virginia Child Protective Services and made available to all Counsel, for review, to make corrections, if necessary, in determining if this is the proper course of conduct to take on behalf of Hailey. In essence, it is the Guardian's position that the natural father in this case deserves the opportunity, and has the right to have the opportunity, to fail at raising his child...." The Guardian Ad Litem believed this provided adequate safe guards for an adjustment period for Hailey to transition into her father's care. All reports the Guardian Ad Litem received following this placement, primarily from teachers, were favorable to this placement. Additionally, there were extended summer visits Hailey enjoyed with her father before the lower Court's ruling, and all of those visits went well and supported Mr. Hickman getting custody of his daughter.

STATEMENT OF FACTS

The following seeks to address certain factual matters as well as legal principles arising from and related to the former trilogy of interest ¹in and to the permanent placement of Hailey Lynn Belle Wilson, hereinafter Hailey. This brief, as a former report of the Guardian Ad Litem,

¹ The Perdues actively sought custody of Hailey throughout the proceedings in the Family Court, but thereafter withdrew their claims to Hailey; thus, the correct appeal concerns the competing interests of the maternal parents, Petitioner, Sheila Wilson and Respondent, Robert Hickman. Ms. Wilson's position was she only wanted Hailey's return if, and only if, the Perdues were not granted custody of Hailey.

simply passes on certain facts, most of which are uncontested, however, the major issues and applicable law present different, conflicting positions; notwithstanding, the Guardian represents to this Court that he was appointed by Order of the Family Court dated July 20, 2008. Prior to the Guardian Ad Litem appointment by the Court, proceedings began in the Family Court of Fayette County seeking a determination of paternity of Hailey between Ms. Wilson and Mr. Hickman; an Order stemming from that May 5, 2004 hearing adjudicated Mr. Hickman's paternity of Hailey, set child support in the amount of \$420.00 per month, provided that genetic testing be paid for by the State, denied AFDC reimbursement, and found that the parties could agree on a parenting plan. The Perdues were neither parties to this action nor involved with Hailey at this time.

The next proceedings, which arose in Fayette County occurred in March 9, 2006; Mr. Hickman petitioned the Family Court of Fayette County for custody of Hailey and on March 24, 2006, Mr. Hickman's petition was heard; the Perdues appeared at this hearing, and the May 24, 2006 Fayette County Order failed to address Mr. Hickman's custody request apparently because Ms. Wilson did not appear and her whereabouts was determined unknown; although the Perdues appeared at this hearing, the Order is silent as to their standing in this matter; next, the Family Court of Fayette County transferred this case to the Boone County Circuit Court by Order from a hearing held on October 17, 2006. It is apparent through these proceedings that Mr. Hickman had been actively trying to obtain custody of Hailey since his March 9, 2006 petition; the Fayette Family Court had not obliged him at that point, and the Perdues, who had Hailey by permission of Ms. Wilson, were not obliging Mr. Hickman either; as Mr. Hickman appeared at the Perdues' residence following this March 2006 hearing asking for the release and custody of his daughter

(Hailey) and the same was denied; the first visitation Order was entered by the Boone Family Court (circa) July 20, 2007, giving Mr. Hickman visits and placing Hailey with the Perdues.

Following the Guardian Ad Litem appointment, depositions were taken of the respective parties and others of interest, as well as, testimony appearing before the Family Court of Boone County together with certain exhibits introduced into and made a part of the record, your Guardian finds certain facts to be material, and should be considered by the Court as follows:

Sheila Carol Wilson is the natural mother and was the primary custodian of Hailey Lynn Belle Wilson, born on February 20, 2002; for the first three and one half (3 ½) years of Hailey's life, Ms. Wilson was the sole, primary caretaker of Hailey. Robert Hickman is the natural, biological father of Hailey and his involvement with Hailey began, initially, in paternity proceedings that occurred in June, 2004 in Fayette County.

The Perdues, Sharon and Matthew, became involved with Hailey in April, 2005 by a temporary assignment of custody of Hailey to them by Ms. Wilson until Ms. Wilson settled in North Carolina; thereafter, in August 2005 Ms. Wilson left Hailey with the Perdues anticipating the Perdues would adopt Hailey as set forth in a consent to adopt executed by Ms. Wilson and dated September 13, 2005. Mr. Hickman's custody odyssey began shortly after the consent to adopt document executed by Ms. Wilson was presented to him in September, 2005 for his signature. He refused to execute and immediately proceeded to initiate custody proceedings establishing his contacts with his biological child Hailey. As stated, these proceedings were initiated in Fayette County, and subsequently transferred to the Family Court of Boone County.

