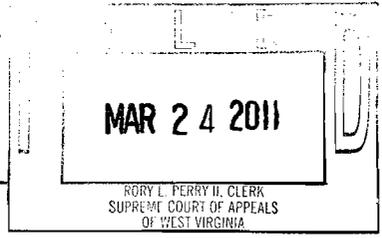


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA



In Re: THE MATTER OF:

ROBIN LYONS and JANET LYONS,
Petitioners below/Appelles,

**ARGUMENT
DOCKET**

Civil Action No: 99-D-2184

And

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

BRIEF OF J. L. (The Minor Child)

Jeff C. Woods
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(304) 760-0170
Guardian Ad Litem

March 23, 2011

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I.

KIND OF PROCEEDING AND NATURE OF RULINGS BELOW

The Appellant, Melissa Arnold is the biological mother of Jon Arnold. The appellant Warren Lee Arnold adopted the involved minor child following the death of his biological father, Jonathan Lyons. The Appellees, Robin Lyons and Janet Lyons are the biological paternal grandparents of the said minor child. The undersigned is the Court appointed *Guardian Ad Litem* for the involved minor child.

This proceeding is an appeal by Melissa Arnold and Warren Lee Arnold from the orders entered in Family and Circuit Courts of Kanawha County, West Virginia which denied their Petition to terminate the grandparent visitation the Robin Lyons and Janet Lyons had exercised with the minor child. The said Petition to terminate visitation was initially denied by the Family Court of Kanawha County by order dated November 13, 2009. The Appellants appealed that Order to the Circuit Court of Kanawha County. Judge Tod Kaufmann of the Circuit Court denied the appeal by Order dated December 16, 2009. This brief is filed on behalf of the involved minor child, the most important party in this action.

II.

STATEMENT OF FACTS

The undersigned was appointed by the Family Court of Kanawha County to serve as *Guardian Ad Litem* for Jon Clayton Lyons (Arnold), a minor male child who was then ten years of age. He is now eleven years old. The Family Court requested recommendations regarding a proposed allocation of "parental time" which would be in the best interests of the child. The Court also directed the *Guardian Ad Litem* to "determine the fitness of the parties and assess the suitability of their [respective] home environments for the minor child."

Mr. Robin Lyons and Mrs. Janet Lyons are the natural paternal grandparents of Jon Clayton Lyons (Arnold). Mr. Jonathan Lyons, the son of Robin and Janet Lyons, is the biological father of this male child. The Appellant, Melissa Arnold, was married to

Jonathan Lyons when Jon Lyons was born on October 16, 1998. However, the two were divorced by an order entered in the Circuit Court of Kanawha County, West Virginia on June 27, 2000. Following their divorce in 2000, Jonathan and Melissa Lyons shared the responsibility of parenting Jon Lyons. Pursuant to a Court adopted "Parenting Agreement" the parties shared major decisions regarding the child. The parties adhered to the aforementioned order and parenting agreement until the untimely death of Jonathan Lyons on October 15, 2000. Thereafter, the paternal grandparents continued to visit with the minor child.

Alleging that Janet Lyons experienced "severe emotional, psychological and physical problems due to her grief" Melissa Lyons sought to have the paternal grandfather present when the child was visiting with the grandmother. In April, 2001, the paternal grandparents filed a "Motion for Grandparent Visitation". Following hearings, the Family Court entered a final order on November 26, 2001, which granted the paternal grandparents the right to visit the minor child on specified weekends of each month. A specific holiday and summer vacation visitation schedule was established.

Mr. and Mrs. Lyons filed a "Petition for Contempt" in the Family Court of Kanawha County on September 3, 2003. They specifically alleged that Melissa Lyons (Arnold) had continuously denied them the visitation granted by the aforementioned final order. This petition also alleged that the child was frequently left in the care of his maternal grandparents who lived within "eyesight" of the paternal grandparents' home in Elkview, West Virginia. Although she denied doing so in a "willful [or] contemptuous" manner, Ms. Melissa Arnold admitted failing to "deliver" the child for visitation on the alleged dates. Noting her marriage to Mr. Arnold, she specifically stated that the court ordered visitation created a "hardship". She also claimed that there were "limiting factors" which required modification of the order. She further alleged that Mr. and Mrs. Lyons had made false reports of child abuse and engaged in "harassment, psychological abuse, and threatening acts." Mrs. Arnold alleged that Mr. and Mrs. Lyons had emotionally abused the minor child by taking him to his father's grave and having him kiss his headstone. Mrs. Arnold also responded that the court ordered grandparent

visitation had “been a constant source of conflict and ha[d] interfered with the parent-child relationship she had enjoyed with her son.” She specifically expressed the belief that the holiday visitation schedule did not allow her and “the child to celebrate Christmas together with her husband’s (and Jon’s stepfather’s) family. Therefore, Mrs. Arnold requested a modification of the existing grandparent visitation schedule.

