No. 29288 - State of West Virginia ex rel. Brandon L. and Carol Jo L. v. Honorable Alan D. Moats, Judge of the Circuit Court of Barbour County, and Linda K. S. and Richard S.

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OF WEST VIRGINIA

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Davis, J., dissenting:

Before the deliverance of the majority's decision herein, an order of adoption was considered to be a complete divestiture of an adoptee's former familial and legal ties and the creation of a unique adoptive family unit with correspondingly new legal relationships among those family members. The Opinion in the case *sub judice*, though, not only unsettles the once certain world of adoption, causing adoptees and adopters alike to constantly question the security of their court-established rights, it also contravenes the preeminent law of this State which dictates the applicability of new pronouncements of law. For these reasons, I respectfully dissent.

A. Finality

The first source of contention I have with the majority's opinion is its resolute disregard of the heretofore understood force and effect of adoption orders: finality. "Finality is of the utmost importance in an adoption." *State ex rel. Smith v. Abbot*, 187 W. Va. 261, 266, 418 S.E.2d 575, 580 (1992). In this respect, it has been stated that

> *[t]he most drastic and far-reaching action that can be taken by a court of equity is to enter a final order of adoption. Such an order severing the ties between a parent and a child is as final, and often as devastating, as though the child had been delivered at birth to a stranger instead of into the arms*

> *of his natural mother or father*. Custody of children and child support are matters that remain within the breast of the court and are subject to change and modification so long as a child is a minor. *This is not true of adoptions*. Once an order of adoption becomes final, the natural parent is divested of all legal rights and obligations with respect to the child, and the child is free from all legal obligations of obedience and maintenance in respect to them. The child, to all intents and purposes, becomes the child of the person adopting him or her to the same extent as if the child had been born to the adopting parent in lawful wedlock.

14A Michie's Jurisprudence *Parent and Child* § 27, at 285 (2001) (emphasis added) (footnote omitted). These sentiments are echoed by the adoption law of this State which proclaims that

> [u]pon the entry of [an] order of adoption, any person previously entitled to parental rights, any parent or parents by any previous legal adoption, and the lineal or collateral kindred of any such person, parent or parents, except any such person or parent who is the husband or wife of the petitioner for adoption, shall be divested of all legal rights, including the right of inheritance from or through the adopted child under the statutes of descent and distribution of this State, and shall be divested of all obligations in respect to the said adopted child, and the said adopted child shall be free from all legal obligations, including obedience and maintenance, in respect to such person, parent or parents. From and after the entry of such order of adoption, the adopted child shall be, to all intents and for all purposes, the legitimate issue of the person or persons so adopting him or her and shall be entitled to all the rights and privileges and subject to all the obligations of a natural child of such adopting parent or parents.

W. Va. Code § 48-4-11(a) (1984) (Repl. Vol. 1999). *Accord* W. Va. Code § 48-4-9(d) (1997) (Repl. Vol. 1999). Likewise, the culmination of an adoption proceeding, which is evidenced by the order of adoption, is held to be inviolate, except in certain enumerated, and quite limited, circumstances:

> (a) An order or decree of adoption is a final order for purposes of appeal to the supreme court of appeals on the date when the order is entered. An order or decree of adoption for any other purpose is final upon the expiration of the time for filing an appeal when no appeal is filed or when an appeal is not timely filed, or upon the date of the denial or

dismissal of any appeal which has been timely filed.

(b) An order or decree of adoption may not be vacated, on any ground, if a petition to vacate the judgment is filed more than six months after the date the order is final.

(c) If a challenge is brought within the six-month period by an individual who did not receive proper notice of the proceedings pursuant to the provisions of this chapter, the court shall deny the challenge, unless the individual proves by clear and convincing evidence that the decree or order is not in the best interest of the child.

(d) A decree or order entered under this chapter may not be vacated or set aside upon application of a person who waived notice, or who was properly served with notice pursuant to this chapter and failed to respond or appear, file an answer or file a claim of paternity within the time allowed.

