

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

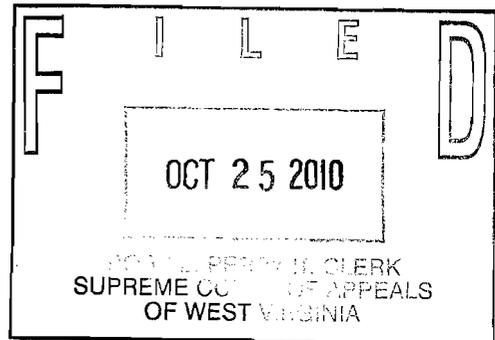
Docket No. 35564

MALYNDA MARIE MOODY,
Petitioner Below(Appellant),

v.

Appeal from the:
Circuit Court of Lincoln County, West Virginia
Case No.: 06-D-51

MICHAEL FRANK HENRY MOODY, II,
Respondent Below(Appellee).



BRIEF OF APPELLEE, RONALD G. SALMONS, GUARDIAN *AD LITEM*

PREPARED BY:

Ronald G. Salmons (W. Va. Bar No. 10304)
Ronald G. Salmons, Attorney at Law, PLLC
6836 State Route 3
P.O. Box 161
West Hamlin, WV 25571
Guardian ad litem and Appellee

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**KIND OF PROCEEDING, NATURE OF THE RULING BELOW
AND STATEMENT OF THE CASE**

This is an appeal from the Circuit Court of Lincoln County, West Virginia, which said court entered on the 18th day of September, 2009, a Circuit Court Order Affirming Family Court Final Order, in which said court affirmed the Order Granting Divorce and Establishing Temporary Visitation of the Family Court of Lincoln County, West Virginia, entered on the 30th day of June, 2009.

The Appellee Guardian *ad litem*, Ronald G. Salmons (“Appellee/Guardian”), was appointed by the Family Court of Lincoln County by order entered on the 29th day of January, 2009, as Guardian *ad litem* for the parties’ two children, A.C.M., born March 11, 1999, and K.M.M., born January 8, 2001. By order of the Supreme Court of Appeals of West Virginia entered the 2nd day of June, 2010, the Appellant was ordered to file a brief within thirty days of receipt of said order and the Appellee/Guardian was ordered to file a response brief within thirty days of receipt of Appellant’s brief. However, Appellant never filed a brief, and the Appellee/Guardian filed a Motion to Dismiss Appeal. By subsequent order of this Court, Appellee/Guardian’s Motion to Dismiss Appeal was refused, and the Appellee/Guardian was ordered to file a brief on or before October 25, 2010. Without reference to or benefit of Appellant’s brief, the Appellee/Guardian offers this brief.

STATEMENT OF THE FACTS

As previously indicated, this Appellee/Guardian was appointed Guardian *ad litem* on the 29th day of January, 2009, and any reference to facts prior to that date are based either upon the investigation of the Appellee/Guardian or from the records of the Clerk of the Circuit Court of Lincoln County.

On the 17th day of February, 2006, the Appellant, Malynda M. Moody, filed a Petition for Divorce (“Petition”) in the Family Court of Lincoln County alleging, among other things, that she had been a resident of West Virginia for more than one year prior to the filing of the Petition, that she was a resident of Lincoln County, West Virginia, that the Respondent, Michael Moody, was not a resident of West Virginia, that the parties to the divorce were married in Bradley County, Tennessee, on the 5th day of February, 1999, that the parties to the divorce last lived together as husband and wife in McMinn County, Tennessee, that the parties to the divorce separated on the 21st day of December 2001, that the parties to the divorce were the parents of two children, that irreconcilable differences had arisen between the parties, and that the parties had lived separate and apart without cohabitation for one year or more. Along with the Petition, the Appellant filed a Financial Statement alleging no marital assets or liabilities and a Parenting Plan proposing no parenting for the Respondent father.

Service by certified mail of the Petition was returned without delivery and service was perfected by publication. By temporary order of the court entered on the 24th day of August 2006, the Appellant was granted sole parenting of the parties’ two children, the Respondent was appointed a Guardian *ad litem* as it appeared that the Respondent was incarcerated, and the matter was set for further hearing on the 10th day of October, 2006. The Guardian *ad litem* subsequently withdrew from the case after having no contact with the Respondent and upon

having determined that the Respondent was no longer incarcerated. Neither party appeared for the October 10, 2006, hearing, and the court continued generally the matter until such time as either party requested further hearing.