Unfortunately, this may be the end of the facts upon which all of the parties may agree; various arguments were made by the parties advancing their respective interest demonstrating a

variety of reasons as to which party should or should not have custody of Hailey. As your Guardian Ad Litem viewed the facts, Hailey is the only party who comes before this Court with clean hands. She has done nothing to bring on this absolute madness of litigation, each pointing out the weaknesses and short comings of the others, all in an effort to gain some legal advantage to having Hailey. At the time of the proceedings below, Hailey was six years young, and in the Guardian Ad Litem's opinion, not in a position to give a preference of where she should live (or with whom) although she stated a preference to stay with the Perdues. However, based upon certain factual matters as well as legal principles this Court should decide what is in her best interest and where her future may be, not the wishes of a six (6) year old child.

In this connection, the Guardian Ad Litem begins by addressing the testimony of the parties; first, the Guardian wants to discuss Shiela Carol Wilson's testimony. Your Guardian represents to the Court based upon his years of litigation, not very bright ones at that, that Ms. Wilson's testimony to be incredible on its face. Here is a lady who claims that she was drugged, had non-consensual sex with Mr. Hickman and thereby conceived Hailey; thereafter, weeks later she is having consensual sex with Mr. Hickman. She then chooses to leave the State of North Carolina where the relation with Mr. Hickman occurred and Hailey's conception began, and advises she left the State of North Carolina because she had been raped by a Mexican; she leaves North Carolina to return to the State of West Virginia where she takes residence with her natural mother and step-father. Ms. Wilson's natural mother and step-father are the natural father and step-mother of Matthew Perdue which is how the Perdues entered into the picture.

Now, the issue of whether Mr. Hickman's failure to pursue Ms. Wilson, who returns to West Virginia pregnant representing it is his child, constitutes some dereliction of duty and later

abandonment (physical or emotional); the evidence is not disputed that on the birthing of Hailey on February 20, 2002, or shortly thereafter, Mr. Hickman was informed Hailey was born. The next issue that develops, concern the whereabouts of Ms. Wilson following Hailey's birth and Mr. Hickman's failure to hotly pursue her whereabouts and adjudicate his paternity. Given the lack of credibility the Guardian Ad Litem found in Ms. Wilson's sorted tales of becoming pregnant and the reasons for leaving the State of North Carolina, it is difficult for the Guardian to accept her version of where she went following Hailey's birth, and keeping Mr. Hickman posted on not only her whereabouts but the whereabouts of Hailey. Interesting questions are presented; clearly there are unclean hands on both sides, however, with respect to the dereliction of duty on behalf of Mr. Hickman, after reviewing seventy-three (73) cases that "hit" on the quotation "dereliction of duty", none of them explain what is meant by that other than as caught in the phrases announced by every brief filed herein, namely: that a natural parent is entitled to his child unless due to some dereliction of duty, abandonment, misconduct, etc. and so forth, he waives the same. The cases fail to describe what a dereliction of duty is. One would suppose that you first must start with the duty. Does Mr. Hickman have a duty to chase down, locate and prosecute the paternity of a child that he has been informed is his based upon one or two intimate encounters. Your Guardian's experience in the practice of law is that this would be rare to find a person to do so; yet the Guardian Ad Litem suggests Mr. Hickman did not run from this issue by changing addresses, his whereabouts and the like. Ms. Wilson, on the other hand, has changing addresses frequently within West Virginia to Ohio, back to West Virginia, then to North Carolina with several residences within each State.

Up to this point and time the issue of Hailey's custody would be squarely between Ms.

Wilson and Mr. Hickman with primary parenting time, no doubt, having been placed and continuing with Ms. Wilson with allocated parenting time to Mr. Hickman. A relatively simple case at this juncture. However, as the case progressed, distances and perhaps feelings kept Hickman apart from Wilson, Hailey being the one who suffers; then some issue drives Ms. Wilson to give the Perdues Hailey for temporary care; shortly after that Ms. Wilson allows the Perdues to adopt Hailey without ever consulting Mr. Hickman. The reason assigned by Ms. Wilson for giving the child to the Perdues was that she was informed by her mother that unless she released Hailey to someone within forty-eight (48) to seventy-two (72) hours, the Ohio (or Kanawha) Department of Child Protective Services would take Hailey from her care, although she had two other children in her care that seem to be out of the loop from Ohio's or Kanawha's Child Protective Services. This again is an incredible, ingenuous story. No one came forward with any documents demonstrating that the Ohio or any Child Protective Services were ever involved; requests by the Guardian were made to hear from the maternal grand-mother who allegedly informed the Perdues and Ms. Wilson of the contact by Child Protective Services that Hailey's care was at risk with Mr. Hickman unless placed with a third party. This reasoning to place Hailey with the Perdues occurred in the background of the Perdues having just lost, by way of miscarriage, their child and having troubled pregnancies throughout their married life. It perhaps may be that Ms. Wilson, her mother and the Perdues just felt that it was best that Hailey be raised by the Perdues. No one questioned the Perdues are and would be fit and well qualified people to raise any child; yet, Hailey is a person, not a dog or a piece of furniture that can be transferred or handed around within a family without considerations of all who have legal rights to the child placing Hailey with the Perdues; it just seemed to be the right thing to do at the time

