

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

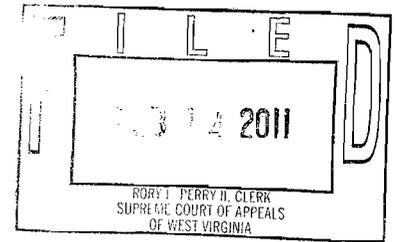
SHEILA WILSON, Petitioner Below, Petitioner

v.

NO.: 101147

ROBERT HICKMAN, Respondent Below, Respondent

Respondents.



RESPONDENT'S SUMMERY RESPONSE

Comes now the Petitioner, Robert Hickman, by and through counsel, Tim C. Carrico, Esq., and Carrico Law Offices LC for his summery response to the petition for appeal pursuant to Revised Rule 10(e). For his response, Mr. Hickman states as follows:

I.

INTRODUCTION

Mr. Hickman is Hailey Wilson's natural father. Hailey will be nine years old on February 20, 2011. Mr. Hickman has had legal and physical custody of her since August of 2008. It took Mr. Hickman a difficult two year battle in the Family Courts of West Virginia to obtain this status. Hailey is doing extremely well in life and school. She and her father live in Angier, North Carolina, 27501. North Carolina is now Hailey's home state.

Hailey's mother, Sheila Wilson, relinquished her parental rights of Hailey on September 13, 2005. Importantly, she ratified her relinquishment by her own subsequent conduct. In addition, she failed to prove that returning Hailey to her would materially promote Hailey's general welfare and best interests. Accordingly, Mr. Hickman was properly designated as Hailey's legal custodian and primary residential parent below. Ms. Wilson also resides in the State of North Carolina.

The other adult contestants in this matter below were Mathew and Sarah Perdue, the child's psychological parents. They are not related to Hailey by blood. Importantly, they do not challenge Mr. Hickman's court ordered status as Hailey's legal custodian and primary residential parent. Mathew and Sarah Perdue continue to live in Boone County, West Virginia.

Based on the foregoing, Mr. Hickman requests this Court to affirm his status as Hailey's legal custodian and primary residential parent. The courts below did not abuse their discretion or commit error in awarding Mr. Hickman this status.

II.

STATEMENT OF FACTS

The Contestants Below

The subject child to this matter is Hailey L. Wilson. She was born on February 20, 2002, at Women's and Children's division of Charleston Area Medical Center in Charleston, W. Va. She is now 9 years of age, and does not reside with her biological mother. See Hickman Deposition. Ms. Wilson is not married, and at the time of her evidentiary deposition had two daughters who live with her. Each child has a different father. See Wilson Deposition, at pp. 48, 49. Ms. Wilson at the time of her deposition was again pregnant, and was allegedly engaged to the expecting child's father since Christmas 2007. Id. at p. 50. She was convicted of DUI in Smithers, W. Va. in 2002, and as a result her drivers license remains suspended as of the date she provided her deposition. Id. at p. 52.

Mr. Hickman is the child's biological father. See Hickman Deposition. Mr. Hickman lives in Angier, North Carolina. He was (35) thirty five years of age at the time

of his evidentiary deposition, and lived with his fiancé and her three boys, who are each (18), (12), and (8) respectively. See Hickman Deposition, at pp. 4, 5. However, he now lives along with Hailey.

Mr. Hickman has a daughter who currently lives in the State of Utah. Id. at p. 5. She was (15) at the time of his evidentiary deposition. However, Mr. Hickman commenced seeking custody of Hailey formally in March, 2006, by his Petition to Modify Child Custody Determination.

At the time of the final hearing, Hailey lived with the contestants below, Sarah Beth Perdue and Mathew E. Perdue, who were married, and had no other children. See S. Perdue Deposition at p. 33. Neither is biologically related to the child. See Wilson Deposition at p. 78. Mr. Perdue's biological father is married to Ms. Wilson's biological mother. Id. at p. 77.

On July 20, 2007, the Court appointed Peter Hendricks's, Esq. to act as the child's guardian ad litem.

