

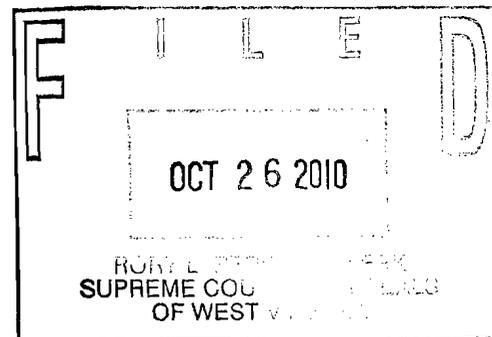
NO. 35679

**IN THE SUPREME COURT OF APPEALS  
OF  
WEST VIRGINIA**

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**CHARLESTON, WEST VIRGINIA**

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In Re: THE MATTER OF:

ROBIN LYONS and JANET LYONS,  
Petitioners below/Appellees,

Civil Action No. 99-D-2184  
Judge Kaufman

and

MELISSA LYONS(now ARNOLD) and WARREN LEE ARNOLD,  
Respondents below/Appellants

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**BRIEF OF APPELLANTS MELISSA ARNOLD  
AND WARREN LEE ARNOLD**

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Troxel v. Granville, 530 U.S. 57 (2000)

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Cathy L.M. v. Mark Brent R., 217 W.Va. 319, 617 S.E.2d 866 (2005)

Lindsie D.L. v. Richard W.S., 214 W.Va 750 at 755, 591 S.E.2d 308 at 314 (2003)

In re the Petition of Nearhoof, 178 W. Va. 359, 359 S.E.2d 587 (1987)

In Re Clifford K. v. Paul S., 217 W.Va. 625, 619 S.E.2d 138 (2005)

### CONSTITUTIONAL PROVISIONS

West Virginia Constituion Art. 3, § 10

U.S.C.A. Const.Amend. 14

### STATUTORY PROVISIONS

W.Va. Code § 48-10-1001, 1002

## I. KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

Appellants Melissa and Warren Lee Arnold, the lawful natural biological mother and the adoptive father of the child at issue herein, namely Jon Arnold, hereby appeal from an Order of the Circuit Court of Kanawha County affirming in its entirety an Order of the Family Court of Kanawha County entitled *Order Regarding Motion to Terminate Grandparent Visitation* which order denied and dismissed the Appellants' motion to terminate the grandparent visitation which the Appellees had secured with the Appellants' minor child.

The proceedings and rulings herein appealed originally arose by motion of the Appellants before the Family Court requesting the termination of all rights to any court ordered grandparent visitation of the Appellees with the Arnold's now eleven year old child. However, the history of this case is long-standing, and the disagreements and grievances of the parties have been clearly documented in the record for well over eight years now, as should be evident to the Court through a cursory glance of the case file which has now been designated and delivered.

On December 5, 2008, The Arnolds finally requested that the Family Court simply terminate in its entirety the grandparent visitation which had previously ordered by the Court. As basis therefore the Arnolds claimed that such visitation was no longer in the best interests of their child due to the fact that the Lyons' had made false allegations of abuse concerning the child's father, Warren Lee Arnold, as well as the resulting repercussions of these false allegations, also that due to the child's age the

current grandparent visitation is no longer appropriate and serves to interfere with the child's ability to establish normal relationships with his immediate family because of his absence from the home on such a repeated and continual basis, and further that based upon the child's adoptive father's work schedule the grandparent visitation actually serves to prohibit extended weekend parenting time with his son and thus interferes with the parent/child relationship, as well as numerous other grounds as more fully outlined in the record of this case. Simply stated, the two sole fit and lawful parents of the child at issue have now reached a decision regarding the care, control and custody of their child, that decision being that the court-ordered grandparent visitation was no longer in their son's best interests.

The Family Court then saw fit to appoint a *guardian ad litem* for Jon, namely Jeff C. Woods, Esq. Two hearings were subsequently held on this matter and a final order entitled *Order Regarding Motion to Terminate Grandparent Visitation* was finally filed and entered with the Circuit Clerk on November 13, 2009. Said order rejected out of hand the lawful fit parent's testimony and decisions concerning the best interests of their child and Ordered that the previously granted grandparent visitation continue, and additionally ordered that the Arnolds and Lyons attend group counseling sessions together.

On December 14, 2009, the Arnold's appealed the Family Court's Order to the Circuit Court, and on December 16, 2009 said petition was summarily denied, stating quite succinctly and briefly that the Family Court's decision "was supported by the record, was not an abuse of discretion, and was not clearly erroneous." Effectively, the Circuit Court refused to review the case at all, as evidenced by the almost immediate

entry of an order finding that the Family Court did not err, although said order of the Circuit Court failed to address any specific point argued by the petitioners or to clarify any issues of law raised in what was essentially a “stock” order denying the Appellants’ appeal and is itself, in its entirety, little over one page. (See *Order Denying Petition for Appeal*). Although the Arnolds now appeal this “*Order Denying Petition for Appeal*” of the Circuit Court, their present appeal and brief in support thereof addresses mainly the application of the law, the findings and the conclusions of the Family Court order originally appealed, due to the fact that the order of the Circuit Court failed to address any of these points specifically and was in effect essentially a simple and terse refusal to even hear the Appellants’ petition.

At the heart of this matter is the very question of whether or not the two lawful fit parents may make and enforce a decision as regards the best interests of their child when one parent is the biological mother and the other parent is the adoptive father. These parents now appeal together both the erroneous findings and conclusions of the Family Court regarding their constitutional right to care for their child as they see fit, and the resulting order of the Circuit Court affirming the Family Courts decision that indeed they may not.

This appeal calls into direct question whether, as applied to the current case only, the West Virginia Grandparent Visitation Act as contained in West Virginia Code §§ 48-10-101 to -1201 is unconstitutional when the two lawful and fit parents disagree with the Family Court as to whether or not the continuation of such a schedule of court-ordered visitation is in the best interests of their son.