is the best spin the Guardian can put on what has happened up to this point with Hailey. The amazing thing that is left out of the equation is the natural, biological father, whom if all believed wanted nothing to do with Hailey, should have been brought into the fold before the adoption papers were prepared and executed by Ms. Wilson; that is what brings us to this juncture. Is Hailey to be returned to a mother with whom she shares two siblings, which mother has executed a legal document, fully aware of its contents whereby she released, relinquished her rights to Hailey and transferred this child on a permanent basis to a couple that share no biological blood or ties with Hailey, yet are prosperous, religious, otherwise well grounded in the community, and perhaps a fit but for overlooking the rights of a natural parent to his child; additionally, Ms. Wilson, in the underlying litigation, wanted the Perdues to have Hailey; she only asserted her claims to Hailey if the Perdues were unable to have her (Hailey's) custody. This position did not stand favorably with the Guardian or the Court.

From the Guardian's perspective, Ms. Wilson's rights are easily dealt with; her only "props" which she has to continue regular contacts with Hailey are the two siblings whom Hailey grew up and bonded with and wants to continue to see; at a minimum Ms. Wilson should continue to receive her allocated parenting time as arrangements may be worked out among the parties or the Court directs; for reasons to be later assigned, your Guardian sees no basis in the facts of this case or the law herein addressed that will allow Ms. Wilson to regain custody of Hailey, particularly since she only seeks to regain custody if and only if, the Perdues lose their claim to Hailey. The more difficult question presented at the lower Court was between the interest of the Perdues and the natural, biological father of Hailey, Robert Hickman; more succinctly, does the September 2005 consent to adopt Hailey executed by Ms. Wilson placing

Hailey primarily with the Perdues, cloak them with the entitlements necessary to keep a natural parent (Hickman) from having custody of his child. With the Perdues now withdrawn from the litigation, the rights of the natural parents deserve closer attention.

ISSUES PRESENTED

- I. WHETHER THE COURT WAS CLEARLY ERRONEOUS AND ABUSED ITS DISCRETION IN FAILING TO DETERMINE THAT ROBERT HICKMAN ABANDONED HAILEY BELLE WILSON?**
- II. WHETHER THE COURT WAS CLEARLY ERRONEOUS AND ABUSED ITS DISCRETION IN FAILING TO ALLOCATE CUSTODIAL RESPONSIBILITY AND DECISION-MAKING IN ACCORDANCE WITH WEST VIRGINIA CODE §48-9-206, 48-9-207; AND IN FAILING TO SPECIFY WHY SHEILA WILSON WAS NOT DESIGNATED AS THE PRIMARY CUSTODIAN?**
- III. WHETHER THE COURT WAS CLEARLY ERRONEOUS AND ABUSED ITS DISCRETION IN RELYING ON THE RECOMMENDATION OF THE GUARDIAN AD LITEM, WHEN HE ONLY HAD ONE APPROXIMATELY 15 MINUTE INTERVIEW WITH THE CHILD AT THE COURTHOUSE IMMEDIATELY PRIOR TO A HEARING?**
- IV. WHETHER THE COURT WAS CLEARLY ERRONEOUS AND ABUSED ITS DISCRETION IN ALLOWING THE MINOR CHILD TO BE PLACED IN A NEW HOME, IN A NEW COMMUNITY, WITHOUT ANY SUPPORT SYSTEMS, AND WITHOUT ANY MECHANISM FOR FEEDBACK AS TO HOW THE CHILD WAS DOING?**

POINTS AND AUTHORITIES

1. A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment or other dereliction of duty, or has waived such right or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her child will be recognized and enforced by the courts. Syl. pt. 2, Hammack v. Wise, 158 W.Va. 343, 211 S.E.2d 118 (1975); Syllabus, State ex rel. Kiger v. Hancock, 153 W.Va. 404, 168 S.E.2d 798 (1969); Syllabus, Whiteman v. Robinson, 145 W.Va. 685, 116 S.E.2d 691 (1960).