Mr. Hickman and Ms. Wilson meet and Hailey is subsequently born

Mr. Hickman and Ms. Wilson began dating in Angier, North Carolina, in Spring of 2002. See Hickman Deposition at p. 7. They dated for two to three months, and Mr. Hickman learned that Ms. Wilson became pregnant. Id. At this time, it was his understanding that the expecting child was either his or was the child of an individual by the name of Joey Carter. Id. at p. 8.¹

¹ Ms. Wilson at her evidentiary deposition denied that she and Mr. Hickman dated or were ever boyfriend and girlfriend. See Wilson Deposition at p. 5. She explained that she was dating Joey Carter at the time and was just friends with and hung out with Mr. Hickman. Id. at p. 6. Ms. Wilson testified that she had intercourse with Mr. Hickman on two separate occasions. Id. at p. 54. During the first time, she contends that Mr. Hickman allegedly slipped her a drug causing her to pass out, which allowed Mr. Hickman to have intercourse with her while she was incapacitated. Id. at pp. 7, 8, 9, and 54. She believes that she became pregnant from this sexual encounter. Id. at p. 55. She then testified that their second sexual encounter was

Ms. Wilson, prior to giving birth to Hailey, moved back to W. Va. in August of 2002. See Wilson Deposition at p 25. However, she continued to have contact with Mr. Hickman after her move. Id. She explained that they talked, he came to W. Va. a couple of times, including times when he helped her move some items to W. Va., and visited during the Christmas holidays Id. at pp. 25, 26, 27.

Ms. Wilson then called Mr. Hickman from the Hospital after giving birth to Hailey on February 20, 2002. See Hickman Deposition at p. 9. Mr. Hickman then did not hear from Ms. Wilson. Id. He called her mother who informed him that when she got out of the hospital she packed her things and moved to the State of Ohio with her children. Id.

Bureau of Child Support Enforcement institutes paternity action in Fayette County

On May 5, 2004, Mr. Hickman appeared by telephone for a final hearing on a paternity action relating to Hailey, which was instituted by the West Virginia Bureau of Child Support Enforcement. Apparently from the time of Hailey's birth on February 20, 2002, until May 5, 2004, Respondent Wilson was living with her children, including Hailey, in the State of Ohio. See Wilson Deposition at p. 32. Mr. Hickman had not had any contact with either Hailey or Ms. Wilson during this time. See Hickman Deposition, at p. 12.

consensual. Id. at p. 54. She had learned that her boyfriend, Joey Carter, was seeing someone else so she went to Mr. Hickman's residence and had consensual intercourse with him as pay-back to Mr. Carter. Id. at p. 11, 12. During Respondent Wilson's deposition she was questioned whether she thought Mr. Carter could be the child's father. She testified that Mr. Carter could not have been the father because they always used protection. Id. at p. 99. However, earlier in her deposition she testified that upon learning of her pregnancy, Mr. Carter got a big smile on his face, dropped to one knee, and proposed to her. Id. at p. 23. Finally, Wilson testified that one of the reasons she moved from North Carolina to West Virginia in August of 2002 was because she was also allegedly raped by a Mexican, who was still running around at large at the time. Id. at p. 22.

Based on the paternity test, Mr. Hickman was determined to be Hailey's father. See Hickman Deposition. Accordingly, he was formally adjudicated Hailey's father, and the Court ordered that Hailey's birth certificate be amended to reflect Mr. Hickman as the father. Id. Upon receiving the paternity test results, and more than two years after Hailey's birth, Mr. Hickman became certain that he was Hailey's father. See Hickman Deposition at p. 31.

Importantly, at the hearing on May 5, 2004, the Court set child support, and directed that Mr. Hickman pay Ms. Wilson child support in the amount of \$420.00 per month. See Hickman Deposition, Exhibit no. 3, Paternity Order entered June 1, 2004. Mr. Hickman always paid his required child support except for an occasion when he got hurt and fell behind then got caught back up. See Wilson Deposition at p. 29. The Court at the hearing on May 5, 2004, left the parenting issues up to the parents. See Hickman Deposition, Exhibit no. 3, Paternity Order entered June 1, 2004.

