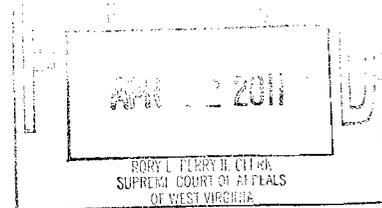


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No.101559

IN RE THE MATTER OF:
ANTONIO ROBERT AGUILAR,

a minor under the age of eighteen.

CIVIL ACTION NO 09-FIG-1
(HARRISON COUNTY)



**JOINT REPLY ON BEHALF OF
PETITIONER, CAROL GOLDEN, AND GUARDIAN AD LITEM**

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The Appellee's sole reliance on In Re: Abbigail Faye B. is misplaced. First, the Appellee argues that the only instance where a guardianship may be granted to a third party instead of a parent is that where the parent has been abusive. Second, the Appellee argues that the definition of fitness is "based upon the abuse and neglect law."

This Court's recent decisions hold otherwise. The facts in the matter of In the Interest of Robert H., Slip Opinion No. 101469 (2011), are similar to the facts in the case at hand. Like the Appellant in this matter, Robert H.'s aunt and uncle were very involved in the child's care and took the child in to live with them.

Also similar to the case at hand is the fact that the aunt and uncle in Robert H. filed a petition for guardianship of the minor child, pursuant to West Virginia Code Section 44-10-3. The aunt and uncle asserted that they had assumed the role of psychological parents.

Unlike the instant matter, lower court in Robert H. actually had an evidentiary hearing and appointed a psychologist to evaluate the parties. The psychologist and child's guardian *ad litem* both advised the court that a parental bond had been established between the child and his

aunt and uncle. Both also opined that severing this relationship would likely cause significant harm to the child.

The circuit court in Robert H. noted that pursuant to West Virginia Code Section 44-10-3(a), a parent shall have a priority in a guardianship proceeding. However, in contrast to the lower court in this matter, the circuit court in Robert H. noted that the competency and fitness of the proposed guardian and the welfare and best interests of the child shall be given precedence. These are two of the exact arguments being made by the Appellant in this matter.

As in the instant matter, the father in Robert H. objected to the appointment of the guardians and asserted that as the child's biological parent who has not been found to be abusive or neglectful, has a fundamental constitutional right to custody of his child. The father further argued that even if the bond that the child developed with his aunt and uncle rose to the level of a psychological parent, such a bond could not operate to deprive a fit parent of custody.

When addressing this argument, the circuit court relied upon the following: "A parent has the natural right to the custody unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty or has waived such right, or by agreement or otherwise has **transferred, relinquished or surrendered such custody**, the right of the parent to the custody of his or her infant child will be recognized and enforced by the courts." *Id.*

Further, this court in Robert H. stated that "If a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable

rights of the child must be considered in connection with any decision that would later impact the child custody. To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child."

Like the child in Robert H, the child in the instant matter had lived with his grandmother for most of his life. She is clearly his psychological parent. Ignoring this fact, the lower court failed to even conduct an evidentiary hearing into the matter and therefore, failed to protect the equitable interests of the child.

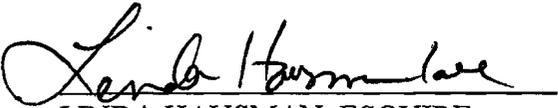
The Appellee also is mistaken in her definition of manifestly harmful. In the Summary Response, the Appellee states that "[t]he West Virginia Supreme Court of Appeals held that a finding of unfitness would be based upon child abuse and neglect laws." In Skidmore v. Rogers, Slip Opinion No. 35291 (2011), this Court held in Syllabus Point 6 that "[t]he term 'manifestly harmful' as used in West Virginia Code § 48-9-401(b) (2009) means obviously harmful or plainly harmful." The lower courts also erred in their application of West Virginia Code § 48-9-401(b), by misinterpreting the term "manifestly harmful."

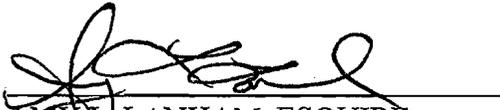
In Skidmore, the family court interpreted "manifestly harmful" to mean "something close to abuse and neglect." This Court found that the lower court misinterpreted the term "manifestly harmful." The Court stated that "[t]he term 'manifestly harmful' is without ambiguity." The Court further stated that it will apply the term's plain meaning "[w]ithout resorting to the rules of interpretation." Citing Williams, 196 W. Va. 639, 474 S.E.2d 569, Syl. Pt. 1, in part (*quoting*, in part, Syl. Pt. 2, State v. Elder, 152 W. Va. 591, 165 S.E.2d 108 (1968)). "The word "manifest" is defined as "readily perceived by the eye or the understanding; evident; obvious; apparent;

plain. "Random House Webster's Unabridged Dictionary 1169 (2d Ed. 1998); see also Merriam-Webster's Collegiate Dictionary 755 (11th Ed. 2005)"

Unfortunately, in the case at hand, no evidence whatsoever was taken despite the recommendations of the undersigned guardian *ad litem*.

For the forgoing reasons and for the reasons asserted in the Appellant's Brief filed with the Petition for Appeal in this matter, the lower court order should be reversed and remanded with instructions to appoint Carol Golden as the guardian for the minor child, Antonio Robert Aguilar, and for such further and additional relief to which the Court deems appropriate under the circumstances.


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CERTIFICATE OF SERVICE

I, Linda Hausman, counsel for Carol Golden, do hereby certify that a true copy of the foregoing Joint Reply on Behalf of Petitioner, Carol Golden, and Guardian ad Litem was served upon Steven B. Nanners, Esquire, counsel for Gina Huffman, Respondent Mother herein; and upon Jorge Aguilar, Respondent Father herein by the following method:

- United States mail, postage prepaid
- Certified mail, return receipt requested
- Hand delivered
- FAX
- Credible Person Service/Private Process Server

and I further certify that service was made this 21st day of April, 2011, at the following addresses:

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