(e) A decree or order entered under this chapter may not be vacated or set aside upon application of a person alleging there is a failure to comply with an agreement for visitation or communication with the adopted child: Provided, That the court may hear a petition to enforce the agreement, in which case the court shall determine whether enforcement of the agreement would serve the best interests of the child. The court may, in its sole discretion, consider the position of a child of the age and maturity to express such position to the court.

(f) The supreme court of appeals shall consider and issue rulings on any petition for appeal from an order or decree of adoption and petitions for appeal from any other order entered pursuant to the provisions of this article as expeditiously as possible. The circuit court shall consider and issue rulings on any petition filed to vacate an order or decree of adoption and any other pleadings or petitions filed in connection with any adoption proceeding as expeditiously as possible.

(g) When any minor has been adopted, he or she may, within one year after becoming of age, sign, seal and acknowledge before proper authority, in the county in which the order of adoption was made, a dissent from such adoption, and file such instrument of dissent in the office of the clerk of the circuit court which granted said adoption. The clerk of the county commission of such county and the circuit clerk shall record and

> index the same. The adoption shall be vacated upon the filing of such instrument of dissent.

W. Va. Code § 48-4-12 (1997) (Repl. Vol. 1999).

As is evidenced by the above-quoted authorities, once the proceedings surrounding an adoption have been concluded, the ultimate import of the court's final order of adoption is just that---to serve as a final and complete resolution of the adoptee's former and forthcoming familial and legal relationships, thereby providing him/her with the comfort and knowledge of future certainty. Despite this legislatively intended result, however, the majority of this Court has, in just one Opinion, completely obviated the security attending the conclusion of adoption proceedings by allowing grandparents, who had no prior order of visitation,[1] to petition the court for such an order at any time, even after the entry of a final

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[1]This fact is significant as both the grandparent visitation statutes and the adoption laws suggest that a grandparent who has previously been granted visitation with his/her grandchild has at least nominal rights to continue such a relationship following the grandchild's adoption. *See* W. Va. Code § 48-2B-9 (1998) (Repl. Vol. 1999) (noting, in subsection (a), that "[t]he remarriage of the custodial parent of a child does not affect the authority of a circuit court to grant reasonable visitation to any grandparent," but further admonishing, in subsection (b), that "[i]f a child who is subject to a visitation order under this article is later adopted, the 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"); W. Va. Code § 48-4-8(a)(3) (1997) (Repl. Vol. 1999) (requiring notice of adoption be given to "[a]ny person other than the petitioner . . . who has visitation rights with the child under an existing court order issued by a court in this or another state"); W. Va. Code § 48-4-12(e) (1997) (Repl. Vol. 1999) (observing that "[a] decree or order [of adoption] may not be vacated or set aside upon application of a person alleging there is a failure to comply with an agreement for visitation or communication with the adopted child," but allowing "[t]hat the court may hear a petition to enforce the agreement, in which case the court shall determine whether enforcement of the agreement would serve the best interests of the child"). *But compare* W. Va. Code § 48-2B-3 (1998) (Repl. Vol. 1999) ("A grandparent of a child residing in this state may, by motion or petition, make application to the circuit court of the county in which that child resides for an order granting visitation with his or her grandchild.") *with* W. Va. Code § 48-2B-7(c)

(continued...)

adoption order.