## II. STATEMENT OF FACTS

Originally this case began, as correctly stated in the Order of the Family Court, with the divorce of Mellissa Lyons (now Arnold) from Jonathon Kelli Lyons, which action was filed over ten (10) years ago. One child was born of this union, namely Jon Arnold, the child who is the subject of the present controversy. Shortly after the divorce was final in October of 2000, Jonathan Kelly Lyons died. In November of 2001, while Melissa Arnold remained a single mother and only twenty-two (22) years of age, she reluctantly agreed to the entry of an order on grandparent visitation with the Appellees, Janet and Robin Lyons. This “agreement” by Mellissa, which was reached notably prior to either her marriage to Warren Lee Arnold or his subsequent adoption of their child, Jon, has since served to consistently haunt and destabilize the Arnold family unit, and to force their engagement in numerous emotionally exhaustive and expensive legal battles with the Lyons’ over the care, custody and control of their very own son.

Since the entry of this original order, there have been numerous disputes, distrust and mutual animosity between Arnolds and the Lyons beginning with the Lyons’ unfounded allegation that Melissa was purposefully keeping her son from the grandparents, to numerous contempt petitions alleging willful contempt on the part of Jon’s mother and eventually culminating in false allegations of abuse.<sup>1</sup>

During the interim, and specifically in June of 2003, Melissa married and moved to live with Warren “Lee” Arnold in Roane County, West Virginia. Lee Arnold later adopted Jon as his own child by Order of Roane County Circuit Court , over the blatant

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<sup>1</sup> Notably, neither Melissa nor Lee Arnold has ever been found to be in wilfull contempt of any order of the Family Court.

and strenuous objections of the Lyons'. The case was eventually appealed to the Supreme Court regarding the Circuit Court's decision not to allow a name change of the child based upon the objection of the Lyons. The matter was reversed and remanded with instructions that such a name change was indeed appropriate and that the Arnolds were entitled to the same as a matter of right.<sup>2</sup> Thus, the animosity of the Lyons towards the Arnolds and their parental decisions regarding their son is not limited to the numerous proceedings before the Kanawha Family Court, but is also well know even to this Court as these very same parties have agued here previously regarding essentially the same issue: the extent of the parent's rights as regards their son.

Two days prior to Christmas of 2007, and conveniently during the Appellees' court-ordered visitation with the Appellant's minor child, falsely inflammatory and slanderous allegations of abuse were levied by the Lyons' against Jon's newly adoptive father, Lee Arnold. (See attached "Criminal Complaint" marked as Exhibit A). The result of these false allegations were enormous and disruptive to the Arnold family, being both emotionally and financially taxing on the Appellants, and for three entire months thereafter while the resulting Domestic Violence Petition was in effect, Lee Arnold was forced to live outside of his very home.<sup>3</sup> Christmas was as a result ruined at the Arnold home, and they were forced to halt their celebrations due to the court-ordered removal of their child and the erroneous arrest of his father. These allegations were even stated to have been clearly coerced by the grandparent Appellees in a later forensic psychological evaluation performed upon the child notably at the expense and request of Mrs. Arnold immediately upon his return to his home (see attached "Forensic Interview" marked as

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<sup>2</sup> *In Re: the Adoption of Jon L.*, 625 S.E.2d 251, 2005.

<sup>3</sup> See Transcript of *Hearing Regarding Motion to Terminate Grandparent Visitation* as held on March 20, 2009, [hereinafter referred to simply as "Hrg. Trans."] pgs. 84-87

Exhibit B). Mr. Arnold was in fact arrested and humiliated at his home and in plain sight of his wife, two children, and neighbors on December 23, 2007 as a result of these allegations of abuse, which charges were later dismissed by Motion of the Roane County Prosecutor after “further investigation and disclosures revealed that the charge was likely baseless”. (see attached “Motion” from Roane Ct. Mag. Ct. Case No. 07-F-333 marked as Exhibit C). Melissa Arnold was even forced to file a Writ of Habeas Corpus to retrieve her own child from the Lyons’ due to the Lyons’ convenient failure to include or even mention Mrs. Arnold (the child’s mother) as an interested party in the original ex-parte emergency DVP, which glaring omission resulted in a temporary sole custody determination by the magistrate in favor of the grandparents. (see attached “Writ of Habeas Corpus” in the Family Court of Kanawha County Case No. 07-MISC-519 marked as Exhibit D)

Jon was not returned to his mother until after the holidays, on January 2, 2008, when Mr. and Mrs. Arnold were reluctantly forced to agree to the entry of a protective order allowing Jon to be returned to his mother, provided that his father have absolutely no contact with him for ninety (90) days. (See attached Magistrate Civil Action No. 07-D-2122, and Kanawha County Family Court Action No. 07-DV-2028 marked as Exhibits E, F, and G respectively) As a result, Mr. Arnold was forced to live away from his home, removed from his family, including his wife, his adoptive son and newly born infant daughter throughout the pendency of the DVP which resulted from the Lyons’ false allegations and blatant manipulation of the Arnold’s son.<sup>4</sup> Upon his return, the family finally celebrated their Christmas holidays together in April of 2008.

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<sup>4</sup> Hrg. Trans. Pg. 84-85

The psychological forensic evaluation of Jon was performed the very day following the child's return to his mother, by Dr. Timothy Saar.<sup>5</sup> This evaluation states clearly that Jon was coerced into making false allegations against his father, and further that such manipulation of a cognitively impaired child "**should be considered emotional abuse and should call into question the Lyons' ability to care for this child.**" At the final hearing in the present case, Dr. Saar restated that he stands firmly by this conclusion to this day, and although upon repeated questioning he did admitted that it was "possible" that indeed anyone could have coerced this child at various times throughout his young life, he still maintained his original opinion as being the one most supported by the evidence.<sup>6</sup>

Although a supervised and unlicensed psychologist later testified in this matter contrary to Dr. Saar's initial investigation, Dr. Saar subsequently testified that she was not a psychologist, but was actually being supervised by him at the time, and further that she was neither qualified nor permitted by him as her supervisor to make such broad baseless conclusions as she had.<sup>7</sup> Dr. Saar again restated that he stood by his initial assessment of abuse by the grandparents in their manipulation of this cognitively impaired child.<sup>8</sup> Interestingly, the current Order being appealed relies heavily upon the testimony and conclusions of this woefully unqualified "psychologist", even after her supervising psychologist, Dr. Saar himself testified to her numerous failings, her