On March 23, 2004, the Family Court entered an “Agreed Modification Order” which eliminated the midweek visitation, but permitted the grandparents to exercise visitation during the school year on the third weekend of every month. This modified order also permitted grandparent visitation during holidays and the summer.

In June 2004, the parties agreed to the entry of an order relating to visitation by the grandparents during “summer vacation.” After posting a “Performance Bond” the paternal grandparents were permitted to take the minor child on vacation in Cancun, Mexico. Subsequent to this trip Warren Lee Arnold lawfully adopted the minor child. The adoption was finalized in the Circuit Court of Roane County in September, 2004.

On July 3, 2008, Melissa Arnold filed a “Motion for Ex Parte Relief/Emergency Temporary Relief”. In this petition she alleged that Mr. and Mrs. Lyons had “knowingly lodged false allegations of domestic abuse concerning the minor child.” The available information indicates that Mr. and Mrs. Lyons, after observing bruises on the child’s body and being informed by the child that Mr. Arnold spanked him with a belt, reported the incident. A state police investigation and the filing of a domestic violence petition followed. The adoptive father (Warren Arnold) was thereafter denied contact with the child for approximately three months.

While the investigation was pending, the child was evaluated by Psychologist Timothy S. Saar, Ph.D. Dr. Saar expressed the opinion that the child had been “coached by his grandparents into accusing his [adoptive] father of abusing him.” He considered the “coaching” to be mental abuse. He also indicated the child was cognitively impaired. Further, he questioned the ability of the Lyons to care for the child. He suggested future grandparent visits be supervised by a neutral third-party. (See Dr. Saar’s report of July 23, 2008 – Exhibit A)

In addition to the filing the aforementioned petition for ex parte relief, Mr. Arnold filed a motion to intervene. He specifically cited his adoption of the child. By order dated August 28, 2008, the Family Court granted this motion to intervene. The Court also set forth the agreement of the parties which allowed the grandparents to have one supervised visitation per week with the minor child for eight weeks beginning August 1, 2008, with the first six to be conducted at the Charleston YWCA monitored visitation center or alternatively in the office of Psychologist Saar. The visitations during weeks seven and eight were to be conducted in office of Psychologist Saar, who was to submit a timely report. Beginning on week four, the grandparents were permitted to have telephone contact with the minor child on Tuesday and Thursday evenings at approximately 7:00 p.m. At the end of the eight week period and depending on the report of Psychologist Saar, the grandparent visitations previously set by the court were to resume. Ms. Ashley Hunt, a Supervised Psychologist, monitored the visits. She reported that the child "obvious[ly] missed his grandparents". She recommended that the regular visitations with the grandparents be restored. She also recommended therapy to help him in coping with the parties' discord. (See Exhibit B).

On December 5, 2008, Mr. and Mrs. Arnold filed a "Motion to Terminate Grandparent Visitation". In this motion, they alleged that the child's age and activities rendered the grandparent visitation inappropriate. Further, they alleged that the grandparent visitation resulted in a continuing absence from home which interfered with the child's ability to establish normal childhood relationships and their parenting responsibilities. Interestingly, they noted that the relationship between themselves and the Lyons "had deteriorated throughout the years to a [current] non-functional level of mutual animosity and distrust." They also stated that the grandparent visitation prevented the adoptive father's development of an enriched relationship as he worked during the week. They cited the weekend and holiday visitations with the grandparents as an obstacle in the development of a relationship between the child and "his extended" and presumably adoptive family. Mr. and Mrs. Arnold also stated that the grandparent visitation schedule prevented them from enrolling the child in "extra-curricular

activities”, especially those which required regular weekend participation. Finally, they averred that they, as the “lawful parents of the child...no longer wish[ed] for their child to be subjected to grandparent visitation which they contended was not in “in their child’s best interest.” Mr. and Mrs. Lyons responded and resisted this motion to terminate grandparent rights.