2. A person who is of good character and a proper person to have custody of the child and is reasonably able to provide for it ordinarily is entitled to the custody as against other persons, and this rule applies although such others are much attached to the child, and the child is attached to them, and prefers to remain with them, and they are in all respects suitable to have the custody of the child and able to support and care for it, or even though they are better able to afford the child material advantages. The state cannot, as it has been said, interfere with the right of unoffending parents to the custody of their children merely to better the moral and temporal welfare of the latter. Whiteman v. Robinson, 145 W.Va. 685, 116 S.E.2d 691 HN5, (1960); 67 C. J. S., Parent and Child, Section 11c. See also: State ex rel. Palmer v. Postlethwaite, 106 W.Va. 383, 145 S.E. 738 which held: It would be a dangerous and pervasive doctrine to hold that the mutual affections of the child and its temporary custodian should annul the parent's natural right to his offspring. Mutual affections nearly always bring up between a young child and its custodian even though there may be no blood relationship. The law does not recognize and this Court will not sanction any relationship which produces a mutual affection between a child and

its temporary custodian and which leads to the annulment of the suitable parent's natural right to the care, custody and control of his child.

3. In the law concerning custody of minor children, no rule is more firmly established than that the right of a natural parent to the custody of his or her infant child is paramount to that of any other person; it is a fundamental personal liberty protected and guaranteed by the Due Process Clauses of the West Virginia and United States Constitutions. See: Clifford K., *infra*, HN32.

4. When a parent, by agreement or otherwise, has transferred, relinquished or surrendered the custody of his or her child to a third person and subsequently demands the return of the child, the action of the court in determining whether the custody of the child shall remain in such third person or whether the child shall be returned to its parent depends upon which course will promote the welfare and best interests of the child; and the parent will not be permitted to reclaim the custody of the child unless the parent shows that such change of custody will materially promote the moral and physical welfare of the child. See: Whiteman, *Supra*, HN1.

5. Temporary custody to a third person is not tantamount to a divestiture of the right of a parent to the custody of his or her child. See: Whiteman, *supra*, HN2.

6. In order to separate a child from its parent on the ground of the unfitness of the parent there must be cogent and convincing proof of that fact. See: Whiteman, *supra*, HN4.

7. W.Va. Code § 48-22-306, in part, provides: Abandonment of a child over the age of six (6) months shall be presumed when the birth parent: (1) fails to financially support the child within the means of the birth parent; and (2) fails to visit or otherwise communicate with the

child when he or she knows where the child resides, is physically and financially able to do so and is not prevented from doing so by the person or authorized agency having the care or custody of the child: provided, that such failure to act constitutes uninterrupted for a period of six months immediately preceding the filing of an adoption petition. See: Carter, etc. et al Blake A. Karawan, 220 W.Va. 33, 640 S.E.2d 96 (2006). This case considered a parent who for thirteen and one half (13 ½) years had been absent from his fourteen (14) year old son, and thereby it was claimed the father was guilty of abandonment; the Carter Court held that the father stayed in the background hoping some day his child would seek him out, want to be with him and spend time with him; the Carter Court hinted at or otherwise eluded to the hostile situations existing when he would make attempts to see the child given the mother is remarried and new family she had undertaken with her husband; the Carter Court found that there was no abandonment in this situation.

8. Where a father abandons his children, provides no support and maintenance, does not visit the children, and does not in any other reasonable way, given his position in life and the opportunities for the exercise of his parental rights, exercise the authority or undertake the responsibilities of a parent, Courts would not be concerned with the father's protectable interest because he would have waived such interest by abandonment. See: In Re: The Adoption of William Albert B., Katy Ann B. And Sierra Nicole B., 216 W.Va. 425, 607 S.E.2d 531 (2004), HN5, The William Albert B. Court relying on § 48-22-102, Code defining abandonment in order to determine whether a natural father had waived his rights by virtue of abandonment; the Court addressed the lack of evidence provided in a clear, cogent and convincing manner to demonstrate that the father in the instant case had abandoned his child based upon the support obligations set

forth in the record, his persistence to obtain custody and visitation by filing proper pleadings in the Family Court of Tyler County and later in the Circuit Court of Tyler County; there was evidence of problems in the father obtaining contact with the minor children and the Court was unwilling to find the evidence sufficient to conclude that the father had abandoned his children under the guidelines set forth in § 48-22-306, supra.

9. Under W.Va. Code, 48-4-3(a), failure to pay child support alone does not constitute abandonment of the natural parent's rights in an adoption proceeding. See In the Adoption of: Michael Charles Schoffstall, 179 W.Va. 350, 368 S.E.2d 720 (1988) Syl pt. 2; other cases addressing the issue of abandonment in the Schoffstall opinion follows: where the trial court gave great weight to the father's admitting that he had not paid child support in the amount of \$125.00 per month which support obligation had been delinquent for several years, the Court concluded that his failure to pay support may be Contempt of Court but it is not abandonment; also holding the majority of jurisdictions find that failure to pay child support is merely a factor to consider when concerning abandonment and not per se evidence of abandonment, citation supplied. See: Schoffstall, supra.