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<sup>5</sup> See again Exhibit B, page 4

<sup>6</sup> See Hrg. Trans. pg. 12, and pgs. 24-31

<sup>7</sup> Hrg. Trans. pgs. 6-12

<sup>8</sup> Hrg Trans. Pg. 12, lines 9-21

susceptibility to influence, and her habit of making emotionally based and unsupported conclusions.<sup>9</sup>

The Arnold's, as the child's lawful and fit parents<sup>10</sup>, finally filed their motion to terminate the grandparents' visitation in its entirety, citing numerous grounds therefore, including but not limited to Jon's age and his eventual enrollment in extracurricular activities, Jon's strained relationship with his immediate family, especially that of his new sister (born to Lee and Melissa Arnold well after the grandparent visitation was originally entered), Jon's limited quality time spent with his father due to his father work schedule as relates to the grandparent visitation, as well as their family's continually deteriorating relationship with the Lyons'. Through their subsequent testimony the Arnolds stated quite clearly and unambiguously that they were simply attempting to make and enforce a parental decision as regards the care custody and control of their minor child and accordingly what they, as parents, have determined to be in the best interests of their child.

This case is unique in this regard: a lawful and fit mother and father, the ONLY lawful and fit mother AND father of the child at issue, have concluded and determined that further visitation with these abusive and disrespectful grandparents is no longer in the best interests of their minor child. The Arnolds now feel that it is vital to their son's continued well being and the stability of their family unit as a whole that their child no longer have any "court-ordered" contact with these grandparents. In the order now appealed the Circuit Court affirmed the proposition that the Family Court was within its lawful authority to simply disagree with the parental decision of the Arnolds, and in turn

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<sup>9</sup> Hrg. Trans pg. 6, line 23 through pg. 12, line 21

<sup>10</sup> No allegation or proof upon the record exists that the Arnolds are not the sole lawful and fit parents of Jon.

substitute its own ideals and the conclusions of the guardian for those of the fit parents, resulting in the continued enforcement of the grandparent visitation currently in effect.

It is abundantly clear from the very first sentence of the Family Court Order, and continuing throughout its entirety, that the Family Court based its decision upon emotion and subjective inferences rather than upon the law and the Constitutions of the United States and the State of West Virginia from which all of our laws arise. The Family Court simply disagreed with the decision of the lawful fit parents and ordered the strict enforcement of the grandparent visitation currently in effect. The Family Court even added an additional term of "joint counseling" for the parties involved, which would mandate Lee and Mellissa Arnold attend sessions wherein they would be forced to sit in the same room to presumably "bond" with the very persons who have for years actively sought to disrupt and destroy their family.

### III. ASSIGNMENTS OF ERROR

1. The Circuit Court's decision upholding the ruling of the Family Court must be reversed because the court continues to ignore/misinterpret and thus, misapply, the holding in *Troxel v. Granville*, 530 U.S. 57 (2000) to the instant case;
2. The Circuit Court erred when it affirmed the Family Court's "best interests" determination which ignores settled precedent regarding the role of third parties in the upbringing of children and merely substitutes the Family Court's judgment for that of the lawful fit parents, the Appellants;
3. The Circuit Court erred when it affirmed the Family Court's finding that the current grant of grandparent visitation did not substantially interfere with the parent/child relationship of the lawful parents, the Appellants;
4. The Circuit Court erred when it affirmed the Order of the Family Court because said order failed to adequately demonstrate what "special weight", if any, the Family Court gave to the lawful parents' preference as required by *Brandon L. v. Moats*, 551 S.E.2d 674 at 685 (W. Va. 2001), and why such preferences were unilaterally rejected;
5. The Circuit Court erred in failing to address the clearly erroneous finding of the Family Court where said court minimized the amount of grandparent visitation currently exercised by the Appellees by stating that such entailed "approximately fifteen overnights per year", when in all actuality and fact the grandparent visitation currently entails approximately forty-eight (48) overnights each year,

and additionally infringes upon both Thanksgiving Day, Christmas Eve, as well as the day after Christmas;

6. The Circuit Court erred when it refused to reject the clearly unconstitutional findings of the Family Court when it accepted the recommendations of a third party *guardian ad litem* over the reasonable and clear determinations of the lawful, fit parents concerning the care, custody and control of their child;
7. The Circuit Court erred when it failed to hold that West Virginia's grandparent visitation statute, only as it has been applied in the present case, is an impermissible and unconstitutional infringement upon the sole lawful fit parents' substantive Due Process right to the care custody and control of their own minor child;
8. The Circuit Court erred when it failed to conclude that the Family Court misapplied and/or misinterpreted W.Va. Code § 48-10-1002;
9. The Circuit Court erred when it upheld the Family Court's reliance upon the testimony of an unlicensed supervised psychologist over that of the child's licensed treating psychologist, or that the lower court either mischaracterized and/or misunderstood the testimony of the child's licensed treating psychologist;
10. The Circuit Court erred in upholding the Family Court's discussion and ruling regarding the child's best interests, especially in light of the parent's clear preferences and testimony as to their child's best interests where such ruling is unsupported by the testimony and the record;

#### IV. DISCUSSION OF LAW AND AUTHORITIES RELIED UPON

The standard of review of the rulings below is that the findings of fact made by the Circuit Court are reviewed under the clearly erroneous standard, and the application of the law to the facts are reviewed under an abuse of discretion standard. Questions of law are reviewed *de novo*. See Syl. pt 1, *Turley v. Keese*, 624 S.E.2d 578 (W. Va. 2005).