By reaching the decision announced herein, the majority has permitted grandparents, in general, to petition courts for visitation with their *former* grandchildren after their familial relationship has been terminated as a result of the grandchild's adoption. *See* W. Va. Code § 48-4-11(a) (explaining change in familial relationships upon entry of final adoption order). As the adoption will have likewise divested these *former* grandparents of their kinship with their *former* grandchild, however, they simply would have no standing under the governing statutes to pursue such a claim---a simple observation which the Court's Opinion deftly ignores. *See id. See also* W. Va. Code § 48-2B-2(2) (1998) (Repl. Vol. 1999) (defining "[g]randparent" as "a biological grandparent, a person married or previously married to a biological grandparent, or a person who has previously been granted custody of the parent of a minor child with whom visitation is sought", but omitting a *former* grandparent from such definition). I find this result to be particularly absurd considering the majority's lengthy discussion of the respondent grandparents' standing in the case *sub judice*, *see supra* Section III.A, and their ultimate finding of such standing in spite of the respondents' son's relinquishment of his parental rights and their grandchild's subsequent adoption.

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[1](...continued)
(1998) (Repl. Vol. 1999) (suggesting that petition for grandparent visitation will not be granted in certain circumstances where "there is a presumption that visitation privileges need not be extended to the grandparent if the parent through whom the grandparent is related to the grandchild . . . exercises visitation privileges with the child that would allow participation in the visitation by the grandparent if the parent so chose").

Moreover, my colleagues suggest, at the end of Section III.A of the majority Opinion, *supra*, that the Legislature could have amended the adoption statutes to address the present scenario and that their failure to do so necessitates reliance solely on the grandparent visitation statutes. *See* W. Va. Code § 48-2B-1 (1998) (Repl. Vol. 1999) (providing that "[i]t is the express intent of the Legislature that the provisions for grandparent visitation that are set forth in this article are exclusive"). Neither do I agree with this conclusion. Rather, I am of the opinion that the long-standing rule of statutory construction resolves this quandary: *inclusio unius est exclusio alterius*. This doctrine, which means that "'"one is the exclusion of the others[,]" . . . informs courts to exclude from operation those items not included in the list of elements that are given effect expressly by statutory language.'" *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 491 n.6, 490 S.E.2d 306, 310 n.6 (1997) (quoting *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 630 n.11, 474 S.E.2d 554, 560 n.11 (1996)). *Accord State v. Lewis*, 195 W. Va. 282, 288 n.12, 465 S.E.2d 384, 390 n.12 (1995).

Because the adoption statutes at issue herein do, in fact, address the issue of grandparent visitation in adoption proceedings,[2] it seems to me that the Legislature's refusal to speak further on this topic indicates its decision to foreclose any further intervention in adoption proceedings by grandparents or other individuals who seek to assert a purported right to visitation with the adoptee. Given that the respondents' claim does not come within the rubric of intervenors contemplated by the adoption statutes, I would submit that they lack standing to pursue visitation with Alexander David and that the final order of adoption should

[2]*See* W. Va. Code § 48-4-8(a)(3); W. Va. Code § 48-4-12(e). For a discussion of the pertinent language of these statutes see *supra* note 1.

be allowed to remain undisturbed by further proceedings that are not sanctioned by the governing statutory law.

B. Prospective Application

The second issue on which I part company with my brethren herein is the proposed application of the instant Opinion. While my colleagues adhere to the belief that this decision should be given retroactive effect, the applicable law supports only the prospective application of the Court's holding. Typically, the prospective/retroactive dilemma is resolved through the contemplation of several factors

> In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. *Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity.* Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions.

Syl. pt. 5, *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979) (emphasis added). Among these enumerated criteria, I am most concerned with the fourth and fifth factors which address the difficulties attending the majority's decision in this case insofar as it represents a dramatic

departure from the existing statutory law regulating adoptions and grandparental visitation rights.