***Respondent Wilson moves back to
North Carolina, relinquishes custody and consents to adoption***

Ms. Wilson lived in Ohio from February 2002 until August of 2005. See Wilson Deposition at pp. 30, 32. She relocated back to Boone, North Carolina. Id. at p. 30. However, during this relocation she left her three kids (Raven, Corey, and Hailey), in West Virginia with her mom and stepfather. Id. at p. 30. She explained that she requested her parents to go ahead and put her two oldest children in school in West Virginia because she had not found a residence in North Carolina. Id. at p. 33.

On August 26, 2005, Respondent Wilson inserted her notarized signature on documents regarding Hailey stating as follows:

I, Sheila C. Wilson, do hereby give Matt and Sarah Perdue, full legal responsibility of my daughter Hailey Wilson while I am resettling in North Carolina. Any medical or legal matters are to be handled by them.

See Wilson Deposition Exhibit no. 1.

Ms. Wilson testified that her mother told her over the telephone sometime before September 13, 2005, that Child Protective Services instructed that she had 48 hours to 72 hours to find someone to take care of Hailey or she would be taken, and placed in foster care. See Wilson Deposition at pp. 37, 38. Ms. Wilson's mother could not provide an explanation as to why, other than it was what Ms. Wilson's stepfather had said. Id. at p. 38.

Ms. Wilson then met with contestants below, Sarah and Mathew Perdue, in North Carolina, and on September 13, 2005, inserted her notarized signature on the consent to adopt documents prepared by the Perdue's attorney regarding their desire to adopt Hailey. See Wilson Deposition Exhibit no. 3, Executed Consent to Adopt Form. This document at paragraph 9 states:

That the adoption of HAILEY LYNN BELLE WILSON by SARAH BETH PERDUE and MATHEW EARL PERDUE, will forever terminate all of my parental rights, including any right to visit or communicate with HAILEY LYNN BELLE WILSON and any right of inheritance.

Ms. Wilson testified that she read the consent to adopt form very carefully before signing. See Wilson Deposition at p. 83. She testified that she read and understood the language in the document including paragraph 9. Id. at p. 84. Additionally, she testified that she changed her mind maybe two weeks to one month later. Id. at p. 69. However, she did not go back to West Virginia and get Hailey based on the following reasoning: "I didn't go to get her. My understanding was once you sign those papers there is no turning back." Id. at p. 69.

Mr. Hickman refuses to consent to Hailey's adoption and seeks to obtain custody

According to Sarah Perdue, Hailey had stayed with her and her husband on occasion in April and May 2005. See S. Purdue Deposition at p 32. And, that Hailey allegedly moved in with them full time in the beginning of July 2005.

Subsequent to Ms. Wilson executing the consent to adopt form, Mr. Hickman was presented with identical paperwork. See Hickman Deposition Exhibit no. 5 Unsigned Consent to Adopt Form; Hickman Deposition at p. 18. And, he continued to abide by and pay his monthly child support obligation. Id. at p. 15.

On March 9, 2006, Mr. Hickman filed his petition seeking custody of Hailey in the Family Court of Fayette County, West Virginia. Mr. Hickman requested that on a temporary basis that he receive parenting time with child to be increased over time. He further requested that his monthly child support payment be paid to the Perdue's rather than to Ms. Wilson.

On May 24, 2006, Mr. Hickman and the Perdue's appeared for a temporary hearing before Family Court Judge Steele. Ms. Wilson did not appear in that she had not been served. The Court directed that Mr. Hickman's child support be paid to the Perdue's rather than to Ms. Wilson. The Court refused to take any action on the Mr. Hickman's petition. See Temporary Orders relating to temporary hearing on May 24, 2006.