With the parties having not been divorced by the court, the Appellant noticed the matter for final hearing set for the 27th day of May, 2008, and at said hearing both the Appellant and the Respondent appeared. By temporary order entered the 7th day of July, 2008, the court ordered, among other things, that the Appellant be granted exclusive parenting of the parties' children, that the Respondent's child support obligation be modified, and that the parties appear for mediation in regard to a parenting plan. The mediator reported that the notice of mediation to the Respondent was returned as undeliverable. No mediation was held.

By temporary order entered on the 29th day of October, 2008, the court, among other things, granted primary parenting of the parties' children to the Appellant, appointed a Guardian *ad litem* to investigate whether the Respondent was incarcerated, and reset the matter for hearing on the 20th day of January, 2009. On December 18, 2008, the West Virginia Bureau for Child Support Enforcement filed a Motion to Intervene and Motion for Judgment, with the matter being set for hearing simultaneously with the January 20, 2009, hearing. At the January 20, 2009, hearing, this Appellee/Guardian was appointed as Guardian *ad litem* for the parties' children, with the matter being set for hearing on the 19th day of May, 2009, which said hearing was reset for the 26th day of May, 2009.

On the 19th day of May, 2009, this Appellee/Guardian submitted his Report of Guardian Ad Litem ('Report'). In said Report, this Appellee/Guardian stated that he interviewed by telephone the Respondent on several occasions, that he readily admitted numerous incarceration for worthless checks, that the Respondent stated that he has attempted contact with the parties'

children but that the Appellant intervened and interfered with any attempted contact, and that the Respondent stated that he desired stepped-up visitation and overnight visitation as his parenting goal.

Further in said Report, this Appellee/Guardian reported that he interviewed the Appellant in person on numerous occasions and had numerous telephone contact with the Appellant, that the Appellant stated that the Respondent has not tried to see the parties' children, that the Respondent has always known the location of the children, that the Respondent has an extensive criminal history not disclosed to the Appellee/Guardian. Further, this Appellee/Guardian reported that the Appellant was adamant that the Respondent not be granted any visitation or contact with the parties' children.

And further in said Report, this Appellee/Guardian reported that he interviewed the parties' children in person and in private and that the children (ages nine and ten at the time of the interview) appeared happy, comfortable, healthy, attentive and well-cared for, that neither child remembered their father but that both were aware of a father living elsewhere, that both children appeared confused in regard to whether they wanted to see or hear from their father, and that eventually both children admitted, although with caution, that each would like to meet their father in a controlled and secure situation.

In said Report, this Appellee/Guardian, based on the best interest of the children, recommended to the court that on a trial basis, the Respondent be allowed introductory visitation under a supervised and controlled manner, preferably at a social service agency or professional facility and supervised by a child psychologist, counselor or other professional; that on a trial basis, the Respondent be allowed to telephone and write the children, without interference from the Appellant; that this limited contact with the children be reviewed by a child psychologist,

counselor or other professional, and a report of such review be compiled and submitted to the court; that if the Respondent fails to exercise visitation and contact with the children on a regular and continuous manner, or if visitation and contact is deemed by the reviewing psychologist, counselor or other professional to be detrimental to the children, all visitation and contact should be terminated; that all parties be prohibited from making any disparaging remarks regarding the other party in the presence of the children, or from discussing this matter with the children; that the Bureau of Child Support Enforcement seek past, present and future child support from the Respondent; and that the court review this matter in six months or such other time deemed appropriate by the court.