In the proceedings underlying the instant appeal, it appears that Alexander David's biological parents, Carol Jo L. and David Allen C., complied with the statutory requirements for obtaining consent to and giving notice of Brandon L.'s prospective adoption of his stepson. *See* W. Va. Code § 48-4-3 (1997) (Repl. Vol. 1999) (delineating persons from whom consent to adopt is required); W. Va. Code § 48-4-8 (1997) (Repl. Vol. 1999) (listing individuals entitled to notice of adoption proceedings). Nowhere in these statutes, however, is there a requirement that persons in the position of the respondent grandparents, who did not have any court-established rights to visitation with their grandson, must give their consent to such an adoption or be notified of the proceedings therein. Thus, it appears that the parties to Alexander David's adoption proceedings complied with the law then in existence and, as a result thereof, should have been able to enjoy the protections provided thereby upon their conclusion. *See, e.g.*, W. Va. Code § 48-4-11(a) (describing finality of adoption proceedings). The majority's decision in the case *sub judice*, though, usurps any reliance Carol Jo L., David Allen C., or Brandon L., not to mention Alexander David, could reasonably have placed upon the final resolution of Alexander David's adoption by creating, in the child's grandparents, rights not heretofore contained in the applicable statutory law.

By allowing retroactive application of the instant decision, the majority has effectively amended the statutory law governing both adoption and grandparents' visitation rights to include a class of grandparents never contemplated by either of these promulgations. Primarily, the consent and notice provisions of the adoption laws of this State are designed to shield parents and children alike from

difficulties that may arise when persons who have protected interests have not been made parties to such proceedings. Perhaps no case in this Court's recent history illustrates this point more poignantly than *Kessel v. Leavitt*, 204 W. Va. 95, 511 S.E.2d 720 (1998), *cert. denied*, 525 U.S. 1142, 119 S. Ct. 1035, 143 L. Ed. 2d 43 (1999), wherein a biological mother's failure to notify her child's biological father of their son's adoption resulted in protracted litigation in this Court on claims of tortious interference and fraud nearly seven years after the child's birth and when the child's adoptive fate had long been sealed. As further insurance against late-asserted claims, the Legislature has additionally included within the list of those persons entitled to notice of adoption proceedings "[a]ny person . . . who has visitation rights with the child under an existing court order issued by a court in this or another state." W. Va. Code § 48-4-8(a)(3). Similarly, in the off chance that such persons either have not been properly notified or that the visitation order has not been effective in securing visitation with the adoptee post-adoption, these individuals are allowed a rare opportunity to seek relief from the court in an otherwise finalized matter. *See* W. Va. Code § 48-4-12(e). When, however, the virtual floodgates are opened to allow grandparents, such as the respondents herein, to request visitation rights following the conclusion of adoption proceedings where they had no pre-existing right thereto, the scope of persons with protected interests contemplated by this State's adoption laws has been compromised and a novel application of the law has been created. Both of these results dictate giving the majority's Opinion prospective effect.

Moreover, the Court's decision herein drastically changes the scope of persons entitled to pursue visitation in accordance with the grandparents' visitation statutes. As I discussed in Section A., *supra*, the entry of a final order of adoption effectively changes the legal and familial relationships of the

parties thereto by divesting the pre-adoption lineages and obligations and replacing them with ties indicative of the post-adoption state of affairs. Among the divestitures that take place in the course of an adoption are those of "the lineal or collateral kindred of any" person who was previously entitled to parental rights. W. Va. Code § 48-4-11(a). Thus, as a result of Brandon L.'s adoption of Alexander David, David Allen C.'s parental rights to his son were relinquished and those rights of his parents, the respondent grandparents, if any such rights existed, were likewise extinguished. The effect of the majority's holding, however, has been to miraculously restore the respondents's former kinship status as the child's grandparents upon the Court's decision to grant them standing to pursue their claims for visitation with their *former* grandson. Accordingly, then, the majority's Opinion will have the effect of expanding the Legislature's definition of a "grandparent" to include those persons who formerly enjoyed that status despite the subsequent adoption of their grandchild and their divestiture of such familial status by the statutes governing that adoption. *Cf.* W. Va. Code § 48-2B-2(2). Since this alteration in the grandparent visitation statutes also represents a dramatic departure from the previously established law in this field, the majority's pronouncement thereof should be applied prospectively only.

Accordingly, for the foregoing reasons, I respectfully dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.