In the summer of 2006, Mr. Hickman drove from North Carolina to the Perdue's' residence in Boone County, West Virginia. He requested custody, and was refused despite the fact that the Perdue's had no legal authority to deny him. See S. Perdue Deposition at pp. 36, 37. Mr. Hickman went back to North Carolina, and until recent

orders by the Family Court in Boone County, West Virginia, had only been allowed to see Hailey on a very limited basis as allowed at the Perdue's discretion. Id. at p. 35, 36, 37.

On October 17, 2006, the Family Court of Fayette County, W. Va., again refused to take action on Mr. Hickman's petition seeking custody and parenting time, and transferred the matter to the Family Court of Boone County, West Virginia. See Transfer Order relating to the hearing on October 17, 2006.

The Perdue's then petitioned the Circuit Court of Boone County, W. Va., for guardianship of Hailey pursuant to Civil Action no. 07-CIG-2. This request was granted by the circuit court on a temporary basis without objection by Mr. Hickman.

On June 28, 2007, the parties appeared before the Court for a temporary hearing. The Court entered an Order terminating the Perdue's guardianship of Hailey and directed that they be designated her custodian on a temporary basis until further order of the Court. The Court also entered an Order reducing Mr. Hickman's child support obligation to \$50.00 per month. Mr. Hickman at this hearing was also awarded specific parenting time with Hailey for the very first time. Succinctly, he received two weekends in July 2007, one full week in August 2007, and two weekends in September, 2007. Also, as a result of this temporary hearing, the Court entered an order on July 20, 2008, appointing Peter Hendricks's, Esq., as the child's guardian ad litem.

The parties returned to the Court for a hearing on February 27, 2008, at which time the Court directed that evidentiary depositions occur, and the parties attempt to work out an interim parenting schedule between themselves.

On March 16, 2008, Ms. Wilson executed her rescission of consent to adopt. See Respondent's rescission of consent to adopt attached. On April 9, 2008, Ms. Wilson for the very first time filed her response to Mr. Hickman's petition. In it, she requests restoration of her custody of Hailey.

The parties below and the guardian ad litem appeared for a final hearing on April 23, 2009, at which time the trial court designated Mr. Hickman as the child's primary residential parent and legal custodian. The court further ordered that Mr. Hickman's status be phased on gradually over the summer for the child's best interest. This phase in period occurred, and Hailey is now thriving with her father being her custodian and primary residential parent.

III.

ARGUMENT

A. THE SPECIFIC CIRCUMSTANCES IN THIS CASE AND THE BEST INTERESTS OF THE CHILD DID NOT WARRANT OR SUPPORT A FINDING THAT MR. HICKMAN ABANDONED CHILD.

Ms. Wilson contends that the family court should not have designated Mr. Hickman as Hailey's primary residential parent and legal custodian. In support of this purported error, she contends that Mr. Hickman gave up his right to this status based on her contention that Mr. Hickman abandoned Hailey. This position is unequivocally contrary to the specific facts in this case, and the child's best interests.

There were many important facts and extenuating circumstances supporting the family court's finding that Mr. Hickman had not legally abandoned the child:

1. Although, Mr. Hickman believed he was Hailey's father, he was not certain of that until the resolution of the paternity matter in June of 2006;

2. Based on Ms. Wilson's own testimony, she had intercourse with another man around the same time Hailey was conceived;
3. After she became pregnant, Ms. Wilson immediately moved from North Carolina to West Virginia;
4. After she gave birth to Hailey, she left West Virginia for the State of Ohio;
5. Ms. Wilson's whereabouts and residences are not entirely clear after she left West Virginia for Ohio;
6. Hailey was conceived after only a very brief relationship between Mr. Hickman and Ms. Wilson;
7. Ms. Wilson's family did not provide Mr. Hickman any assistance as to their whereabouts in Ohio;
8. Ms. Wilson's strange and unbelievable testimony that she was initially raped by Mr. Hickman, and that she later had consensual sex with him to get back at her cheating boyfriend;
9. Ms. Wilson's ratification of her relinquishment of Hailey by her own conduct;
10. The lack of believability of Ms. Wilson's testimony as to why she executed the relinquishment, and as to why she did not later attempt to get Hailey back;
11. Mr. Hickman's fitness as a parent, and
12. Hailey's best interests.