- A. **The Circuit Court's decision upholding the ruling of the Family Court must be reversed because the court continues to ignore/misinterpret and thus, misapply, the holding in *Troxel v. Granville*, 530 U.S. 57 (2000) to the instant case.**

In the Order now appealed, the Circuit Court has failed to acknowledge the fact that the Family Court entirely ignored and continues to refuse to address the clear holding of the *Troxel* decision by the United States Supreme Court.<sup>11</sup> In reading both the original order granting grandparent visitation along with its subsequent modifications, and the current Order under appeal *in pari materia*, the Circuit Court as well as the Family Court obviously feel that in their sole discretion they may determine what exactly entails the best interests of two lawful fit parents' child, and further that our Courts retain an unfettered authority to ignore and disregard lawful fit parents' determinations as how best to raise their own child and . Although the Family Court rested its decision in part upon *Cathy L.M. v. Mark Brent R.*, 217 W.Va. 319, 617 S.E.2d 866 (2005), it incorrectly assumed that case's holding to be: where there exists *any* prior agreed orders concerning grandparent visitation, lawful fit parents are forever thereafter prevented from asserting that changes in circumstances and/or actions of the grandparents involved can

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<sup>11</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

never serve to make such a grant of grandparent visitation contrary to their child's best interests.<sup>12</sup>

However, the Family Court overlooks the fact that we are only recently faced with the addition of Warren Lee Arnold as an interested party and, most importantly, as a lawful fit parent, and that his preferences as the child's father have never been addressed by the Family Court.<sup>13</sup> Neither Melisa nor Lee Arnold had previously EVER testified regarding their wishes or their conclusions regarding their child's best interests prior to the Hearing on March 20, 2009.<sup>14</sup> Furthermore, the Family Court has NEVER made the necessary and specific findings of fact which would support a grant of grandparent visitation on the part of the Appellees over the objection of the child's father (and mother) as is clearly required by this Court's ruling in Turley v. Keese, 218 W.Va. 231 at pg. 234, 624 S.E.2d 578 at pg. 581 (2005).

The Family Court's failure to address or to otherwise heed or to even acknowledge the ruling in *Troxel* and its progeny is clear error.<sup>15</sup> The *Troxel* decision is unequivocal and, when compared factually with the case at bar, there can be no doubt whatsoever that in this case the forced imposition of the currently fixed visitation schedule in favor of the grandparents violates the Appellants' fundamental liberty interest in the right to raise their child as they see fit.<sup>16</sup>

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<sup>12</sup> *Order Regarding Motion to Terminate Grandparent Visitation*, paragraph 42.

<sup>13</sup> See *Motion to Intervene* filed July 3, 2008.

<sup>14</sup> Hrg. Trans. pg. 43, line 12 through pg. 44, line 20.

<sup>15</sup> Although the *Troxel* case was repeatedly mentioned and addressed by Appellant's Counsel throughout the hearing and pleadings in this case, the *Troxel* decision, or any discussion relating thereto, is absent entirely from the Family Court's order.

<sup>16</sup> *Troxel*, at pg. 65.

First, a brief review of the factual similarities. In *Troxel*, the petitioning grandparents were the parents of a deceased child.<sup>17</sup> Here, the Lyons' are the parents of Jon Arnold's deceased father. In *Troxel*, prior to and after the death of their son, the grandparents had regular contact with the grandchildren.<sup>18</sup> Here, the same is true. The custodial parent in *Troxel* wished to have control over what time, if any, she wanted her children to spend with the grandparent.<sup>19</sup> Here, the Arnolds simply wish to have the exclusive right, as the child's mother and father, to determine if and when any such visits with the Lyons' will in the future occur.

In this context, the *Troxel* Court states as follows:

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

*Troxel v. Granville*, 530 U.S. 57, at pg. 64 (2000) (citations omitted).

In discussing the particular facts of that case, the *Troxel* Court observed:

[The Washington statute] as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "[a]ny person may petition the court for visitation rights at any time," and the court may grant such visitation rights whenever "visitation may serve the best interest of the child." That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. [The Washington

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<sup>17</sup> *Troxel*, at pg. 62.

<sup>18</sup> *Troxel*, at pg. 60-61.

<sup>19</sup> *Troxel*, at pg. 61

Statute] contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. **Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.** The Washington Supreme Court had the opportunity to give [the statute] a narrower reading, but it declined to do so.

Turning to the facts of this case, the record reveals that the Superior Court's order was based on precisely the type of mere disagreement we have just described and nothing more. The Superior Court's order was not founded on any special factors that might justify the State's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters. **To be sure, this case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that [the Washington statute], as applied, exceeded the bounds of the Due Process Clause.**

*Troxel*, 530 U.S. at pg. 68 (citations omitted) (emphasis added).

Ultimately, the *Troxel* Court held that: “[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.” 530 U.S. at 68-69 (citations omitted) (emphasis added).

The Family Court has consistently ignored in its entirety the *Troxel* decision, although its application and stark similarity to the present case is clear beyond any doubt. If the lower court gives any weight whatsoever to *Troxel*, it obviously misinterprets the case to mean that if a court determines that grandparent visitation is in the best interests of the child, it may then simply use this finding to “rebut” the presumption that a fit parent acts in the best interests of that child if the fit parents views

do not coincide with the Court's.<sup>20</sup> That view however, is antithetical to *Troxel's* holding.

The "bottom line" is simply this: irrespective of what West Virginia's statute says, it is axiomatic that West Virginia law must give way to the United States Constitution and to the Constitution of West Virginia.<sup>21</sup> On virtually identical facts, the United States Supreme Court vacated a state court decision, *as applied*.<sup>22</sup> This Court therefore, must simply decide whether it will honor the holding of *Troxel*. If so, the Circuit Court's order denying the appeal as well as the Family Court's decision in this case must be reversed and overturned due to fact that the *Order Regarding Motion to Terminate Grandparent Visitation* constitutes an impermissible infringement upon the lawful fit parents right to exercise custody and sole discretion in the upbringing of their child.

**B. The Circuit Court erred when it affirmed the Family Court's "best interests" determination, which determination ignores settled precedent regarding the role of third parties in the upbringing of children and merely substitutes the Family Court's judgment for that of the lawful fit parents, the Appellants**

In the present case, the Family Court slants the factual record against the child's lawful parents and ignores West Virginia Supreme Court precedent in reaching its conclusion that the best interests of the minor child requires a set visitation schedule with the grandparents.<sup>23</sup>

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<sup>20</sup> Hrg. Trans. pg 107 line 17 through pg. 115, line 23.

<sup>21</sup> West Virginia Constitution Art. 3, § 10, and U.S.C.A. Const.Amend. 14.