10. In a divorce proceedings where custody of a child of tender years is sought by both the mother and father, the Court must determine in the first instance whether the primary caretaker is a fit parent, when the primary caretaker achieves a minimum, objective standard of behavior which qualifies him or her as a fit parent, the trial Court must award the child to the primary caretaker. Syl. pt. 6, Garska v. McCoy, 167 W.Va. 59, 278 S.E.2d 357 (1981).

11. To be considered fit, the primary caretaker parent must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide

habitable housing; (4) avoid extreme discipline, child abuse or other similar vices; and (5) refrain from immoral behavior under circumstances that would effect the child. In this last regard, restrained normal sexual behavior does not make a parent unfit. Richardson v. Richardson, 187 W.Va. 35, 415 S.E.2d 276 (1992).

12. Abandonment means any conduct by the birth mother, legal father, determined father, outsider father, unknown father or punitive father that demonstrates a subtle purpose to forgo all duties and relinquish all parental claims to the child. § 48-22-102, Code of W. Va., as last amended (2007).

13. W. Va. Code § 48-9-103, as last amended, addresses standing to participate in a proceeding affecting the custody of minor children in cases where the child's parents are not married to each other and provides as follow: (a) Persons who have a right to be notified of and participate as a party in an action filed by another are: (1) A legal parent of the child, as defined in section 1-232 [§48-1-232] of this chapter; (2) An adult allocated custodial responsibility or decision-making responsibility under a parenting plan regarding the child that is then in effect; or (3) Persons who were parties to a prior order establishing custody and visitation, or who, under a parenting plan, were allocated custodial responsibility or decision-making responsibility; (b) In exceptional cases the Court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child's best interests. The Court may place limitations on participation by the intervening party as the Court determines to be appropriate. Such persons or public agencies do not have standing to initiate an action under this article.

14. The mere existence of a psychological parent relationship, in and of itself, does not

automatically permit the psychological parent to intervene in a proceeding to determine a child's custody pursuant to W.Va. Code § 48-9-103. Clifford K., etc. et al v. Paul S., etc. et al, 217 W.Va. 625, 619 S.E.2d 138 (2005) HN31.

15. In exceptional cases and subject to the Court's discretion, a psychological parent may intervene in a custody proceeding brought pursuant to W.Va. Code § 48-9-103 (2004) when such intervention is likely to serve the best interests of the children whose custody is under adjudication. See: Clifford K., supra, HN33.

16. Absent a showing that a natural parent is unfit, a natural parent's right to custody outstrips that of a grandparent. See: Clifford K., cited supra, HN36.

17. The reference to "exceptional cases" contained in W.Va. Code § 48-9-103(b) (2004) signifies unusual or extraordinary cases, and, accordingly, a court should exercise its discretion to permit intervention in such unusual or extraordinary cases only when intervention is likely to serve the best interests of the subject child. See: Clifford K., cited supra, HN28.

18. A psychological parent is a person who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills a child's psychological and physical needs for a parent and provides for the child's emotional and financial support. The psychological parent may be a biological, adoptive, or foster parent, or any other person. The resulting relationship between the psychological parent and the child must be of substantial, not temporary, duration and must have begun with the consent and encouragement of the child's legal parent or guardian. See: Clifford K., cited supra, HN30.

ARGUMENT

STANDING OF THE PERDUES

The briefs filed by Ms. Wilson and Mr. Hickman in the lower Court raised issues challenging the standing of the Perdues in the original action; after reviewing the applicable statute, § 48-9-103, Code, supra, and the Orders of the Fayette County Family Court and Circuit Court of Boone County, it is clear that the Perdues had standing. This is now a moot point as the Perdues abandoned their claims to Hailey.

Prior to the actual filing in this matter before the Family Court of Boone County, the Perdues appeared and were made parties in the Fayette County proceedings; although in the Order of October 17, 2006 where they were made parties, the Order did not specifically address custody; the same is suggested, however, by virtue of the Court's directive that the Perdues return to Boone County Circuit Court and seek guardianship over Hailey; this was done and the Circuit Court of Boone County specifically entered an Order of the Perdue's Guardianship consistent with Chapter 44 of the Code, placing the temporary care of Hailey with the Perdues and addressing the effort between the Perdues and Mr. Hickman to arrange a visitation schedule. This last guardianship Order of the Circuit Court of Boone County, was careful to point out that no advantages or disadvantages would emanate from this Order it was simply giving the Perdues, the leverage they needed, the Guardian believed, to litigate their interest in obtaining custody of Hailey.

Under subsection three (3) of § 48-9-103, that relevant portion of the Code provides that persons who were parties to a prior Order establishing custody and visitation... have standing to participate in a proceedings effecting the custody of minor child or children in cases where their parents are not married; clearly, the aforesaid Orders of the Fayette County Family Court and Circuit Court of Boone County get the Perdues there on the issue of standing; in the off chance

these Orders may not be so construed by the Court consistent with subsection three (3) of § 48-9-103, this Court's first Order dismissing the guardianship Order and then making them parties with temporary custody of Hailey, without objection, clearly gives them the standing status they need to pursue their interests in having custody or other rights to Hailey determined.