Mr. Hickman has acknowledged that since the commencement of this action he should have done more to attempt to establish an emotional bond with his Hailey, when

he learned that Ms. Wilson was pregnant. He agrees that he should not have waited until March of 2006 to file his petition seeking parenting time.

Importantly, Mr. Hickman did eventually act to assert his parental rights, and he did so before it was too late. And, it has resulted in materially furthering Hailey's best interests. She has resided full-time with her father since August of 2009. She is doing extremely well, and thriving in school.

There was significant litigation and factual development in this matter below, and each of the contestants were represented by very capable attorneys. In addition, Hailey was appointed a guardian ad litem with extensive practice, experience, and expertise, in domestic matters including child custody issues. The family court's decision awarding custody to Mr. Hickman was done carefully with due consideration of the facts.

Importantly, the family court did not terminate Ms. Wilson's parental rights. It is fully within her rights to attempt to get custody back through a subsequent modification proceeding, if warranted by the circumstances. Finally, it is important to note that the Purdues, two people who love and care for Hailey, are not challenging the family court's decision. Mr. Hickman would submit that the Purdues would be involved in an appeal if custody had been awarded to Ms. Wilson.

B. ALLOCATION OF CUSTODIAL RESPONSIBILITY UNDER W. VA. CODE § 48-9-206(a), WAS NOT REQUIRED.

Ms. Wilson contends that the family court erred by not allocating custodial responsibility under W. Va. Code § 48-9-206(a).² Importantly, the facts in this case did not warrant such an analysis. Indeed, W. Va. Code § 48-9-206(c), states that:

“If the court is unable to allocate custodial responsibility under subsection (a) of this section because the allocation under that subsection would be

² Ms. Wilson raised this issue for the first time in her appeal to the circuit court.

manifestly harmful to the child, or because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a pattern of caretaking sufficiently dispositive of the issues in the case, the court shall allocate custodial responsibility based on the child's best interests, taking into account the factors in considerations that are set forth in this section and in section two hundred nine and 9-403(d) of this article and preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed."

Although it was not required to, the family court did make specific findings of fact as to the allocation of parenting and caretaking functions prior to Mr. Hickman instituting this action. The court found that Hailey was born in February 2002. That she was primarily with her mother until July of 2005 at which time she moved in with the Purdue's full time. She continued to live with the Purdue's up to March 2006, when Mr. Hickman instituted the action. The record is unequivocally clear that from at least July of 2005 up to the time Mr. Hickman filed this action, Ms. Wilson did not provide any parenting and caretaking functions to the child. She had given Hailey to the Purdue's so that they would provide these functions.

Ms. Wilson knowingly and voluntarily executed documents reflecting her intent to relinquish her parental rights of Hailey, and she ratified her intention by giving physical custody of Hailey to the Purdue's. Therefore, Ms. Wilson's right to the return of custody was governed by this Court's holding in In re Cottrill, syllabus point 2, 176 W. Va. 529, 346 S.E.2d 47 (1986):

“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 parents depends upon which course will promote the welfare and best interest of the child; and the parent will not be permitted to reclaim the custody of the child unless the parent shows that such a change will materially promote the moral and

physical welfare of the child.’ Point 4, Syllabus, *State ex rel. Harmon v. Utterback*, [144] W. Va. [419], [108 S.E.2d 521].” Syllabus point 1, *Davis v. Hadox*, 145 W. Va. 233, 114 S.E.2d 468 (1960).”

The family court did not make the finding necessary to return Ms. Wilson to the status of primary residential parent. In fact, the record in this case is overwhelming clear that Ms. Wilson did not prove that designating her as Hailey’s primary residential parent would materially promote Hailey’s moral and physical welfare. Hence, neither the family or circuit court committed error.