During hearings held with regard to the motion to terminate grandparent rights, a difference of opinion between Ms. Ashlee Hunt, a psychologist supervised by Dr. Saar, and Dr. Saar himself became apparent. (See the reports of Dr. Saar and Ms. Hunt dated July 23, 2008, October 2, 2008, and November 29, 2008 – Exhibits A, B, and C).

At a hearing held on February 3, 2009, Ms. Hunt essentially summarized her visits with the minor child and observations of the court ordered visitations between the child and his paternal grandparents. She supported the continuation of such contact and visitations. She testified that it was not in the child’s best interest to be in the middle of and exposed to the conflicts between Mr. and Mrs. Lyons and Mr. and Mrs. Arnold. The hearing was continued to permit Mr. and Mrs. Arnold to present the testimony of Dr. Saar.

The “Temporary Order” entered by the Family Court on February 3, 2009, awarded the paternal grandparents visitation and telephone contact with the minor child. This matter was rescheduled for hearing on March 20, 2009, at 2:00 p.m. By order entered on February 4, 2009, the Family Court appointed the undersigned as Guardian *ad Litem* for the minor child. In accordance with the directives of the Family Court, the Guardian *Ad Litem* conducted an investigation and submitted a report to the parties and the Court. That investigation included a review of documents and interviews with the parties and relevant individuals, including Mr. Robin Lyons, Mrs. Janet Lyons, Mrs. Melissa Arnold, Mr. Warren L. Arnold, and Jon Lyons-Arnold. The Guardian *Ad Litem*’s report is a part of the record and a copy is attached hereto. (See Exhibit D). These interviews were summarized as follows:

Mr. Robin Lyons expressed a great love for his grandson and his concerns for the overall affection he experienced when with Mr. and Mrs. Arnold. He was concerned by

the fact they appeared to treat him as if he had some severe cognitive difficulties. He also noted they refused to allow the child to play baseball. Mr. Lyons noted that the maternal grandparents were able to see Jon anytime they desired. He found it difficult to understand why he and his wife were experiencing difficulties visiting their only grandson. He was quite concerned that Jon is the last male carrying the “Lyons bloodline”. He denied having any animosity toward Mr. and Mrs. Arnold. He believed Jon was losing his identity with the “Lyons” family. He also noted that the child had been advised by Mrs. Arnold and members of her family that she and Jonathan were never married – remarks which confused the child when he found photographs of their wedding.

Regarding the suspected abuse, Mr. Lyons stated he reported the same after Jon indicated that Mr. Arnold “spanked him with a belt and the buckle hit him.” Photographs were shown to the police who then pursued the allegations.

Mrs. Janet Lyons believed Mr. and Mrs. Arnold were trying to prevent Jon from knowing anything about his father or the Lyons family. She denied being “addicted to medications”. She acknowledged her ailments, but indicated they did not interfere with her ability to take care of Jon. She also noted that Jon enjoyed being with them and often cried when he had to leave. She alluded to the amount of time they spent bonding with Jon when their son and Mrs. Arnold were married and prior to Jonathan’s death.

Mrs. Melissa (Lyons) Arnold questioned the appropriateness of the grandparent visitation. In addition to expressing the belief that Mrs. Lyons overused her prescription medications, she stated the grandparent visitation was hampering her ability to form new family relationships and traditions. She specifically noted that the lifestyle of Mr. and Mrs. Lyons was different from her own. She stated she did not “trust them at all”. Further, she stated that “it is hard to turn her son over to them when she did not like them.” She believed Mr. and Mrs. Lyons had told Jon too much about his father and his fatal accident. She expressed great animosity over the fact they had “reported her husband (Mr. Arnold) for child abuse.” She considered the report false and a ploy for the Lyons to get more visitations with Jon. She also expressed the belief that the grandparent

visitations consumed too much time and interfered with her efforts to build a family and traditions. She acknowledged that Jon had a good relationship with her parents who saw him without a schedule. She felt that it would be difficult for Mr. and Mrs. Lyons to see him in that manner.