<sup>22</sup> *Troxel*, at pg. 72-73

<sup>23</sup> Visitation of Cathy L. v. Mark Brent R., 217 W.Va. 319, 617 SE.2d 866 (2005); In Re Clifford K. v. Paul S., 217 W.Va. 625, 619 S.E.2d 138 (2005); Turley v. Keese, 218, W.Va. 231, 624 S.E.2d 578 (2005);

The Family Court states as the primary reason for its denying the Appellant's motion in the Order now appealed that "the reasons set forth by the Arnolds [for seeking to terminate grandparent visitation] are **rejected** as pretext".<sup>24</sup> This type of ruling, in the present case, is clearly contrary to West Virginia law as well as the laws of the United States and their respective constitutions.<sup>25</sup> The Family Court cannot properly "second guess" the wishes of lawful fit parents as how to best raise their child, and even more offensive here is the inference that these lawful and fit parents have in some manner lied or misrepresented their motives to the Court.<sup>26</sup>

It is not within the Family Court's province to second guess the motivations or concerns of lawful fit parents, and in fact *Troxel* states the exact opposite, that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made."<sup>27</sup> Our Courts have stated time and again that fit parents may raise their children as they see best, without the necessity of conferring with our courts in every decision made concerning their own children's well being.<sup>28</sup> There exists a presumption, which was essentially ignored by the Family Court in the present case, that fit parents act in the best interests of their children.<sup>29</sup> In other words, when the Arnolds filed their motion to terminate the grandparent visitation, the Court *must* automatically assume that they did so in accordance with the best interests of their child. This

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Lindsie D.L. v. Richard W.S., 214 W.Va 750, 591 S.E.2d 308 (2003); State ex rel. Brandon L. v. Moats, 209 W.Va. 752, 551 S.E.2d 674 (2001); In re the Petition of Nearhoof, 178 W. Va. 359, 359 S.E.2d 587 (1987).

<sup>24</sup> *Order Regarding Motion to Terminate Grandparent Visitation*, at paragraph 37.

<sup>25</sup> W.V. Const. Art 3§10, and U.S.C.A. Amm. 14.

<sup>26</sup> *Order Regarding Motion to Terminate Grandparent Visitation*, at paragraph 38.

<sup>27</sup> *Id.* at pgs. 72-73.

<sup>28</sup> Lindsie D.L. v. Richard W.S., (syllabus point 4) 214 W.Va 750, 591 S.E.2d 308 (2003)

<sup>29</sup> *Id.*

presumption was NEVER rebutted, and yet is suspiciously absent in the Court's Order. The Courts' decision to reject the Arnold's pleadings and testimony that their child's best interests demanded the termination of the grandparent rights is contrary to all settled precedent in the field of family law and is quite frankly offensive to the Arnolds as parents. Furthermore, it is a well settled point that the Arnold's interest in the upbringing of their child far exceeds that of ANY OTHER third party, including grandparents.<sup>30</sup>

Here, the Family Court "cherry picks" the facts in order to make it appear that the Appellants' motion was based entirely upon malice towards the child's grandparents.<sup>31</sup> Even if this were so, which it is not, the Family Court would still be obliged to give these fit parents the benefit of the doubt.<sup>32</sup> However, valid reasons (besides the obvious and willful near destruction of the Arnold family unit at the hands of the Lyons' via false allegations of abuse) were clearly given by the Appellants, and yet were summarily rejected as "pretext".<sup>33</sup>

For instance, the Arnolds both testified that Lee Arnold's schedule allows him to spend quality time with his children nearly exclusively during the weekends, two weekends of which every month Jon is absent from their home due to the current grandparent visitation schedule.<sup>34</sup> Further, the Arnolds assert in their pleadings that Jon's immediate family, especially his five year old baby sister, Emma, suffers from Jon's forced separation from the family household.<sup>35</sup> Also, Melissa Arnold testified that the grandparents have **never** discussed with Jon's parents their wishes as to his religious

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<sup>30</sup> *Lindsie D.L. v. Richard W.S.*, at Syllabus Point 2.

<sup>31</sup> *Order Regarding Motion to Terminate Grandparent Visitation*, at paragraph 36-38.

<sup>32</sup> *Lindsie D.L. v. Richard W.S.*, at Syllabus Point 4.

<sup>33</sup> See *Motion to Terminate Grandparent Visitation*.

<sup>34</sup> Hrg. Trans. pg. 55, line 1, through pg. 56, line 21; and, pg. 86, lines 2-9

<sup>35</sup> See *Motion to Terminate Grandparent Visitation*.

upbringing, or their teachings concerning any spiritual “afterlife”<sup>36</sup>, although the Lyons have, on occasion, unilaterally taken it upon themselves to educate Jon in this regard as concerns his deceased biological father.<sup>37</sup>

Additionally, and most importantly, the Lyons consistently refuse to confer or even to request the permission of the Arnolds during any activities they subject Jon to during their visitation, such as boating, trips out of state, etc.<sup>38</sup> Essentially, this mother and father are forced by the Court to allow their child to leave their home for days and sometimes weeks at a time with no idea as to his whereabouts, activities or well being.<sup>39</sup>

This is not an extraordinary case. It is no different from any other case where a grandparent wishes to exert control over his or her grandchild more than a legal parent desires. What is absent from the Family Court’s analysis is any actual evidence that the child’s best interest would be served by a fixed schedule rather than by his legal parent’s choice of timing and duration, if any. In point of fact, the grandfather in this case, Robin Lyons, himself accidentally admits that there does exist a “parenting privilege” as to overnight visitation with grandparents when discussing the fact that neither he nor his wife have any court-ordered visitation with their other grandchildren.<sup>40</sup>

Accordingly, the Appellants submit that the record does not support the Family Court’s findings that it would be in the child’s best interests to impose upon these fit parents any fixed visitation schedule for the benefit of the grandparents herein, or that there existed any reason to reject the parent’s testimony that such continued visitation is NOT in their child’s best interests. The record also clearly fails to support the frankly

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<sup>36</sup> Hrg. Trans. pg. 56, line 22 through pg. 57, line 9.