On the 26th day of May, 2009, the matter came for further hearing in the Family Court of Lincoln County, with both parties, the Appellee/Guardian, and the attorney for the Bureau of Child Support Enforcement present. Among other things, the court granted the parties a divorce on the grounds of irreconcilable differences; granted Appellant primary custodial responsibility of the parties' children until such time as a parenting plan is developed and adopted by the court or until such time as there was further order of the court; granted Respondent temporary visitation with the parties' children under the following conditions: (a) visitation under the supervision of Mary Crouch of Lincoln Primary Care or under the supervision of another mental health professional agreed to by the court, (b) an introductory one hour visit with the children to occur on June 29, 2009, under controlled and supervised conditions as delineated above, (c) thereafter, supervised visitation was to occur one time per month for a period recommended by the above mental health professional, (d) the Appellant was to arrange for counseling for the children, prior to June 29, 2009, with said counseling being held by Mary Couch or other mental health professional agreed to by the court, (e) the Appellant was to arrange for a counseling

session on June 29, 2009, prior to the hearing scheduled for this date, so as to facilitate Respondent's visit with the children, (f) the Appellant was to notify the Respondent of the time and date of all counseling sessions, and (g) all parties were to fully cooperate with the aforementioned mental health professional and with said counseling sessions. The court specifically noted the objections of the Appellant to the aforementioned visitation schedule. All parties were prohibited, while in the presence of the children, from making any disparaging remarks concerning the other party or from discussing the matter of this divorce or of the necessity for counseling sessions. The court ordered that the Respondent's performance bond was to continue in the amount of \$1,200.00, that the Respondent was ordered to pay an additional \$1,200.00 in child support prior to the June 29, 2009, hearing and within sufficient time for said payment to be accredited to Respondent's obligation, and that prior to the June 29, 2009, hearing, Respondent shall post a personal recognizance bond in the amount of \$5,000.00, with said bond relating to the aforementioned proposed visitation and parenting schedule.

By separate order from the May 26, 2009, hearing, the court found the Respondent in civil contempt of court for Respondent's failure to pay child support; required the Respondent to post the aforementioned bond requirements; required the Respondent to make the aforementioned child support payments; and ordered that if the Respondent failed to pay child support as ordered, the Respondent would be incarcerated.

On June 15, 2009, the Appellant filed Objections stating "I object to 3. The Respondent is granted temporary visitation with the parties' children[.]" On June 18, 2009, the Appellee/Guardian filed a Notice of Hearing in regard to further hearing on the parenting issues in the case and for hearing upon Appellant's Objections and Exceptions.

On June 29, 2009, these matters came for further hearing. The court found that the Appellant had made a good faith effort to arrange counseling but due to matters beyond her control, the court needed to modify its previous order in regard to counseling. The court then ordered visitation between the children and the Respondent to be supervised by KVC; ordered an introductory one hour visit with the children and the Respondent to occur on July 30, 2009, ordered visitation to occur one time per month under the control, supervision and recommendation of KVC; ordered the Respondent to pay all fees associated with supervised visitation; and ordered the Appellee/Guardian to arrange all counseling and visitation and to notify all parties of the same. The court set the matter for further hearing on July 30, 2009.

The Appellee/Guardian notified the Appellant, the Respondent, and the court of counseling sessions for one child on July 15, 2009, and the other child on July 22, 2009. Additionally, the Appellee/Guardian notified all parties of Respondent's first visitation with the children scheduled for July 30, 2009.

On July 23, 2009, the Appellant filed a Petition for Appeal from Family Court Final Order. On August 5, 2009, the Circuit Court of Lincoln County entered an Order Granting Hearing/Oral Arguments on Appeal of Final Order from Family Court and set the matter for hearing on the 21st day of August, 2009. On July 30, 2009, the Family Court appointed a Guardian *ad litem* for the Respondent as the Respondent was incarcerated in the state of Georgia, with the Guardian *ad litem* withdrawing from representation shortly thereafter due to Respondent's release from custody, and with the Family Court resetting the matter for further hearing on the 6th day of October, 2009, which said hearing was reset for October 30, 2009.

On August 21, 2009, Appellant's Petition for Appeal from Family Court Final Order was heard by the Circuit Court of Lincoln County. On September 18, 2009, a Circuit Court Order

Affirming Family Court Final Order was entered. The court first found that its review was bound by West Virginia Code § 51-2A-14(b). That statute prohibits the Circuit Court from looking to evidence beyond the record created in Family Court. Furthermore, in reviewing the record created, West Virginia Code § 51-2A-14(c) requires the Circuit Court to “review the findings of fact made by a family court judge under the *clearly erroneous* standard and [to] review the application of law to the facts under an *abuse of discretion* standard.” (emphasis added). This means, simply stated that the Circuit Court must deny the Petition for Appeal, unless the Family Court has made erroneous findings of fact or has abused its discretion in applying the law.