When questioned about the adoption and the changing of Jon's name, Mrs. Arnold stated that her husband (Mr. Arnold) loved Jon and was a good father to him. She also stated that she wanted Jon to have the same name as herself, daughter and husband. She also noted that Mr. Arnold's family had "accepted" Jon and missed him when he was visiting with the Lyons.

Mr. Warren L. Arnold admitted having considerable anger and wishing to "punish" Mr. and Mrs. Lyons for making a false report of child abuse against him. He believed he was wrongfully separated from Jon for more than ninety days as a result of that false report. He expressed the belief that they should, therefore, be denied their rights to visit with Jon. Mr. Arnold noted that he is "much older" than Mrs. Arnold. However, he stated that they had a genuine relationship. He also acknowledged loving Jon, as if he were his biological son. In as much as he worked five days a week, Mr. Arnold resented the fact Mr. and Mrs. Lyons had dedicated time with him. He believed that the time could be spent with him and members of the Arnold family.

Jon Lyons-Arnold expressed a desire to live with his Mom and Dad, but wanted to see all of his grandparents. He stated he loved his Paw Paw Lyons "a lot." He liked talking to his grandparents on the phone.

Based upon the results of the investigation and in an attempt to consider the best interests of the child and as set forth in the attached report, the Guardian Ad Litem recommended the Grandparent visitation rights of Mr. and Mrs. Lyons remain intact.

During the hearing held on March 20, 2009, the Guardian and the parties testified as set forth above. The Family Court entered an order dated November 13, 2009, which held that "the Arnolds [had] not met the burden imposed upon them by West Virginia Code § 48-10-2 in that they [had] failed to prove by a preponderance of the evidence that the Lyons [had] materially violated the terms and conditions of a previous order."

Therefore, the motion to terminate grandparent visitation was denied and dismissed. This order was appealed to the Circuit Court of Kanawha County, which by order dated December 16, 2009, affirmed the same. This proceeding is an appeal by Melissa Arnold and Warren Lee Arnold from the orders entered in Family and Circuit Courts of Kanawha County, West Virginia. This brief is filed on behalf of the involved minor child, the most important party to the litigation.

III.

ASSIGNMENTS OF ERROR/ISSUES

A. Whether the decision of the Circuit Court which affirmed the Order entered by the Family Court of Kanawha County on November 13, 2009, was erroneous for any reason and was inconsistent with the ruling of the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000)?

B. Whether, when viewed in light of the considerations necessitated by the best interests of the child, the decision of the Circuit Court of Kanawha County which affirmed the Order entered by the Family Court of Kanawha County is legally and factually correct and, consistent with *Troxel v. Granville*, 530 U.S. 57 (2000), and *Brandon L. v. Moats*, 551 S.E.2d 674 (W.Va. 2001)?

C. Whether the allocation of visitation time allocated to the Appellee Grandparents in this case is consistent with the intent of West Virginia Code Section 48-10-1002 and otherwise consistent with the constitutional dictates of due process and any other rights applicable to the parent-child relationship?

D. Whether the actions of the Circuit Court of Kanawha County which affirmed the order of the Family Court of Kanawha County denying the Appellants' "Motion to Terminate Grandparent Visitation" is legally and factually correct and should be affirmed?

IV.

DISCUSSION OF LAW AND AUTHORITIES RELIED UPON

A. The decision of the Circuit Court which affirmed the Order entered by the Family Court of Kanawha County on November 13, 2009, is not erroneous for

any reason and is consistent with the ruling of the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000) and therefore must be affirmed.

B. When viewed in light of the considerations necessitated by the best interests of the child, the decision of the Circuit Court of Kanawha County which affirmed the Order entered by the Family Court of Kanawha County is legally and factually correct and, consistent with *Troxel v. Granville*, 530 U.S. 57 (2000), and *Brandon L. v. Moats*, 551 S.E.2d 674 (W.Va. 2001).

C. The visitation time allocated to the Appellee Grandparents in this case is consistent with the intent of West Virginia Code Section 48-10-1002 and otherwise consistent with the constitutional dictates of due process and any other rights applicable to the parent-child relationship and was in the best interests of the minor child.

D. The actions of the Circuit Court of Kanawha County which affirmed the order of the Family Court of Kanawha County denying the Appellants' "Motion to Terminate Grandparent Visitation" is legally and factually correct and must be affirmed.