C. THE FAMILY COURT DID NOT COMMIT ERROR BY RELYING ON THE RECOMMENDATION OF THE GUARDIAN AD LITEM.

Ms. Wilson’s contention that the Purdue’s were not the child’s psychological baseless. The record is entirely clear that the Purdue’s acted as Hailey’s primary residential parents commencing in July 2005, and continued to do so until the family court awarded Mr. Hickman with the status of primary residential parent in August of 2009. It is not disputed that the Purdue’s did a very good job and love Hailey. Mr. Hickman did not contest this at anytime. Mr. Hickman and the Purdue’s simply struggled because the Purdue’s wanted to be Hailey’s parents, and during the pendency of this matter Mr. Hickman at times had difficulty receiving meaningful parenting time from them. He was forced obtain all of his parenting time by virtue of requests to the family court rather than by mutual agreement.

The guardian ad litem in this case did an extensive amount of work in this case. Not only did he independently investigate Hailey’s best interests, he performed extensive legal research in order to best determine how to handle the strange issues in this case. He provided his research directly to the parties as the litigation continued. He further devised a discovery and evidentiary plan that allowed for people who did not have the

funds to litigate (Ms. Wilson and Mr. Hickman) to receive a fair shot. The guardian ad litem went above and beyond in this case. It would have been error for the family court to not rely on his recommendations. For these reasons, Ms. Wilson's contention that the family court erred by relying on the guardian ad litem's recommendation is baseless.

D. THE FAMILY COURT DID NOT COMMIT ERROR BY ALLOWING HAILEY TO BE PLACED WITH HER FATHER IN NORTH CAROLINA.

It must be noted that, Hailey's placement with her father in North Carolina was a gradual phased in process. This did not occur overnight. It was a process that started in the Summer of 2006 and was completed in August of 2009. Hailey's placement with her father is going very well. She is doing well in school. Furthermore, Mr. Hickman has sent progress reports to the guardian ad litem.

There is no question that if the guardian ad litem felt that Hailey's placement with her father was not working well to date, then he would immediately take action on the child's behalf. In addition, the family court still has jurisdiction over this matter. The final order awards both the Purdue's and Ms. Wilson parenting time. If Ms. Wilson has any issue, she simply just has to file a motion in the Family Court of Boone County. It is further noted that Ms. Wilson lives approximately 45 minutes away from Mr. Hickman in North Carolina.

Mr. Hickman has been driving Hailey to Ms. Wilson's residence on weekends so that Ms. Wilson and her daughter's may see Hailey. There is not a written parenting plan in place setting forth a parenting schedule. Mr. Hickman and Ms. Wilson could not agree to a specific parenting schedule. Subsequent thereto, Ms. Wilson filed her appeal and is seeking relief through the appeal.

In sum, the error alleged by Ms. Wilson is baseless. Her appeal should be dismissed.

WHEREFORE, for the reasons stated herein, the respondent, Robert Hickman, respectfully requests this court to deny Ms. Wilson her appeal, and affirm the judgment of the Family Court of Boone County, West Virginia.

RESPECTFULLY SUBMITTED,

ROBERT HICKMAN
Respondent

By Counsel:

A handwritten signature in black ink, appearing to be 'TC', written over a horizontal line.

TIM C. CARRICO, ESQ. (WVSB # 6771)
CARRICO LAW OFFICES LC
1412 Kanawha Blvd East
CHARLESTON, WV 25301
(304) 347-3800
(304) 347-3688 fax
Email: tcarrico@carricolaw.com
COUNSEL FOR THE RESPONDENT

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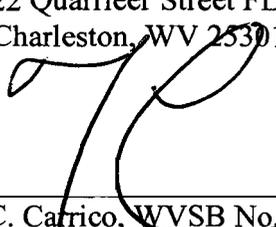
ROBERT HICKMAN, Respondent Below, Respondent

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing **Respondent's Summary Response** was served this 14th day of February, 2011, via United States mail, postage prepaid upon the following person:

Maureen Conley
Legal Aid of WV Inc.
922 Quarrieer Street FL.4
Charleston, WV 25301



Tim C. Carrico, WVSB No. 6771