Appellant raised identical grounds for appeal in Circuit Court that Appellant raises now.

In evaluating the grounds for appeal, the Circuit Court found:

In this case, Ms. Moody (now Kopsolias) stated in her Petition for Appeal that the Respondent/Appellee, Mr. Moody, had had no contact with either child since 2001 until October 2008. In his written report to the Family Court, the Guardian *ad litem* noted Mr. Moody’s lack of contact with his children since June 2001, for reasons that were disputed between the parties. He recommended that the West Virginia Bureau for Child Support Enforcement seek past, present and future child support from the Respondent/Appellee, Mr. Moody.

From the grounds set forth in her Petition for Appeal, Ms. Moody (now Kopsolias) disagrees with the Family Court’s determination that the Respondent/Appellee, Mr. Moody, should have temporary, supervised visitation with the parties’ children for one (1) hour per month, starting with an introductory one-hour visit on June 29, 2009. The Family Court’s Final Order further provides that Mary Crouch of Lincoln Primary Care, or another mental health professional agreed to by the Family Court, shall supervise each such visit. In addition, that Final Order requires the Petitioner/Appellant, Ms. Moody (now Kopsolias), to arrange counseling for the children with Ms. Crouch or another court-approved mental health professional, and requires all parties to cooperate with the aforesaid mental health professional and with the children’s counseling sessions. Based upon the report of the

Guardian *ad litem*, the Family Court included those provisions in his June 30, 2009, Order Granting Divorce and Establishing Temporary Visitation.

Ms. Moody (now Kopsolias) did not raise as an issue in her Petition for Appeal any rulings in the Family Court's Final Order relating to the Respondent/Appellee's payment of child support. Instead, she acknowledged in the appeal petition that Mr. Moody has "begun to pay child support since attempting to gain visitations." The June 2001 to October 2008 time period that she cited in her petition regarding his failure to support the children predates the June 30, 2009, Final Order from which she has appealed.

Ultimately, the Circuit Court found no sufficient ground to grant the Petition for Appeal. The Circuit Court could find no findings of fact made by the Family Court Judge in his June 30, 2009, Order Granting Divorce and Establishing Temporary Visitation that were clearly erroneous, and in reviewing the Family Court Judge's application of the law to the facts in the June 30, 2009, Order Granting Divorce and Establishing Temporary Visitation could find no abuse of discretion by that Judge in his conclusions of law.

On October 8, 2009, the Appellant filed an appeal with the Supreme Court of Appeals of West Virginia. By order of the Supreme Court of Appeals of West Virginia entered the 2nd day of June, 2010, the Appellant was ordered to file a brief within thirty days of receipt of said order and the Appellee/Guardian was ordered to file a response brief within thirty days of receipt of Appellant's brief. However, Appellant never filed a brief, and the Appellee/Guardian filed a Motion to Dismiss Appeal on July 21, 2010.

On August 12, 2010, the Appellee/Guardian filed a Guardian Ad Litem's Motion to Find Petitioner, Melinda Marie Moody Kopsolias, In Contempt of Court. This Appellee/Guardian alleged that the Appellant failed to abide by orders of the court regarding counseling and visitation. Specifically, the Appellee/Guardian alleged that the Appellant failed to return calls to

the children's therapist, failed to provide the children's therapist with a contact number after Appellant's telephone was disconnected, failed to respond to correspondence from the children's therapist, and failed to keep appointments regarding therapy services, as well as scheduled supervised visitations with the Respondent father. Additionally, the Appellee/Guardian alleged that the Appellant had hindered, hampered and frustrated the matters before the court.

By subsequent order of this Court entered on September 22, 2010, Appellee/Guardian's Motion to Dismiss Appeal was refused, and the Appellee/Guardian was ordered to file a brief on or before October 25, 2010.

RESPONSE TO ASSIGNMENTS OF ERROR

A. Ground One: Abandonment

“Respondent has not had any contact with either child since 2001. He has not attempted to telephone, mail anything, or visit children. Children were at the same address from June 2001–April 2008. Respondent was aware of location, address and phone number. Children have always been in Lincoln County.”

Appellee Guardian Ad Litem’s Response:

Parental contact is a factor the court must consider when making visitation determinations; however, it is not a dispositive factor. Neither the Family Court nor the Circuit Court abused its discretion or were clearly erroneous in determining visitation for the minor children.

B. Ground Two: Respondent is unfit

“Respondent had a daughter state removed from his custody at birth while in hospital in or around 1992. Respondent believes in mental and physical abuse as forms of dicipline [sic]. CPS Hamilton County TN was aware of abuse early 2001. Respondent lost custody of two other children in 2001.”

Appellee Guardian Ad Litem’s Response:

Prior loss of custody is not a dispositive factor in the determination of visitation of subsequent children. Further, these facts and claims do not appear in the records of the lower courts. However, in this case, the Respondent has shown an interest in retaining visitation with the children. In light of this information, this Appellee/Guardian affirms his recommendation for supervised visitation based on the best interest of the children.

C. Ground Three: Failure to Support

“Respondent has failed to support children from June 2001 up to Oct 2008 to support collected = 1025.83. Respondent has only begun to pay child support since attempting to gain visitations.”

Appellee Guardian Ad Litem’s Response:

Payment of child support is a factor the court must consider when making visitation determinations; however, it is not a dispositive factor. Neither the Family Court nor the Circuit Court abused its discretion or were clearly erroneous in determining visitation for the minor children.

D. Ground Four: Respondent is a career criminal

“Respondent has spent time in prison in NC and GA for two different felonys [sic]. Respondent is on probation in TN and GA. Respondent spend [sic] his life either in jail or committing a crime. Respondent has been in jails in at least 4 states and countless counties. Respondent committed bigomy [sic] at least twice. Respondent will never be a constant in their lives.”

Appellee Guardian Ad Litem’s Response:

The Respondent’s criminal record is a factor the court must consider when making visitation determinations; however, it is not a dispositive factor. Neither the Family Court nor the Circuit Court abused its discretion or were clearly erroneous in determining visitation for the minor children.

STANDARD OF REVIEW

“This Court reviews the circuit court’s final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.” Syl. Pt. 4, Burgess v. Porterfield, 469 S.E.2d 114 (W. Va. 1996).

“[This Court has] long applied an abuse of discretion standard to questions relating to the maintenance and custody of the children.” Carter v. Carter, 470 S.E.2d 193, 198 (W. Va. 1996). Syllabus, Nichols v. Nichols, 236 S.E.2d 36 (W. Va. 1977), states:

Questions relating to alimony and to the maintenance and custody of the children are within the sound discretion of the court and its action with respect to such matters will not be disturbed on appeal unless it clearly appears that such discretion has been abused.

In accord Syl. Pt. 2, Wood v. Wood, 438 S.E.2d 788 (W. Va. 1993); Syl. Pt. 8, Wyant v. Wyant, 400 S.E.2d 869 (W. Va. 1990); Syl., Luff v. Luff, 329 S.E.2d 100 (W. Va. 1985).

“Where the issue on an appeal from the circuit court is clearly a question of law . . . involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 2, Thomas v. Morris, 687 S.E.2d 760, 762 (W. Va. 2009) (citing in part Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 459 S.E.2d 415 (W. Va. 1995)).

ARGUMENT

“[T]he best interests of the child is the polar star by which decisions must be made which affect children.” Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872 (W. Va. 1989); State ex rel. Cash v. Lively, 187 S.E.2d 601, 604 (W. Va. 1972). “[C]hild visitation with a noncustodial parent is a circumstance which normally will promote the welfare of a child.” Carter, 470 S.E.2d at 199.

A. Neither the Family Court nor the Circuit Court abused its discretion or were clearly erroneous in evaluating the Respondent’s negative factors for determining visitation for the minor children.

Although stated in separate grounds for appeal, Appellant’s grounds one, three, and four all involve non-dispositive factors to be considered by the court in its decision whether to grant visitation. Therefore, those three grounds will be discussed in-turn in this Section of Appellee/Guardian’s Brief.