The issues involved in this matter are governed by various sections of the West Virginia Code. Specifically, this matter raises issues relating to the "effect of remarriage or adoption" on a grant of grandparent visitation as well as the "modification or termination" of such visitation. West Virginia Code § 48-10-901 clearly indicates that the "remarriage of the custodial parent of a child does not affect the authority of a circuit court to grant reasonable visitation to any grandparent. The facts in this case clearly demonstrate that Mr. and Mrs. Lyons enjoyed visitation before the remarriage of the mother to Mr. Arnold. Further, the grandparents' visitation remained in place following the marriage of Mr. and Mrs. Arnold. Most importantly, the minor child had benefitted from and enjoyed such visitation. An obvious bond, which the child wished to continue, was formed and nurtured.

West Virginia Code § 902 indicates that "an order for grandparent visitation is "automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent, or other relative of the child." However, this statute does not abandon nor dictate that the best interests of the child be ignored. In *State ex rel.*

Brandon L. v. Moates, 551 S.E.2d 674, 209 W.Va. 752 (2001), this Court held that the right of the paternal grandparents to visitation following an adoption is governed by the Grandparent Visitation Act instead of the more general provisions of the adoption statutes. This Court further held that the statute which permitted grandparents to apply for an order granting visitation with a grandchild contained no limitations on when a petition may be filed. Also, the statute did not limit the consideration to petitions seeking visitation to “pre-adoption situations”. (*Id.*)

Clearly, the issue relating to grandparent visitation in the instant case was addressed pre and post-adoption. The parties honored and observed requests and orders for such visitation under both circumstances. Consequently, the minor child was placed in a position where he was able to bond with his paternal grandparents. Permitting his parents to “change their minds” without demonstrating a legitimate reason for doing so would be detrimental to his best interests. In *Petition of Nearhoof*, 359 S.E. 2d 587, 178 W.Va. 359, the Court held that the Circuit Court could “order that the grandparents shall have reasonable and seasonable visitation” with the child of their deceased child, “provided such visitation is in the best interest of the child, even though [that] grandchild had been adopted by the spouse of the deceased child’s former spouse.” Again, the overall evidence of record in this case demonstrates that continuing the grandparent visitations are in the best interests of the minor child.

The aforementioned considerations also underscore the flaws in the Appellants’ assertion that the issues in this case are determined by the decision of the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000). A specific and thorough analysis of this decision demonstrates that the Appellants’ argument lacks merit for numerous other reasons. First, *Troxel*, by its own acknowledgement is limited to an analysis of the statute from the state of Washington. The Court’s opinion specifically stated that “[a] combination of several factors compel[ed] the conclusion that [the provisions of the Washington statute] as applied ..., exceeded the bounds of the Due Process Clause.” (*Id.*)

Second, the facts of the instant case and *Troxel* are easily distinguishable on their individual facts. *Troxel* involved an attempt to restrict visitation. In the instant case, the Appellants are attempting to completely sever the relationship which exists between the biological paternal grandparents and the minor child. While they continuously allude to their constitutionally protected rights, the Appellants attempt to act as if the minor child does not have any. As Justice Stevens stated, children also have Constitutionally protected interests which must be considered and balanced. (*Id.*) See also, *Michael H. v. Gerald D.* 491 U.S. 110, 130 (1983). In this regard, it is also important to note that the Court in *Troxel* alluded to statutes in multiple states, i.e. Mississippi, Oregon, and Rhode Island, and noted that many States expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party. (*Troxel, Supra*). Again, it was and remains the goal of the Appellants to eliminate the relationship which exists between the Lyons and the minor child. A position of this nature overlooks the fact that children have an interest in preserving familial relationships. (*Id.*)

Third, the Court in *Troxel* noted the intended limited nature of its decision. Specifically, the Court stated that its decision rested on the “sweeping breadth of the [Washington statute] and its application” in that case. (*Id.*) This is a general theme to which the Court alluded throughout its decision. Clearly, *Troxel* was not intended to stand for the broad and far reaching Constitutional implications cited by the Appellants.