<sup>37</sup> Hrg. Trans. pg. 61, line 5 through pg. 63, line 11

<sup>38</sup> Hrg. Trans. pg. 103, line 14 through pg. 104, line 16.

<sup>39</sup> Hrg. Trans. pg. 57, line 10 through pg. 58, line 14.

<sup>40</sup> Hrg. Trans. pg. 102, line 15 through pg. 103, line 2.

offensive opinion and ruling that their stated concerns for their child's best interest are mere "pretext".

**C. The Circuit Court erred when it affirmed the Family Court's finding that the current grant of grandparent visitation did not substantially interfere with the parent/child relationship of the lawful parents, the Appellants**

The Family Court's decision rests almost entirely upon the Courts holding in In re the Petition of Nearhoof, 178 W. Va. 359, 359 S.E.2d 587 (1987). It is significant that this case precedes the current statutory provisions, and ironically enough contains within the case a discussion recognizing, among other things, that absent a statutory obligation, most states refused to recognize the "right" of grandparents to visit with grandchildren over the objection of the parents.<sup>41</sup> Moreover, the decision made in *Lindsie* post-dates the *Nearhoof* decision and holds clearly that the rights of a fit parent to make decisions as to the care and custody of their child are paramount to those of **any** third party, including grandparents.<sup>42</sup>

As for the Family Court's factual findings, they are either contrary to the evidence presented or otherwise without any support in the record. Both Melissa<sup>43</sup> and Lee Arnold<sup>44</sup> testified credibly that continued visitation was not in their child's best interests. The Family Judge chose to ignore the Arnold's testimony regarding how a fixed schedule interferes with their decisions regarding the activities and upbringing of

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<sup>41</sup> In re the Petition of Nearhoof, 178 W. Va. 359, 359 S.E.2d 587 (1987) at footnote 3.

<sup>42</sup> Lindsie D.L. v. Richard W.S., (syllabus point 2).

<sup>43</sup> Hrg. Trans. pg 63, lines 12-14.

<sup>44</sup> Hrg. Trans. pg 87, lines 17-19.

their child.<sup>45</sup> Rather, the Family Court conveniently and simply concludes that any and all such assertions by the Arnolds are mere “pretext”.<sup>46</sup>

**D. The Circuit Court erred when it affirmed the Order of the Family Court because said order failed to adequately demonstrate what “special weight”, if any, the Family Court gave to the lawful parents’ preference as required by *Brandon L. v. Moats*, 551 S.E.2d 674 at 685 (W. Va. 2001), and why such preferences were unilaterally rejected.**

Again, when the Family Court even remotely addressed the parents’ preferences, it simply stated that these were “pretext” and then supplemented its own determination that the Arnolds are thus motivated entirely by malice towards the Lyons.

<sup>47</sup> The Order of the Family Court states quite boldly, and without merit, that “[t]he real motivation for the Arnolds filing this petition is to retaliate for what they believe was the Lyons intentional and malicious manipulation of Jon in0ot making false allegations of abuse against his father.”<sup>48</sup>

This statement alone demonstrates a fatal flaw in the Family Court’s analysis and application of the law. The *Lindsie* decision states quite clearly that a fit parent is **always** afforded the presumption that they act in a child’s best interests.<sup>49</sup> Further, *Troxel* recognizes that such a presumption exists as to all fit parents, and recognizes the parent’s fundamental right to make decisions regarding their child, and further expressly prohibits a court such as the one in this case from substituting its judgment for that of the fit parents. Furthermore, by stating (erroneously) that the Arnolds acted out of malice and/or revenge in filing their request to terminate the grandparent visitation, the Family

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<sup>45</sup> After hearing the testimony of the parents the Family Judge had to be reminded that both parents had clearly stated on the record that continuing with the grandparent visitation was no NOT in the child’s best interest (Hrg. Trans. pg. 105, line 24 to pg. 111, line 16).

<sup>46</sup> See *Order Regarding Motion to Terminate Grandparent Visitation*, specifically paragraph 37.

<sup>47</sup> *Order Regarding Motion to Terminate Grandparent Visitation*, at paragraph 38.

<sup>48</sup> *Id.*

<sup>49</sup> *Lindsie D.L. v. Richard W.S.*, at Syllabus Point 4.

Court impermissibly has shifted to the natural parent the burden to justify their own decisions regarding the upbringing and care of their child. This is precisely the kind of court intervention that *Troxel* prohibits and admonishes as absolutely unconstitutional.

Instead of articulating how it afforded the Arnolds preferences any special weight, the Family Court devotes its time to criticizing their decisions and attacking their logic. It also, again, unfairly “cherry picks” the record in certain respects. For example, the Order makes no mention of the Arnold’s own testimony in regards to the upbringing of their child, or the valid concerns they levied as to their child’s best interests in this regard. However, much time is devoted to the recommendations of the guardian, even though he stated quite clearly, and erroneously, during cross examination his “feeling” that fit parents are NOT presumed by him to act in the best interest of their children. Nearly the entirety of the guardian’s report addresses his own “feelings” as concerns this case.<sup>50</sup>

It is clear from the evidence and record in this case that the Family Court did not afford any special weight whatsoever to the lawful fit parents’ preferences. In fact, absolutely **zero** weight was given to the parents’ preferences in the order of the Family Court. The Court merely distorts the evidentiary record and ignores both the *Moats* and *Troxel* decisions in order to justify its intrusion into Appellants’ child-rearing decisions, and the Courts own “feeling” that this child needs regular contact with everyone who loves him.<sup>51</sup>

**E. The Circuit Court erred in failing to address the clearly erroneous finding of the Family Court where said court minimized the amount of grandparent visitation currently exercised by the Appellees by stating erroneously that such visitation entailed “approximately**

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<sup>50</sup> See *Final Report of the Guardian Ad Litem*

<sup>51</sup> See *Order Regarding Motion to Terminate Grandparent Visitation* as read in its entirety.

**fifteen overnights per year”, when in all actuality and fact the grandparent visitation currently entails approximately forty-eight (48) overnights each year, and additionally infringes upon both Thanksgiving Day, Christmas Eve, as well as the day after Christmas;**

This fact, as erroneously stated by the Order of the Family Court, is evident by the record in this case. A brief review of the Final Order entered on November 26, 2001, as well as the subsequent Modification order entered on March 23, 2004, reveals quite clearly that the Lyons’ “grandparent visitation” schedule entitles them to the custody and control of the Arnolds’ child on the First and Third weekend of every month.<sup>52</sup> Said visitation is expanded during the summer vacation months to include the entirety of these weekends, as well as an additional nine (9) days of vacation time. Also, Thanksgiving Day, Christmas Eve, and the day after Christmas are infringed upon<sup>53</sup>, and the Arnolds testified that such a visitation schedule was impractical and damaging to their family unit, and most importantly NOT in their child’s’ best interest.

Again, this is an apparent attempt by the Family Court to “cherry pick” the facts and minimize the effect that the grandparent visitation inflicts upon the Arnold family unit and Jon in particular, as well as an apparent attempt to reinforce the perceived pettiness and malicious intent of the Arnolds in seeking to terminate the grandparent visitation, when in fact they are simply making a judgment as to their own child’s best interests, again with absolutely no regard for *Troxel* and its progeny.

**F. The Circuit Court erred when it refused to reject and overrule the clearly unconstitutional findings of the Family Court when it accepted the recommendations of a third party *guardian ad litem* over the reasonable and clear determinations of the lawful, fit parents concerning the care, custody and control of their child.**

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<sup>52</sup> See *Final Order* entered on November 26, 2001 and the *Modification* order entered on March 23, 2004 which orders outline specifically the amount of time Jon spends away from his home by order of the Family Court.

<sup>53</sup> Hrg. Trans. pg. 54, lines 1-21.

Since this point was addressed above, it will now only briefly be stated that the Family Court's ultimate reliance upon the report of the guardian over the clearly stated preferences of the child's parents is clear from the record and Order appealed in this case and is obviously contrary to law.<sup>54</sup> Such reliance on the opinion and subjective "feelings" of an appointed third-party are clearly contrary to all relevant precedent as established by *Moats* and *Troxel*, as well as being in direct contradiction to the constitution and the fundamental Due Process rights of lawful fit parents to the care, custody and control of their minor child without undue interference by the State or without the "second guessing" of parental decisions by our Courts, or by our Courts appointed representatives. If anything in this case smacks of "pretext" it is clearly the Family Court's appointment of a guardian in the present case, when the Court needed only to hear and give appropriate weight to the preferences of the fit parents, and had in its possession already a forensic psychological evaluation from a source much more experienced and qualified to make determinations as to a child's psychology.<sup>55</sup>

**F. The Circuit Court erred when it failed to hold that West Virginia's grandparent visitation statute, only as it has been applied in the present case, is an impermissible and unconstitutional infringement upon the sole lawful fit parents' substantive Due Process right to the care custody and control of their own minor child;**

Although in *Troxel* the U.S. Supreme Court found a Washington Statute to be an impermissible infringement upon a parent's constitutional right to the custody and control of their minor child, our own State's Supreme Court has found that the Grandparent Visitation Statute as contained in W.Va. Code § 48-10-101 et seq., is "by its terms" constitutional, however as applied to each individual case, rulings must always comport

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<sup>54</sup> See *Order Regarding Motion to Terminate Grandparent Visitation*

<sup>55</sup> See again Exhibit B, *Forensic Interview*

with the Due Process clause, and deference must be afforded to a parent's preference in this regard.<sup>56</sup>

In *Moats*, our Court stated in summary that, by its terms, and in light of the *Troxel* decision, our Grandparent Visitation Statute was not *per se* unconstitutional due to the fact that one of the factors listed therein for consideration in a grant of grandparent visitation is the "preference of the parent". The Court cautioned that "special weight" **must** be afforded to this factor in light of *Troxel*.<sup>57</sup> Ironically, the very case relied upon by the Family Court, that of *Cathy L.M.* should be controlling in the present case, and clearly establishes that where a parent's (or in our preset case "both parents") express their desire and articulate clearly their wish that their child not be required to visit the grandparent in question, in almost every situation the parental preference must prevail due to the clear fundamental constitutional right of parents over that of grandparents.<sup>58</sup>

In other words, when a lawful, fit parent objects to such visitation, and further can articulate reasons therefore, the Constitutions of both West Virginia and the United States demands that the parent's preference not be disturbed else the State find itself second guessing fit parents daily decisions as to how best raise their child.<sup>59</sup> Essentially, the very case cited by the Family Court in support of its Order is the case which establishes the rule in West Virginia, and is the very case which clearly establishes the constitutional error inherent in the Order itself. That rule being in favor of a parent's preferences over that of any Court's "feelings" or any "wishes" of a third party is quite clear.<sup>60</sup> The case

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<sup>56</sup> *Brandon L. v. Moats*, 551 S.E.2d 674 at 685 (W. Va. 2001); and *Cathy L.M. v. Mark Brent R.*, 217 W. Va. 319, 617 S.E.2d 866 (2005)

<sup>57</sup> See *Moats*, at page 685.

<sup>58</sup> See *Cathy L.M.* at 327 or 874.

<sup>59</sup> W.V. Const. Art 3§10, and U.S.C.A. Amm. 14

<sup>60</sup> *Cathy L.M. v. Mark Brent R.*, 217 W. Va. 319, 617 S.E.2d 866 (2005)

of *Cathy L.M.* proves unequivocally that although our Grandparent Visitation Statute is not unconstitutional on its face, it can obviously be applied to reach an unconstitutional result or outcome. Such is the very case at bar. The result of the Family Court's application of the Grandparent Visitation Statute is, in the present case and Order, in direct contradiction to the fundamental due process rights of this child's lawful fit parents to the custody, care and control of their very own child.

**H. The Circuit Court erred when it failed to conclude that the Family Court misapplied and/or misinterpreted W.Va. Code § 48-10-1002**

The Family Court, in the Order now appealed, seems to believe that the sole statutory avenue for the termination of a previous grant of grandparent visitation exists under W.Va. Code § 48-10-1002. Although this statutory section is titled "termination of grandparent visitation" the Court ignores the previous section in the very same Act. W.Va. Code § 48-10-1001 is clearly meant to be read in conjunction with section 1002 and the Family Court's refusal to address the provisions of section 1001 is clear error.