Lastly, assuming all of these issues fail under the statute, they have been significant players and parties in Hailey's life and their interest would be necessary to fully adjudicate, not only the custodial rights and entitlements of respective parties, but allocation of parenting time as well since it is clear that a bond has established between the Perdues and Hailey; the question more importantly to resolve is who will be held accountable to have the trust and custody of Hailey on a primary or permanent basis.

CUSTODY OF HAILEY

In the lower proceedings, the Perdues sought allocation of primary parenting time, (custody) of Hailey based primarily upon the certain factors; Ms. Wilson concurred in the Perdue's request in this placement. Ms. Wilson only sought custody of Hailey should the Perdues efforts to get custody of Hailey fail. These factors which the Perdues and Ms. Wilson advanced follow:

1. The Perdues became Hailey's primary custodian initially by written, temporary consent executed by Ms. Wilson on August 26, 2005; thereafter, Ms. Wilson executed a written consent to adopt on September 13, 2005. From that point on, they have become the primary, custodial persons responsible for Hailey's care. They noted that they had contacts with Hailey prior to that time; the Perdues' marriage date was circa 2003.

2. The Perdues have had Hailey on a continuous basis since August 2005 other than

specific visitations allocated to Mr. Hickman and Ms. Wilson.

3. Mutual bonding has occurred between them and Hailey, they represent the prospect of Hailey experiencing separation anxiety attacks at the thought of her being separated from them. They are financially responsible; Mrs. Perdue has a nursing degree and Mr. Perdue is employed as an off-road coal truck driver; they are well grounded in the community where they live with religious ties and other ties throughout the Big Coal area, and given all the above they feel they can best provide for Hailey as they are fit and proper people to do so.

4. The Perdues represent that Mr. Hickman has had no contact with Hailey from her birth until September 13, 2005, never actively sought parenting time following his adjudication of paternity (May 5, 2004) and as a consequence Mr. Hickman has waived his rights to custody of Hailey by his non-actions in regard to developing a relationship with the child. The Perdues also argue this constitutes a dereliction of his parental duty to Hailey.

5. The Perdues rely heavily on the syllabus set forth in the Brandon L. E. decision, holding that if the child resides with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable rights of the child must be considered in connection with any decision that would alter the child's custody... The Perdues also sight other cases in their brief concerning psychological parent, waiver, and the Utterback opinion whereby Ms. Wilson has relinquished permanent custody and the burden shifts to her to show that the return of that child to her would materially and substantially promote Hailey's best interest, which they claim she has failed to show.

6. Additionally, they feel that Mr. Hickman is unfit for the primary reason they assign that he has a sixteen (16) year old daughter living in Utah that he has only paid support for, yet he has never exercised parenting time with her; they claim this to be a “red flag” and evidence of his inability to parent and otherwise makes him unfit.

This substantially outlines the claims of the Perdues (as joined by Ms. Wilson in her conditional claim for Hailey) against the natural father, Robert Hickman. The Guardian Ad Litem has considered the depositions filed, the briefs of Counsel, as well as, the private interviews he entertained with both Ms. Wilson and Mr. Hickman; your Guardian did not undertake to interview and do a home study of the Perdues as no one, including the Guardian, has ever challenged their fitness as parents or their ability to raise a child, or Hailey as the case may be. In addressing some of the concerns that the Perdues have raised about placing Hailey with Mr. Hickman on the fitness issue, the Guardian’s initial interview with Mr. Hickman by telephone centered around the Guardian requesting Mr. Hickman to simply give his child (Hailey) up, it would make it easy on everyone, that Hailey would (more than likely end up with the Perdues) other than Ms. Wilson, the Guardian also advised him, the Perdues were reasonably well off, connected in the community and he could feel good about leaving his child in good hands. He responded very quickly to this claim that this was not an option; he advised the Guardian at that point that he was approximately nineteen (19) years young when he was involved in a pregnancy with another woman, and that child was raised principally without him being in the picture although he was paying child support, and that to this day that haunted him. He hopes very much that sometime in the future the daughter will look him up, but currently he did not feel that he had the strength to face that mistake he made by being out of his first child’s

life. He reassured the Guardian that he would never make that mistake again and that was the resolve he had in part, as well as, wanting to be a father and part of Hailey's life which was why he sought to get custody of his daughter. Additionally, the record should note and the evidence should be that Mr. Hickman is not a man of financial means. He certainly, at best, is an hourly laborer, and is currently suffering from an injury he had in December 2006.

The best argument put forth by the Perdues (as joined by Ms. Wilson) against Mr. Hickman is simply his absence from Hailey after his paternity testing on May 5, 2004 to on or about September 13, 2005. This approximate sixteen (16) month absence, they contend, is a waiver of rights by a natural parent to custody of his child and otherwise constitutes dereliction of duty significant enough to reduce, diminish, or even bar, any claim he may have to custody of his child.

The Court should review the various facts set forth in the cases announced in the Points and Authorities, listed supra, particularly the Whitemen and Clifford K. decisions, as well as the other cases therein cited. In every single such case there is a substantial absence by an actual parent from his child with an intervening third party stepping in and making the claim that the absent parent has now waived or somehow lost his claim to his child. Your Guardian is yet to find in any of the cases set forth in his Points and Authorities, the briefs of Counsel, that have that specific holding. On the contrary, the Whiteman and subsequent cases clearly acknowledge periods of time, temporary in nature, where mutual bonding occurs between a third party and child and even this third party is able to give more material advantages to the child and the child cares for and does not want to leave the third party, the Courts have uniformly held that it would be a dangerous and pervasive doctrine to hold that the mutual affections of the child in a

temporary custodian should annul the parent's natural right to his offspring. See: cases cited supra. In Whiteman, the father was absent for several years, in Clifford K., fifteen months.

The custodial clock for the Perdues began to run circa July 2005; Mr. Hickman's petition for custody was filed on March 9, 2006. By his deposition, pages twenty-five (25) thru forty-five (45), he indicated after realizing that the mother, Ms. Wilson, was giving the child up to adoption he felt, as the natural father, he would be in a better position to raise his child; he testified he tried to get some money together in order to accomplish that. Being a wage earner the Guardian understands that it may have taken him several months to get that money together to hire a lawyer, come to West Virginia and fight for custody. He has been on that track consistently since March 9, 2006. If you compare the custody time table of the Perdues' to Mr. Hickman's, these parties' times are about the same; there is only two (2) to five (5) months differences from when the Perdues became involved as custodial players of Hailey and Mr. Hickman's efforts to become her custodial father. Additionally, the Perdues want to be given credit for the exclusive time they had with Hailey, by not allowing or sharing any visits between Hailey and her natural father until Ordered. The reason for this is to gain the advantage that they have now advanced to this Court, to wit: We have been the ones who have had Hailey the most, therefore, give Hailey to us. Are they allowed to gain some advantage by this type of conduct? At least Mr. Hickman saw the need to warm up to and have a transition period between initially starting out with Hailey and working up to a permanent relationship. This to your Guardian showed good judgement on Mr. Hickman's part, shows that he has parental instincts, that he cares about his child, and he wants to raise his child and get off on a proper footing that will result in a lasting relationship. On the other hand, the Perdues, no doubt being scared that every time the child is with Mr. Hickman

their chances of keeping Hailey is somehow reduced, or at least threatened, and as a consequence put that right above what the Guardian believes to be, or would have been, in Hailey's best interest if there was more of an accommodating atmosphere between the Perdues and Hickman in this regard. Should the Perdues prevail because they chose a course of conduct the Guardian sees to be contrary to Hailey's best interest in the overall picture of the placement of Hailey? Your Guardian thinks not.

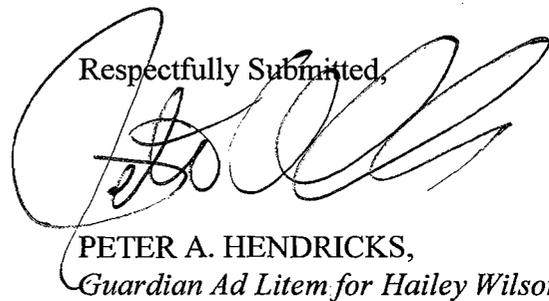
The case which the Perdues point to, In re Brandon L. E., relates to a psychological parent concept which the Perdues maintain they have established with Hailey. However, the key to understand the Brandon L. E. decision is that the psychological parents' rights might trump that of a natural parents' when during the time that the psychological parents have the child, the natural parent fails to have any contact with the child; the Guardian is reminded of Mr. Hickman's efforts to see Hailey and extend his contacts with her which they refused; when you view the Perdues efforts to limit, restrict and minimize the natural parent's rights to his child, how do they keep from falling under the holdings in the subsequent cases cited by Counsel for Mr. Hickman which deal with the natural parent's custody rights outweighing that of a grandparent (or psychological parent). See: Clifford K. and other cases, above cited.