1. Abandonment

The term “abandonment” is not defined within the sections of the Code that address visitation other than under the Uniform Child Custody Jurisdiction and Enforcement Act, which defines “abandoned” as “left without provision for reasonable and necessary care or supervision.” W. Va. Code § 48-20-102(a). Abandoned is also defined in the abuse and neglect section of the Code. See W. Va. Code § 49-6-9 (defining “abandoned” as “without supervision . . . for an unreasonable period of time in light of the child’s age and the ability to care for himself or herself in circumstances presenting an immediate threat of serious harm to such child”). Here, neither of the aforementioned definitions are on-point. However, this Court has on occasion looked to the definition provided in the adoption statutes for guidance in specific cases. See State ex rel. Paul B. v. Hill, 496 S.E.2d 198 (W. Va. 1997) (involving an issue of

whether voluntary relinquishment of parental rights incident to adoption placement could constitute abandonment for abuse and neglect purposes); see also W. Va. Code §§ 48-22-102, -306 (providing definition of abandonment for purposes of adoption law and identifying conduct presumptively constituting abandonment). Under the adoption statutes, abandonment is defined as “any conduct . . . that demonstrates a settled purpose to forego all duties and relinquish all parental claims to the child.” W. Va. Code § 48-22-102. Using the adoption statute’s definition of abandonment, the lower courts did not abuse its discretion in finding that the Respondent did not abandon the children.

The Respondent has not been a constant figure in the children’s lives. However, Respondent claims that attempted contacts were thwarted by the Appellant. As noted in the Appellee/Guardian’s Report of Guardian Ad Litem dated May 18, 2009, the Respondent readily admitted to not seeing the children since June 2001. However, the Respondent stated that he had attempted to contact the children, but was unsuccessful due to the actions of the Appellant. Appellant claimed that Respondent had not tried to see the children.

Despite the lack of contact from the Respondent, the children, when interviewed separately by the Appellee/Guardian, wanted to visit with the Respondent in a controlled setting. The Appellee/Guardian, after evaluating the best interests of the children, recommended to the Family Court that the Respondent be allowed introductory visitation in a supervised and controlled manner. Accordingly, the Family Court ordered an introductory one hour supervised visitation between the Respondent and the children, followed by monthly supervised visitations in accordance with the recommendations of a mental health professional. Therefore, the Appellee/Guardian maintains that the best interest of the children warrants introductory supervised visitation with the Respondent.

2. Failure to Support

“[This] [C]ourt, in defining a parent’s right to visitation, is charged with giving paramount consideration to the welfare of the child involved. Furthermore, this Court is of the opinion that the right of a parent, not in custody of his or her child, to visit that child may not ordinarily be made dependent upon the payment of child support by that parent. However, when a court finds that the parent’s refusal to make child support payments is contumacious, or willful or intentional, that parent’s visitation rights may be reduced or denied, if the welfare of the child so requires.” Ledsome v. Ledsome, 301 S.E.2d 475 (W. Va. 1983). Further, in an adoption case involving an issue of abandonment, this Court held “that in the absence of specific statutory provisions, the failure to pay child support alone does not constitute abandonment.” Adoption of Schoffstall, 368 S.E.2d 720, 722 (W. Va. 1988).

Ultimately, visitation rights are dependent upon the welfare of the children, and ordinarily, the Respondent’s visitations rights may not be denied merely for non-payment of child support. Ledsome, 301 S.E.2d at 477. “The rights of visitation should not be denied a parent to punish him because of his failure to pay support money for the child. The paramount reason for visitation is the benefit to be derived by the child from associating with its parents and its welfare should not be jeopardized by an order conditioned upon payment of support money or alimony even though such order might prove effective as a collection device.” Id. at 478 (quoting Block v. Block, 112 N.W.2d 923, 927 (Wis. 1961)).

In this case, there is no evidence to indicate that Respondent contumaciously, willfully, or intentionally refused to pay child support. Respondent admittedly owes for several years of child support. Further, the Family Court entered a Contempt Order, pursuant to a Petition filed by the Bureau for Child Support Enforcement, due to Respondent’s failure to pay child support.

Accordingly, the Family Court ordered Respondent to pay an additional \$1,200.00 prior to the June 29, 2009, hearing, and ordered Respondent to post a personal recognizance bond in the amount of \$5,000.00, with the bond relating to the proposed visitation and parenting schedule. See Order Granting Divorce and Establishing Temporary Visitation, ¶¶ 7-8. As the Circuit Court found, “[Appellant] did not raise as an issue in her Petition for Appeal any rulings in the Family Court’s Final Order relating to the [Respondent’s] payment of child support. Instead, she acknowledged in the appeal petition that [Respondent] has ‘begun to pay child support since attempting to gain visitations.’ The June 2001 to October 2008 time period that she cited in her petition regarding his failure to support the children predates the June 30, 2009, Final Order from which she has appealed.” Circuit Court Order Affirming Family Court Final Order. Accordingly, in Appellant’s ground three for appeal with this Court, Appellant again states that Respondent has begun to pay child support. Therefore, the Appellee/Guardian maintains that the best interest of the children warrants introductory supervised visitation with the Respondent.

3. Criminal Record

The Respondent’s criminal record must be considered when making a determination concerning whether or not to allow visitation. In re Tiffany P., Robby P., Alexandria F., and Cheyenne F., 600 S.E.2d 334 (W. Va. 2004). However, this Court has held that, “[a] natural parent of an infant child does not forfeit his or her parental right to the custody of the child merely by reason of having been convicted of one or more charges of criminal offenses.” Syl. Pt. 2, State ex rel. Acton v. Flowers, 174 S.E.2d 742 (W. Va. 1970); Syl. Pt. 7, In re Emily, 540 S.E.2d 542 (W. Va. 2000).

The Family Court did not abuse its discretion in evaluating the Respondent’s criminal history for determining visitation for the minor children. The Family Court was keenly aware of

Respondent's criminal history. Specifically, the Family Court appointed a Guardian *ad litem* at least two different times due to the Respondent being incarcerated during the divorce and custody proceedings. However, it is the Appellee/Guardian's belief that Respondent has never been accused of or convicted of a crime against the person; Respondent is most frequently incarcerated for worthless checks. Therefore, the Appellee/Guardian maintains that the best interest of the children warrants introductory supervised visitation with the Respondent.

The Family Court properly determined that the best interest of the children were promoted by permitting introductory supervised visitation once per month with the Respondent after evaluating the factors again raised by the Appellant in this appeal. Further, as the Circuit Court properly found, the Family Court's evaluation neither constituted an abuse of discretion nor were clearly erroneous. Thus, the lower courts' holdings should be affirmed.

B. Although not raised in the lower court proceedings, prior loss of custody does not alter the Appellee/Guardian's recommendation for supervised visitation.

Appellant, in ground two for appeal, claims that Respondent's alleged prior loss of custody is a basis for reversing the lower courts' decisions to permit supervised visitation. This ground for appeal was first raised at the circuit court level, and therefore the Family Court could not provide a factual analysis of this claim.

It is well-settled that factual issues cannot be first addressed at the appellate level. "Many cases hold that this Court will not consider on appeal nonjurisdictional questions which have not been acted upon by the trial court." Western Auto Supply Co. v. Dillard, 172 S.E.2d 388, 391 (W. Va. 1970); see also Jennings v. Smith, 272 S.E.2d 229 (W. Va. 1980); In re Morgan Hotel Corp., 151 S.E.2d 676 (W. Va. 1966); Korzun v. Shahan, 151 S.E.2d 287 (W. Va. 1966); Work v. Rogerson, 142 S.E.2d 188 (W. Va. 1965); Petry v. The Chesapeake and Ohio Railway Co., 135 S.E.2d 729 (W. Va. 1964); Dunning v. Barlow and Wisler, Inc., 133 S.E.2d 748 (W. Va.

1963); Aetna Casualty and Surety Co. v. Federal Insurance Co. of New York, 133 S.E.2d 770 (W. Va. 1963); Sands v. Security Trust Co., 102 S.E.2d 733 (W. Va. 1958); In re The Estate of Amanda Nicholas, Deceased, 94 S.E.2d 452 (W. Va. 1956); Cook v. Collins, 48 S.E.2d 161 (W. Va. 1948); Highland v. Davis, 195 S.E. 604 (W. Va. 1937); Nuzum v. Nuzum, 87 S.E. 463 (W. Va. 1915). Further, in the Cook case this Court said: “This Court, having no original jurisdiction of this cause and acting only as an appellate court, will not consider nonjurisdictional questions not acted upon by the trial court. . . . To consider and decide nonjurisdictional questions in this Court, not acted upon by the trial court, would be the assumption of jurisdiction by this Court which it does not possess.” Cook, 48 S.E.2d at 163. In the Highland case this Court held in syllabus point 4 that “[t]his Court will not consider questions not acted upon by the trial court.” Highland, 195 S.E.2d at Syl. Pt. 4; see also Weatherford v. Arter, 63 S.E.2d 572 (W. Va. 1951); Weese v. Weese, 58 S.E.2d 801 (W. Va. 1950); Posten v. Baltimore and Ohio Railroad Co., 117 S.E. 491 (W. Va. 1923).