This previous section states:

Any circuit court or family court that grants visitation rights to a grandparent shall retain jurisdiction throughout the minority of the minor child with whom visitation is granted to modify or terminate such rights as dictated by the best interests of the minor child. W.Va. Code § 48-10-1001.

Hence, both of these statutes give the Courts the authority to terminate grandparent visitation. The only difference is that W.Va. Code § 48-10-1001 is discretionary and rests on the "best interests" determination, and W.Va. Code § 48-10-1002 makes such a termination mandatory when a preponderance of the evidence is presented that the grandparents violated a term and condition of the order. These statutory provisions are clearly meant to be read together with one another as evidenced

by their placement under “Part 10” of the relevant Act. In fact, these two statutes constitute the entirety of “Part 10” of the Act, and there can be no other reading than that the sections are indeed intended to be read together. For the Family Court to ignore that it has the right and/or duty to terminate grandparent visitation when such visitation is clearly no longer in the child’s best interests, is blatantly contrary to W.Va. Code § 48-10-1001, which section the Family Court utterly ignored in its Order. The Family Court’s refusal to even address its statutory duty and authority as provided by W.Va. Code § 48-10-1001 is clear error.<sup>61</sup>

Regardless, false allegations of abuse should in every case be considered a “violation of the terms and conditions” of the order granting grandparent visitation. As well, the Arnolds testified that the termination was in their child’s best interests, and such a determination by the lawful fit parents, under all relevant precedent, is absolute and must be presumed valid.

**I. The Circuit Court erred when it upheld the Family Court’s reliance upon the testimony of an unlicensed supervised psychologist over that of the child’s licensed treating psychologist, or that the lower court either mischaracterized and/or misunderstood the testimony of the child’s licensed treating psychologist**

This error was mentioned in detail previously in the statement of facts, and there is no need to here recite the Courts reliance upon the testimony of the unlicensed supervised “psychologist”. Such reliance is evident in reading the Order. It should only be sated that Ms. Hunt did not hold a valid license to practice psychology unsupervised, was clearly unqualified to testify as she did, and Dr. Saar’s later testimony to these matters should have served to negate her unsupported conclusions entirely.<sup>62</sup>

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<sup>61</sup> See, again, *Order Regarding Motion to Terminate Grandparent Visitation*

<sup>62</sup> See testimony of Dr. Saar in Hrg. Trans. pgs. 7-12.

Again, Dr. Saar stated quite clearly that he stands by his initial forensic interview (see attached). Hence, any reliance upon this unlicensed psychologist's testimony and conclusions is clearly erroneous.

**J. The Circuit Court erred in upholding the Family Court's discussion and ruling regarding the child's best interests, especially in light of the parents' clear preferences and testimony as to their child's best interests where such ruling is unsupported by both the testimony and the record.**

The record is clear on this point. The Arnold's made a parental determination that their minor child's best interest would be served by eliminating the Court ordered visitation with the grandparents. Fit parents are presumed to act in their child's best interests.<sup>63</sup> Also, fit parents have the constitutional right to bring their children up as they choose.<sup>64</sup> The Family Court's insentience upon "second guessing" the Arnolds' parental decisions are clearly outlined within the Order and the record in this case. The Appellants takes issue with other erroneous statements made by the Family Court, but the matters pointed out herein should be more than adequate to demonstrate that the Family Court's decision is not based upon facts having support in the record, nor does the Family Court properly apply the facts to the current case law precedent or give the proper legal analysis thereto.<sup>65</sup> The Family Court's decision, therefore, cannot stand.

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<sup>63</sup> *Lindsay D.L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003) at Syllabus Point 4

<sup>64</sup> *See Id.*, at 312, 754

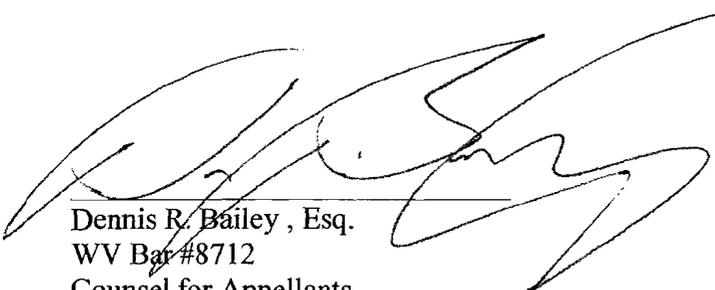
<sup>65</sup> *See, again, Order Regarding Motion to Terminate Grandparent Visitation*

**RELIEF REQUESTED**

**WHEREFORE**, for the reasons set forth above Appellants pray that the Court reverse and remand, or in the alternative overrule in its entirety, the Circuit Court's Order denying the initial appeal as well as the Family Court's *Order Regarding Motion to Terminate Grandparent Visitation*. Appellants further pray for such other and further relief as this Court deems just and proper.

MELISSA ARNOLD and  
WARREN LEE ARNOLD

By Counsel

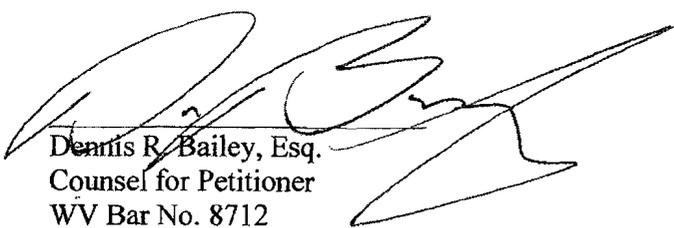


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**CERTIFICATE OF SERVICE**

I, Dennis R. Bailey, Counsel for the Appellants herein, Melissa and Warren Lee Arnold, do hereby certify that I have served the forgoing *Brief of Appellants Melissa Arnold and Warren Lee Arnold* by mailing, via first class United States mail, postage prepaid, a true copy hereof, to the following designated parties, on this the 26th day of October, 2010:

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**EXHIBITS**

**ON**

**FILE IN THE**

**CLERK'S OFFICE**