As emotional as this has been for all concerned, based upon a review of the applicable case law, a clear review of the testimony, interviews, consultations that the Guardian has had to get some polar star case that can tell us what to do in the particular facts of this case, the Guardian has reached the agonizing conclusion that the Courts, overall, try their best to keep and place children with their natural parents over third parties. Your Guardian did not believe then and does not believe now that the fifteen (15) to sixteen (16) month absence that Mr. Hickman had between paternity adjudication and time of taking steps to get Hailey constitutes a waiver, or

any such dereliction of duty on his part that would be a bar to his having custody of his natural child. See: cases supra. “Therefore, it is the recommendation of the Guardian Ad Litem that the primary parenting time of Hailey Lynn Belle Wilson be granted to her natural, biological father, Robert Hickman. There is to be a transition period that by Order of this Court should involve the Child Protective Services (through the Department of Health and Human Resources of the State of West Virginia) to oversee and implement this transition to dad; that department through this Order will contact the State of North Carolina in the relevant County where the child will be residing with her father to make periodic checks to determine the progress, emotional stability and well being of the child during this transition process. There will be reports made from the North Carolina agency to the West Virginia Child Protective Services and made available to all Counsel, for review, to make corrections, if necessary, in determining if this is the proper course of conduct to take on behalf of Hailey. In essence, it is the Guardian’s position that the natural father in this case deserves the opportunity, and has the right to have the opportunity, to fail at raising his child....” Ms. Wilson’s position that she should have custody should the Perdue’s claims fail was and continues to be unpersuasive; Ms. Wilson’s life with Hailey has been marred by a revolving door of men, new residences, rapes, running from CPS workers, all coupled with and leading up to dropping Hailey at the door step of some step-relative for seemingly a better life for Hailey. Placement of Hailey with Ms. Wilson under these circumstances was not an option as the Guardian Ad Litem viewed the facts. Ms. Wilson had three (3) children, all by different men and all out of wedlock. Ms. Wilson became pregnant during these proceedings by a fourth gentleman, again out of wedlock. No one from Ms. Wilson’s family came forward to offer her any support or explanation of why Hailey was dropped at the Perdue’s doorstep or her issues with CPS. With this history, her conditional position of wanting Hailey’s return if, and only if, the Perdues lost their bid for custody of Hailey made it inconceivable then and now to return a child’s care to such a reckless parent.

Additionally, it was the Guardian Ad Litem's recommendation that no party shall have any adverse comments concerning the custodial placement of this child should the Court accept the Guardian's recommendation. All parties were admonished from making statements to the child that would otherwise adversely effect the custodial placement and the efforts to build a relationship between Mr. Hickman and Hailey. Additionally, contacts and allocation of parenting time shall exist for the Perdues, as well as, Ms. Wilson and arrangements through the Department of Health and Human Resources, and the Child Protective Services agencies, the Guardian Ad Litem, the parties and their counsel may direct and believe to be in the best interest of Hailey. This matter was to return to the Court on an interval of, initially, every sixty (60) days for a review with subsequent times becoming more and more distant if Hailey is making substantial progress with Mr. Hickman. Should it be determined that this arrangement was not going well, determinations as to what corrections should be made, if any, would be considered to the extent of even a change of custody of Hailey. With these recommendations, a follow-up review of Hailey's placement with Mr. Hickman shows this placement has been a success and is in Hailey's best interest. Her teachers rave about how well she is doing academically and emotionally. She is now in a stable, caring, loving environment the likes of which Hailey has not seen until placement with her father, Mr. Hickman. This Court should stay the course; the lower court got it right.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to read 'P. A. Hendricks', is written over the typed name and title.

PETER A. HENDRICKS,

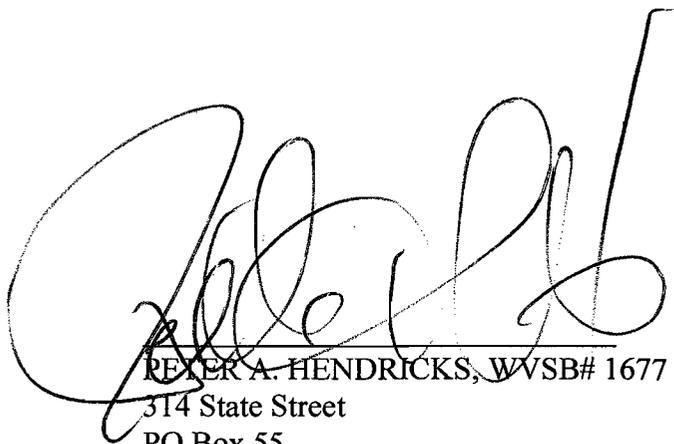
Guardian Ad Litem for Hailey Wilson

CERTIFICATE OF SERVICE

I, Peter A. Hendricks, Guardian Ad Litem for Hailey Lynn Belle Wilson, do hereby certify that a true and exact copy of the foregoing **REPORT OF GUARDIAN AD LITEM** has been served upon the following Counsel of record by United States Mail this ___ day of March, 2011.

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