Here, the Respondent has shown a strong interest in visiting his children. Moreover, the children have expressed interest in meeting and visiting with their father in a controlled environment, as noted in the Appellee/Guardian’s Report of Guardian Ad Litem dated May 18, 2009. The children were ages nine and ten at the time of the Appellee/Guardian’s interview. Appellee/Guardian found the children to be happy, comfortable, healthy, attentive and well-cared for. Both children were capable of determining the contact each wanted with the Respondent. Both children admitted, although with caution, that each would like to meet their father in a controlled and secure situation. Appellee/Guardian maintains that this issue is not appropriate for appeal; however, Respondent’s alleged prior loss of custody does not change the

recommendation of this Appellee/Guardian. Therefore, the decisions of the lower courts in granting once monthly supervised visitation with Respondent should be affirmed.

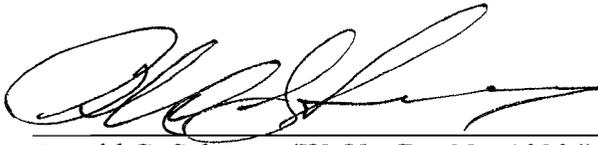
CONCLUSION

After a thorough investigation, this Appellee/Guardian recommended limited supervised visitation between the minor children and their father. Although Appellant opposes all visitation or contact between Respondent and the children based upon the grounds for appeal, it is this Appellee/Guardian's recommendation that in the best interest of the children the Family Court and Circuit Court final orders be affirmed. Appellee/Guardian has interviewed the Appellant, Respondent, and the children on multiple occasions. Appellee/Guardian understands the reasonable concerns of the Appellant which are the basis for her appeal. However, the children have expressed a desire to visit with their father in a controlled environment. So long as Respondent continues to meet the requirements set forth in the Family Court Order Granting Divorce and Establishing Temporary Visitation, this Appellee/Guardian maintains that the best interests of the children are promoted by permitting introductory supervised visitation. The lower courts' holdings should be affirmed.

PRAYER FOR RELIEF

For the foregoing reasons, Appellee/Guardian requests this Court affirm the Circuit Court Order Affirming Family Court Final Order entered on September 18, 2009, and award such other relief this Honorable Court deems just and appropriate.

RESPECTFULLY SUBMITTED,
RONALD G. SALMONS,
Guardian *ad litem* and Appellee



Ronald G. Salmons (W. Va. Bar No. 10304)
Ronald G. Salmons, Attorney at Law, PLLC
P.O. Box 161
West Hamlin, WV 25571
Phone: (304) 824-5711
Fax: (304) 824-2544
Guardian ad litem and Appellee

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON, WEST VIRGINIA

Docket No. 35564

MALYNDA MARIE MOODY,
Petitioner Below (Appellant),

v.

Appeal from the:
Circuit Court of Lincoln County, West Virginia
Case No.: 06-D-51

MICHAEL FRANK HENRY MOODY, II,
Respondent Below (Appellee).

CERTIFICATE OF SERVICE

I, Ronald G. Salmons, Guardian *ad litem* and Appellee, do hereby certify that I have served true copies of this Brief of Appellee, Ronald G. Salmons, Guardian Ad Litem upon the following by certified mail this 25th day of October, 2010:

Malynda Marie Moody
P.O. Box 301
Branchland, WV 25506

Michael Frank Henry Moody, II
345 Wedgwood Lane
Spring City, TN



Ronald G. Salmons (W. Va. Bar No. 10304)
Ronald G. Salmons, Attorney at Law, PLLC
P.O. Box 161
West Hamlin, WV 25571
Phone: (304) 824-5711
Fax: (304) 824-2544
Guardian ad litem and Appellee