Fourth, the United States Supreme Court specifically noted that the constitutionality of any standard for awarding visitation turns on the specific manner in which the statutory standard is applied. (*Id.*) A review of the West Virginia Grandparent Visitation Statue as applied by the Family and Circuit Courts in this case must be made with caution and in recognition of the Supreme Court’s dictate that “constitutional protections in this area are best “elaborated with care.” (*Id.*) Again, the Appellants are attempting to have this Court apply *Troxel* in a dangerous, ill-advised, narrow, selfish and haphazard fashion which ignores, as the Supreme Court recognized

that “state-court adjudications in this context occur on a case-by-case basis.” (*Id.*). Thus, this Court like the United States Supreme Court should be hesitant to hold that specific non-parental visitation statutes violate the Due Process Clause as a *per se* matter.” (*Id.*). The findings of the Family Court of Kanawha County contained specific findings which alluded to defined factors. In pertinent and relevant part the Family Court found that:

(a) the proceeding was one to “terminate grandparent visitation;

(b) the maternal grandparents visited with the minor child on a regular basis and essentially at will;

(c) the professional psychologists, while disagreeing on some issues, appeared to agree that depriving the minor child of contact with his paternal grandparents could prove detrimental and non-beneficial to his future development and the acquisition of his heritage;

(d) the best interest of the child would be served by continuing visitation with his paternal grandparents;

(e) there appeared to be ample opportunities and time available for all of the parties to spend beneficial time with the child;

(f) following the untimely death of the child’s biological father, the Appellants’ subsequent marriage and the adoption of the child by Mr. Arnold, the paternal grandparents continued to visit with the child;

(g) given the longstanding contact between the minor child and the paternal grandparents the abrupt termination of such contact would be detrimental to the child and his future interests;

(h) there was no true evidence that the child’s visitations with the paternal grandparents had been detrimental to the child and his best interests;

(i) although potentially and mildly inconvenient for the adult parties and contrary to their subjective desires, the continuation of the paternal grandparent visitations was in the best interests of the child;

(j) West Virginia Code Section 48-10-1002 was instructive, relevant, applicable and controlling in the resolution of the issues;

(k) the testimony of the Appellants indicated that their desire to terminate visitation was motivated by animosity and ill will toward the paternal grandparents;

(l) The West Virginia Legislature has evidenced a clear intention, absent a demonstration of significant factors of unsuitability or unfitness, to foster relationships between grandparents and grandchildren. *See, e.g. West Virginia Code Sections 48-10-1002 and 49-3-1(a)*;

(m) The West Virginia Supreme Court of Appeals has recognized that preferences given to grandparents for the placement and by analogy visitation, should be overcome only where the record reviewed in its entirety established that the same is not in the best interests of the child. *See, Napoleon v. Walker*, 217 W.Va. 254, 617 S.E. 2d 254, 617 S.E. 2d 801 (2005);

(n) The West Virginia Supreme Court has also recognized the right of a child to enjoy continued association with those individuals to whom the child has formed an attachment. *See, Snyder v. Scheerer*, 190 W.Va. 64, 436 S.E. 2d 299 (1993);

(o) The report and testimony of the Guardian *Ad Litem*, who interviewed the minor child outside the presence of the remaining parties, demonstrates that the child loves his parents and grandparents and has no desire to be separated from either of them;

(p) The evidence in this case demonstrates that the child has a strong attachment to his parental grandparents and that there is nothing about the contact he has with them which is contrary to his best interests;

(q) The State Supreme Court has also recognized that “the best interests of a child are served by preserving important relationships in that child’s life.” *See, State ex rel. Treadway v. McCoy*, 189 W.Va. 210, 429 S. E. 2d 492 (1993); and

(r) the minor child had an important relationship with the paternal grandparents.

In their brief, the Appellants suggest that the Family and Circuit Courts of Kanawha County ignored the testimony of Dr. Saar. However, they fail to note that Dr. Saar had supervised and implicitly improve the reports and recommendations of Ms. Ashley Hunt, the psychologist who interviewed the parties and the child and concluded

that it would be detrimental to his best interests to terminate the visitations which had proceeded over a significant period of time. Regarding this testimony, the Family Court in its order noted that the professional psychologists, while disagreeing on some issues, appeared to agree that depriving the minor child of contact with his paternal grandparents could prove detrimental and non-beneficial to his future development and the acquisition of his heritage.

The termination of grandparent visitation is governed by West Virginia Code Section 48-10-1002. In its entirety, this section provides:

A circuit court or family court shall, based upon a petition brought by an interested person, terminate any grant of the right of grandparent visitation upon presentation of a preponderance of the evidence that a grandparent granted visitation has materially violated the terms and conditions of the order of visitation.

In the instant case the preponderance of the evidence fails to indicate that there is any reason to terminate grandparent visitation. To the contrary, the weight of the evidence demonstrates that the best interests of the child would be negatively impacted by such termination. The available information and the conduct of the Appellants reflect an environment which placed stress and instability in the life of this minor child. This minor child wants to love and spend time with “everybody” in his family. The obvious animosity which exists between the Arnolds and Lyons is of immense concern and does not inure to the best interest of this young man. The Appellants, as the adults to whom he looks for guidance, are engaged in an unfortunate battle driven by a desire to “get even”. By their own statements, Mr. and Mrs. Arnold do not like nor trust the Lyons because of the report of abuse they believed to be false. They testified they were motivated to “get even”. Also, their desire to build a separate family and establish traditions appear to motivate their determination to eliminate the Lyons as biological paternal grandparents. Regardless of the motive, the Appellants engaged in behaviors which are not in the best interest of the minor child. Further, these behaviors have the potential to adversely affect the child’s future and development. At a minimum, such behaviors ignore his constitutional rights and relegate him to a position of being nothing more than a pawn

under their control. As the *Troxel* court explained, the “constitutional liberty” is promised on a rebuttable presumption that “natural bonds of affection lead parents to act in the best interests of their children.” The overall findings of the family court unequivocally shows that the presumption in this case was rebutted as the Appellants’ desired termination of the grandparents’ rights would not be in the best interest of the child. Given the feelings this child has for his parents and grandparents, the removal of anyone from his life would not be in his best interest. None of these reasons support the Appellants’ assertion that they have an absolute right to make all decisions for the child. As the Court in *Troxel* noted a parent’s rights are entitled to deference but are not absolute. In this case, it is clear that the Appellants’ desire to remove the paternal grandparents from the child’s life is not one which was pursued to further any constitutionally protected right. To the contrary, it was one which bespeaks of a desire to “get even” regardless of the harm and costs to the child.

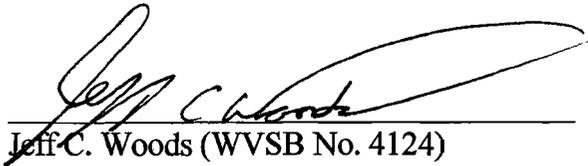
The Appellants are essentially asking this Court to disregard the wishes, needs, and concerns of the child. Specifically, they appear to be arguing that their position as parents clothes them with an absolute and non-reviewable right to do as they please for whatever reasons they please. This is an argument which will set a dangerous precedent and cause a complete abandonment of the legally adopted premise that children are citizens and people who have a right to have their wishes made known and meaningfully considered by the Courts. This Court has specifically indicated that the preferences of children are worthy of consideration and weight. *See e.g., Rose v. Rose*, 176 W.Va. 18, 340 S.E.2d 176 (1985); *Leach v. Bright*, 165 W.Va. 636, 270 S.E. 2d 793 (1980); *See, Murredu v. Merredu*, 160 W.Va. 610, 236 S.E. 2d 452 (1977). *See also, Kiger v. Hancock*, 153 W.Va. 404, 168 S.E. 2d 798 (1969) indicating that in matters involving a child’s custody, due weight must be given to the wishes of a child who is of the age of discretion. Even at the age of eleven, Jon is capable of and has verbalized his desire to have a relationship with everyone in his family, including “all of his grandparents.”

V.

RELIEF REQUESTED

When considered in light of the best interests and needs of the child, the rulings and orders of the Family Court of Kanawha County which denied the Appellants Petition to terminate the rights of the grandparents is legally and factually correct and was properly affirmed by the Circuit Court of Kanawha County. The Order entered by the Circuit Court of Kanawha County on December 16, 2009, must be affirmed by this Court. The Appellants' appeal from that order must be denied.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

In Re: THE MATTER OF:

ROBIN LYONS and JANET LYONS,
Petitioners below/Appelles,

And

Civil Action No: 99-D-2184

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

CERTIFICATE OF SERVICE

I, Jeff C. Woods, Guardian *Ad Litem*, do hereby certify that service of the foregoing "Brief" in the above-styled case has been made on March 24th, 2011, by U.S. mail, postage prepaid, to the following:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE