STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
June 19, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In re: Guardianship of A.C.

No. 13-1120 (Kanawha County 11-FIG-32)

MEMORANDUM DECISION

Petitioner Donald C.[1], by counsel Mark A. Swartz and Mary Jo Swartz, appeals the Circuit Court of Kanawha County's order denying petitioner's petition for appeal from the Family Court of Kanawha County, entered on October 1, 2013. Respondent Brooke B., by counsel Andrew S. Nason, filed a response in support of the circuit court's order. Guardian ad litem for A.C., Sharon K. Childers, has also filed a response in support of the circuit court's order. Petitioner filed a reply to each response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

This guardianship case has a significant history before the courts of this state. A.C. was born in February of 2003. Her biological mother is Leslie F., and her biological father is Petitioner Donald C. In a paternity action filed in the Family Court of Cabell County in 2004, Donald C. was granted primary custody of A.C. Although Leslie F. was granted visitation rights, she has had little contact with the child and has not had a meaningful relationship with A.C. in many years. At the time of the paternity action, Donald C. was living with Respondent Brooke B. Brooke B. asserts that after Donald C. was granted primary custody, she began performing more than half of the parenting tasks for A.C. For the next seven years, Brooke B. acted as a parent to A.C., including, but not limited to, providing financial support; feeding, clothing, and bathing her; supervising her educational and extracurricular activities; and, taking her to required appointments. Brooke B. cared for the child solely when Donald C. had to travel frequently for his job.

In 2009, Donald C. and Brooke B. ended their relationship. Brooke B. moved out of the home and into her own home in Kanawha County. A.C. moved into that home with Brooke B.,

[1] Due to the sensitive facts involved in this case, we refer to petitioner and the other involved parties by their initials. *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

attended school in Kanawha County, and participated in extracurricular activities in Kanawha County. Based on the testimony of several witnesses, the family court found that A.C. lived in this home until approximately February of 2011.

On January 6, 2011, Donald C. pleaded guilty to tax evasion and bank fraud before the United States District Court for the Southern District of West Virginia. Around this time, Donald C. brought A.C. back to his home to live. Brooke B. alleges that this was a ploy to establish himself as a single parent in an attempt to lessen his sentence. On January 18, 2011, Brooke B. filed a motion to intervene in the paternity case in the Family Court of Cabell County. Her motion asserted that she had been A.C.'s psychological mother since the child was twenty months old and that the child had been living with her in Kanawha County. She asked for appointment as A.C.'s guardian while Donald C. was incarcerated. The Family Court of Cabell County transferred the case to the Family Court of Kanawha County based on Brooke B.'s residence and A.C.'s residence. Donald C.'s counsel then filed a motion to dismiss with the Family Court of Kanawha County. He did not challenge venue but asserted that he was the primary caretaker of A.C. and that Brooke B. was not a psychological parent. The Family Court of Kanawha County denied the motion to dismiss and ordered Brooke B. and Donald C. to divide their custodial time with A.C. and to keep A.C. in her private school in Kanawha County.

In March of 2011, Donald C. filed another motion to dismiss after obtaining new counsel, this time claiming that the Family Court of Kanawha County did not have subject matter jurisdiction to hear Brooke B.'s case because he and A.C. lived in Putnam County. The Family Court of Kanawha County set a hearing to hear the motion, but Donald C. filed a petition for writ of prohibition before the Circuit Court of Kanawha County, claiming lack of subject matter jurisdiction in Kanawha County. On June 29, 2011, the Circuit Court of Kanawha County granted the writ of prohibition, finding that A.C.'s residence was that of her father, which was in Putnam County. Shortly thereafter, Donald C., who had since moved to Boone County, filed a guardianship proceeding before the Family Court of Boone County. On July 18, 2011, Donald C. had his mother, Tonette C., appointed as A.C.'s guardian. A.C. then moved to Logan County with her grandparents. Brooke B. was not given notice of these proceedings.

Meanwhile, Brooke B. appealed the June 29, 2011, order of the Circuit Court of Kanawha County to this Court. On January 24, 2013, this Court issued *Brooke B. v. Donald Ray C.*, 230 W.Va. 355, 738 S.E.2d 21 (2013), which reversed the Circuit Court of Kanawha County's grant of Donald C.'s petition for writ of prohibition, finding that the Family Court of Kanawha County did have subject matter jurisdiction as the residence of the minor, not the residence of the biological parent, controls. This Court also noted that the protracted litigation had caused the participants to lose sight of the best interests of the child. *Id.*, 230 W.Va. at 362, 738 S.E.2d at 28.

On September 21, 2011, Donald C. was sentenced to fifty-one months in federal prison. While the appeal was pending before this Court, multiple hearings were held before the Family Court of Boone County. Brooke B. was repeatedly kept from seeing the child. However, on August 15, 2012, an order was entered by the Family Court of Boone County granting Brooke B. visitation every other weekend. Donald C.'s counsel then began representing Tonette C., and

filed a petition for writ of prohibition with the Circuit Court of Boone County, alleging that the Family Court took action that exceeded its jurisdiction. That matter became moot following the decision in *Brooke B. v. Donald Ray C.* Tonette C. then filed a motion to transfer all matters to the Family Court of Logan County, but pursuant to *Brooke B.*, the case remained in the Family Court of Kanawha County.

A final hearing occurred before the Family Court of Kanawha County on June 12, 2013, at which time the current guardian ad litem was appointed and another evaluation of the child was ordered. At a July 12, 2013, hearing, the guardian reported that the child sought to visit Brooke B. more frequently, but was unsure as to where she wished to live. Further, the guardian noted that Donald C. and his family were placing extreme pressure on her to remain in Logan County, West Virginia, and that the litigation and turmoil in A.C.'s life were causing her serious psychological problems. The guardian recommended temporary termination of communication between Donald C. and A.C. based on the pressure being exerted on A.C. in relation to these proceedings.

On August 19, 2013, the Family Court of Kanawha County entered an order vacating the appointment of Tonette C. as A.C.'s guardian and appointing Brooke B. as guardian. Further, Brooke B. was granted custody of A.C. until Donald C. is released from prison, at which time the court will revisit the custody order. Visitation of alternate weekends and shared holidays is ordered with Tonette C. Donald C. and Tonette C. jointly appealed this order to the Circuit Court of Kanawha County, which denied the petition for appeal from the Family Court of Kanawha County by order entered on October 1, 2013. Donald C. appeals from this denial.

We review a circuit court's denial of the appeal from a family court order under the following standard:

> In reviewing a final order entered by a circuit court judge upon a review of, or upon a refusal to review, a final order of a family court judge, we review the findings of fact made by the family court judge under the clearly erroneous standard, and the application of law to the facts under an abuse of discretion standard. We review questions of law *de novo*.

Syl., *Carr v. Hancock*, 216 W.Va. 474, 607 S.E.2d 803 (2004).

On appeal, Donald C. argues two assignments of error. First, he argues that he was denied his constitutional rights to parent A.C., including his right to make living arrangements for her to live with Tonette C. while he is incarcerated. Secondly, he argues that the family court erred in failing to affirmatively determine A.C.'s residency at the time Brooke B.'s motion to intervene was filed and thereby determine if venue was proper in Kanawha County.

Our review of the record reflects no clear error or abuse of discretion by the circuit court. The family court properly found that Donald C. had already made decisions regarding the parenting of A.C. when he allowed Brooke B. to become her psychological parent and that "he cannot now run roughshod over the best interests of the child." As to the determination of A.C.'s residency, the family court made detailed findings regarding the child's living situation with

Brooke B. in Kanawha County, detailing how, for example, Brooke B. maintained A.C.'s school papers, how A.C. celebrated holidays in the Kanawha County home, how friends of A.C. dropped her off at the home, how Brooke B.'s address was A.C.'s official school address, and how Brooke B.'s authority to give consent for medical treatment of A.C. was never challenged.

Having reviewed the circuit court's "Order Denying Petition for Appeal" entered on October 1, 2013, and the family court's "Final Order Allocating Custodial Responsibility and Appointing Guardian" entered on August 19, 2013, we hereby adopt and incorporate the circuit court and family court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court and family court's orders to this memorandum decision.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 19, 2014

CONCURRED IN BY:

Chief Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISQUALIFIED:

Justice Brent D. Benjamin

IN THE FAMILY COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE THE GUARDIANSHIP PROCEEDING OF:
AJ E C , a minor

BROOKE B ,

Petitioner,

and CIVIL ACTION NO. 11-FIG-32

DONALD RAY C , II,

Respondent,

and

LESLIE F ,

Respondent,

and

TONETTE C ,

Respondent

FINAL ORDER ALLOCATING CUSTODIAL RESPONSIBILITY

AND APPOINTING GUARDIAN

Proceedings in this matter were held by this Court on 11 February 2011, 17 March 2011, 12 June 2013, 12 July 2013, 2 August 2013 and 15 August 2013. This case over a "brilliant" and "insightful", yet "anxious and depressed" precious ten year old-girl who is now in need of psychotherapy, was also litigated in the Circuit Court of Kanawha

County, the Family and Circuit Courts of Boone County and the West Virginia Supreme Court of Appeals. This litigation needs to end so this little girl can heal and feel loved by all sides rather than being torn and pressured to the point that there is legitimate fear that she will engage in self-destructive behavior. Unfortunately, that does not appear likely to happen.

Based on the evidence presented, and after an assessment of credibility, the Court makes and enters the following findings of fact and conclusions of law:

A. The History of the Case

Though clearly set forth in the opinion of the West Virginia Supreme Court of Appeals in *Brooke B. v. Donald Ray C.*, 230 W.Va. 355, 738 S.E.2d 21 (2013), the extent to which the father has attempted to destroy the relationship between Brooke B and the child, and in the process psychologically harm his child, bears repeating:

1. A C was born on the 1 February 2003.

2. Leslie F , the biological mother, who is not now and has not for the last nine years been a major factor in A.C. 's life, initially believed that a young man with the surname T was the father of the child. In fact, Mr. T 's parents, both of whom testified on behalf of Ms. B l, treated

like their granddaughter for a period in excess of a year. Much to their credit, they remain a part of her life.

3. Paternity testing was ultimately done and it was determined that Mr. C was not the biological father of A.C.

4. A request for testing of Donald C was advanced before the Family Court of Cabell County, West Virginia.

5. Donald C submitted to paternity testing and it was determined that he was A.C.'s biological father. A Court order establishing his paternity was entered on 8 February 2005.

6. By an agreed order entered on 26 June 2006 in the Family Court of Cabell County, Donald Carter obtained custody of the child. In approximately October 2004, when A.C. was 20 months old, the mother had voluntarily surrendered the child to Mr. C and his then live-in intimate partner, Ms. B. As set forth below, the couple and the child then lived together as a family unit for the next five years. When the adults' relationship ended in 2009, A.C., with Mr. C s consent, *lived primarily with Ms. B in Kanawha County.*

7. On 6 January 2011, Mr. C pleaded guilty to tax evasion and bank fraud in the U.S. District Court for the Southern District of West Virginia. Ms. B testified credibly that a few months prior to that Mr. C stated that he wanted A.C. to now reside with him in Putnam County because he believed that the judge would render a more lenient sentence on a single parent. Ms. B continued to see A.C. and the child remained enrolled at

Sacred Heart grade school in Kanawha County. Less than two weeks after the guilty plea, Ms. B filed a petition to intervene in the Cabell County paternity case. She sought a determination of psychological parent status and requested custodial responsibility with the child and also asked that upon Donald C 's incarceration she be nominated as guardian of the child. Mr. C was sentenced to 51 months in prison in December 2011 and has not personally participated in the proceedings before this Court since then.

8. Acting *sua* sponte, the Cabell County Family Court entered an Order on 1 February 2011 transferring this matter to the Family Court of Kanawha County, West Virginia. The civil action in Cabell County was assigned a FIG (Family Infant Guardianship) number by the Clerk's office and when it was transferred to Kanawha County, West Virginia it was likewise assigned a FIG number.

9. The transferred action was randomly assigned to this Court.

10. A temporary hearing was held on 11 February 2011, at which time Donald C was represented by Michael Callaghan, Esq. As a result of that hearing an Agreed Order was entered on 8 March 2011, granting Brooke B and Donald C week-on/week-off parenting time and also requiring the parties to submit, by agreement, to a custody evaluation by Dr. Bobby Miller in Huntington, West Virginia. The Order further directed, again with the agreement of the parties, that A.C. "shall not be removed from Sacred Heart...and shall continue to attend elementary school there." Finally, the Order set the case down for further proceedings on 17 March 2011. There was

no objection to or challenge to this Court having jurisdiction and venue. Clearly, as of that date, both parties agreed that the majority of A.C.'s time (counting both residential and school) would be spent in Kanawha County, where she had lived with Ms. B for approximately eighteen of the previous twenty-one months.

11. Shortly thereafter, Donald C changed counsel and Mr. Swartz entered the case. Mr. Swartz filed a Notice of Retention with this Court on 8 March 2011.

12. Also on 8 March 2011, the parties and the child submitted to the agreed custody evaluation by Dr. Miller. Donald C at first refused to be evaluated, but after an emergency hearing and a review of the video of the previous proceeding made clear that both parties had agreed to be evaluated, he complied. Nonetheless, he refused to complete the "Personal History Questionnaire". In his evaluation, Dr. Miller found that:

(a) Ms. B "satisfies the concept of psychological parent and is an adequate parent of her non-biological 'daughter', A ";

(b) That while Mr. C wanted "full custody" he also stated that "I would like to be able to split the month so we each [have] 15 days";

(c) That A understood that "...my Mommy and Daddy are arguing over me...my Daddy took me and (for a while) would not let me see my Mommy...that made me very sad...then he said I would never see her again...I want to be with my Mommy...she does everything for me...I really do not know my Daddy very well";

(d) That Tonette C , Mr. C 's mother, said that "I have no problem with Brooke...after all, she is 's mother...however, she is not flesh and blood";

(e) A ' test scores "...suggest that she is worried, unhappy, lonely, moody, pessimistic, fearful or insecure";

(f) Dr. Miller believed that "The child has become a psychological pawn in the adults' dysfunctional relationship. Donald has a new female in his life and is likely to face a significant legal consequence for his admitted fraud. The father states he intends to allow Brooke to have contact with the child but it is the child['s] understand[ing] that Brooke will not be allowed to function as her mother. *This brilliant and perceptive child is emotionally distressed by the antics of the adults and is psychologically suffering*" (emphasis added); and

(g) Dr. Miller concluded that "Brooke B fulfills the accepted description of a psychological parent. As such, the Court may entertain this special circumstance in considering custody issues related to the child, A s." (*See*, Exhibit 1)

13. On 9 March 2011, Mr. Swartz filed a Motion to Continue the hearing set for 17 March 2011 citing the need for additional time to prepare. Brooke B objected to the continuance insofar as two of her witnesses were physicians testifying as fact and not expert witnesses and both had scheduled time off from work to testify. The Court *granted* the continuance but

allowed the hearing to go forward for the taking of the testimony of the two physician witnesses only.

14. On 16 March 2011 at 9:11 P.M., Mr. Swartz faxed to the Court a 45 page motion to dismiss. That is when this case went from being contentious to vicious and ugly. Ms. B. was thereafter repeatedly referred to and dismissed as being merely the "ex-girlfriend" or "the nanny". On 17 March 2011, the hearing was held as planned and the taking of testimony was limited to the two physicians. The Court rescheduled the final hearing to 18 May 2011 and additionally scheduled a hearing on dispositive motions for 9 May 2011 "or earlier once the Court has an opportunity to review them."

15. Nonetheless, approximately twenty-five minutes after the Family Court proceedings had concluded, Mr. Swartz filed a petition for a writ of prohibition arguing that this Court did not have subject matter jurisdiction because the child now lived in Putnam County with her father, ignoring the fact that she had resided in Kanawha County for approximately 18 out of the previous 21 months before Ms. B. filed her petition and that the agreed temporary Order had substantially returned her to Kanawha County home. The petition was likewise littered with gross misrepresentations, including that the motion to continue the 17 March hearing had NOT been granted and that he had been given insufficient time to review the reports of Dr. Miller and the Guardian ad Litem, neither of whom testified at the hearing, nor were their reports received into evidence, precisely because the motion to continue had been granted for all but the two fact witnesses.

16. The prohibition petition was assigned to Circuit Judge Paul Zakaib and a hearing was held on 24 March 2011.

17. On 29 June 2011, Judge Zakaib entered an Order granting the writ of prohibition due to lack of subject matter jurisdiction in this Court. It is that Order that was unanimously reversed by the West Virginia Supreme Court of Appeals in January 2013.

18. On the same day that the writ was issued, Donald C· · filed a request along with the biological mother to have Tonette C appointed the child's guardian. That Petition for Guardianship was filed with the Family Court of Boone County, West Virginia.

19. In clear violation of Rules 3 and 5 of the Rules of Practice and Procedure for Minor Guardianship Proceedings, Mr. Swartz failed to inform the Court of "the names and present addresses of the persons with whom the minor lived" during the last five years, i.e. Ms. B , and failed to serve her with a summons and the petition despite the fact that she was a person with a "custodial interest" in That same day the Boone County Family Court entered an Order prepared by Mr. Swartz sealing the guardianship case.

20. On 18 July 2011, Tonette C was appointed as guardian of Ms. B was not afforded notice of and, therefore, did not participate in the guardianship proceeding.

21. On 22 July 2011, Ms. B filed an appeal from the writ of prohibition granted by the Circuit Court of Kanawha County with the West Virginia Supreme Court of Appeals.

22. On 31 August 2011, Ms. B filed a Motion to Intervene in the Boone County case and an initial hearing was set for 12 October 2011.

23. Donald C then retained Meshea Poore,Esq., an elected member of the West Virginia House of Delegates. Ms. Poore filed a motion to continue the 12 October hearing due to her legislative responsibilities. The Court continued the hearing until 28 November 2011. Mr. Swartz now switched to become counsel for Tonette C

24. Hearings were held before the Family Court of Boone County, West Virginia on 14 February 2012, 3 April 2012, 13 June 2012 and 2 August 2012. A plethora of motions were filed to limit, delay or eliminate Ms. B l's contact with the child. She testified credibly that she was kept from seeing for over five months. At one point, she was called to the hospital when was undergoing a tonsillectomy and then ordered to leave by Mr. C pursuant to the instruction of his then counsel, Mr. Swartz.

25. On 15 August 2012, the Boone County Family Court entered an Order awarding Ms. B time with A.C. of every other weekend during the school year and week on/week off during the summer.

26. In response, Mr. Swartz filed a Petition for Writ of Prohibition with the Circuit Court of Boone County, West Virginia asserting that the Family Court took action that exceeded its jurisdiction.

27. A hearing was held before Circuit Judge William S. Thompson on 20 December 2012. That matter is now moot given the decision of the Supreme Court of Appeals.

28. The West Virginia Supreme Court of Appeals heard oral argument on Ms. B s appeal on 16 January 2013 and issued a decision eight days later, on 24 January 2013, reversing Judge Zakaib, dissolving the writ of prohibition and directing that the Clerk "issue the mandate forthwith". The Court further Ordered that the "Family Court of Kanawha County should promptly order the Boone County action (and any other subsequently filed actions) transferred to Kanawha County."

29. Incredibly, Mr. Swartz's response to the Supreme Court decision was to file a motion demanding that all matters be transferred to *Logan County.*

30. This matter was scheduled for final hearing by this Court on 18 March 2013, but due to the legislative term being in session Ms. Poore requested and received a continuance.

31. This Court presided over a full day hearing on 12 June 2013.

32. Upon motion of Mr. Swartz, the Court appointed a new Guardian ad Litem, Sharon Childers, the third to be appointed for A.C. in two years. The Court also granted his request that the child be evaluated by Dr. Timothy Saar, Ph.D.

33. The Court reconvened on 12 July 2013. The Guardian, in her written report and testimony, found that the child was unsure of where she wants to live but that she wanted to see Ms. B more and that every other weekend was not enough. The child later stated that a move from Man, West Virginia, where Ms. C and her family live, back to Charleston would be hard. She also stated that she wanted to speak to the judge because the adults

have been talking for her and she wanted to talk for herself. The Guardian found that A .C. faces pressure from her father and his family (excluding Tonette C) to articulate a preference to stay in Man. She recommended that phone calls from the father be limited and monitored. Finally, she recommended that the best interests of the child would be served by designating Ms. B as her primary residential guardian.

34. Dr. Saar's written report and testimony were as follows:

(a) This absolutely beautiful and intelligent little girl "believes she is both unattractive and unappealing to others", causing her to choose a path of "withdrawal and social isolation to protect herself";

(b) She appears to be suffering from anxiety;

(c) "Over an extended period of time, this uncomfortable and lonely girl has developed a pattern of dejection and discouragement. Blue, lacking in self-esteem and fearful of provoking the ire of others, she may have become pessimistic about her future. What few pleasures she used to have may have diminished";

(d) "There are concerns about the development of an early eating disorder and possible self-harmful behaviors";

(e) She is "not at a level of emotional maturity to make a decision about a primary caregiver" and should not be asked to state a preference;

(f) She "should not feel that the outcome of these shared parenting concerns is her 'fault'. It is a pressure that she is not able to cope with at this time";

(g) She "appears torn as she has been shuffled between households and left or abandoned by those who are supposed to care. Much of her anxiety stems from the fear of future abandonment should she choose one guardian over the other";

(h) Dr. Saar strongly recommended that A.C. begin individual psychotherapy as she is tired of being placed in the middle and needs treatment for her stress, anxiety and depression that comes from her fear of betraying one side or the other; and

(i) Finally, Dr. Saar testified that "something has to be settled" because this protracted litigation is not healthy for her.

35. With the permission of the parties, the Court interviewed A.C. *in camera*. She is smart, lively, lovely and delightful. Without being asked, she voluntarily expressed confusion about where she wanted to live, whether in Man or with Ms. B . She said "I'm scared to make a decision." She said she wanted to live in Charleston for the longest time and that her Mamaw (Ms. C) would have let her if not for "my daddy, my papaw and Aunt Missy." She said "My daddy...makes such a big deal over me being in Man."

36. In response to the latest proceedings and temporary Orders trying to assure that the child is promptly and timely enrolled in school no matter the outcome of the case, Mr. Swartz has filed a motion to modify, a motion to vacate, a motion to summarily deny the Guardian's recommendation to temporarily halt communication between Mr. C and A.C. due to

pressure being placed upon the child by the father and a motion to appoint a fourth guardian.

B. Facts Related to the Parties

37. Beginning in 2004 Donald C lived with Brooke B Ms. B and Donald's mother were with Donald the first time he picked up A from the biological mother in Huntington, West Virginia. Ms. B and Ms. C picked up the necessary items needed to care for a child of A 's age, including a car seat, clothing, diapers, wipes and other essentials. A was then 20 months old.

38. Upon the couple assuming *de facto* custody, the child was taken to Ms. B 's home in Pratt, Kanawha County, where she and Donald C were residing.

39. The child lived with Brooke B and Donald C first in Pratt, then in the Woodbridge subdivision in Charleston, Kanawha County, and then they moved to Poca, Putnam County, West Virginia.

40. That Brooke B and Donald C continued to reside together there with A until April 2009 when Brooke B moved out and, *with Mr. C 's consent, took A with her.*

41. During the period of time A , Brooke and Donald lived together, Donald C was operating various businesses including a business that provided drill bits to the coal mining industry. These businesses required him to be out of the home daily while Brooke cared for Al .

42. That Brooke B also worked as a clerk for Mr. C business, either taking A with her to the office or working from home.

43. Donald C took numerous out of state trips, both for business and pleasure, always leaving A in the care of Ms. B .

44. During the course of the litigation Ms. B was derisively and repeatedly referred to by Mr. Swartz as "the nanny".

45. There was no evidence introduced that Brooke B was paid to take care of A . On the contrary, she was repeatedly referred to and considered by Mr. C and Tonette C to be the child's mother.

46. That while Brooke B and Donald C lived together it is apparent from the testimony of the various witnesses including Brooke B Tonette C and Mrs. T that Ms. B was primarily responsible for the day-to-day care of the child including, but not limited to, feeding the child, clothing the child, providing recreational activities for the child, putting the child to bed, bathing the child, and taking the child to doctors, dentists, and

extracurricular activities, including, but not limited to, Maverick Gymnastics, music lessons, theater, dance, and piano lessons.

47. That Brooke B prevailed upon Donald C to enroll A at the Sacred Heart preschool program in Charleston, West Virginia and then later in the elementary school at Sacred Heart.

48. It is additionally beyond cavil that Brooke B was primarily responsible for taking the child to school, picking the child up, signing the child's school papers, providing the necessary parent involvement at the school such as playground duty and assisting teachers in various projects. (See testimony of Crystal Bastin, Kim Javins, Patti Corbett, Sharon Erskin and Brooke B).

49. Some employees of Sacred Heart believed that Brooke B was, in fact, the child's actual biological mother. (See testimony of Patti Corbett and Sharon Erskine).

50. When Brooke B *and A* moved out of the Putnam County home in April 2009, for a short period of time they lived either in the home of her parents or in the home of the T family (whose son the biological mother first believed was the father of A).

51. In or about May 2009, a home was purchased for Brooke and A by the T family on Park Avenue on the West Side of Charleston, Kanawha County, West Virginia. Ms. B is now paying the mortgage on that home.

52. That Brooke and A moved into that house on Park Avenue in May 2009 and that became A ' undisputed primary residence until Mr. C , facing a jail sentence for tax evasion and bank fraud, removed her to Putnam County. She, of course, returned primarily to Kanawha County in February 2011.

53. A had and has her own bedroom in the house on Park Avenue.

54. The testimony confirmed that the home contained all of A ' school work and papers. (See testimony of Brooke B , Kim Javins, Crystal Bastine and Chris B ').

55. Ms. B kept and maintained all of A school papers which is consistent with the behavior of parents of early elementary school children.

56. That A had nearly all of her belongings at the Park Avenue house and she celebrated holidays there. (See testimony of witnesses referenced in paragraph 54).

57. That there was testimony that A ' friends would drop her off at that home at the end of activities, (see testimony of Crystal Bastine and Kim Javins) as well as pick her up at that home to begin activities. A would have friends over to that home. She had clothes there. That was the address given during the following school years as her home address. It was not challenged that Brooke B had authority to take her to doctors and give consent for medical treatment.

58. When this motion to intervene and request to be appointed guardian was filed in Cabell County it is uncontroverted that Brooke B *and A.* had lived on the West Side of Charleston, Kanawha County, West Virginia for a period in excess of eighteen (18) months out of the proceeding twenty-one (21) months and that she continued to attend school in Kanawha County.

59. None of Donald C 's witnesses contested the conclusion that the child lived with Ms. B in Kanawha County up until Mr. B was facing the certainty of being imprisoned.

60. That upon evaluation by Dr. Miller, it was his opinion that Brooke B met all the criteria for a psychological parent. (See Dr. Miller's report and his testimony of June 12, 2013.) He testified that Brook is the person that A looked to on a day-to-day basis for her emotional support, for meals, to get her to and from her activities, for her shelter and for all other childhood needs. This conclusion was also supported by the testimony of Dr. Bastin, Dr. T , Brooke B and her mother, Chris B .

61. That Brooke F has been the only consistent mother figure in the child's life, *e.g.* see testimony of Tonette C and Dr. Miller.

62. That the child either calls Brooke "Monkey" which is A contraction for "Mommy Brooke" or just "Mommy."

63. Tonette C the father's mother, acknowledges that Brooke B is the only mother that A has known. And it is clear to this Court from the reports of the first two Guardians ad Litem, Ariella Silberman of

Kanawha County and Peter Hendricks of Boone County, that they, too, found Brooke B to be the psychological parent of this child.

64. Contrary to Mr. Swartz's derision of Ms. B as being merely "the nanny", Donald C sent an Email to Brooke on 13 July 2010 in which he recognized that she was A mother, would always be A mother and he would not take that away. "Nobody wants to or can change that," he wrote.

65. That in the infant guardianship proceeding that was begun in Boone County in June 2011, Brooke B should have been listed as someone with whom the child lived for the five years prior to the filing of the petition and it should have listed Brooke B as someone who claimed a parental interest in the child.

66. That it has been unexplained to this Court why Brooke B was not listed on that petition or given notice of that proceeding. It must be concluded that her exclusion was an intentional effort to prevent her from participating in the proceedings and to permanently exclude her from the child's life.

67. That it would be inappropriate for this Court to put undue weight on the fact that A lived with her grandmother after the Guardianship Order was entered in Boone County, West Virginia on 18 June 2011, due to the fact that Brooke B did not have the required notice and that Mr. C has since 16 March 2011bitterly resisted all of her efforts to maintain a relationship with the child.

68. That the report of Sharon Childers, as well as the testimony from the child herself, indicates that even while in prison Donald C has unduly pressured the child to curtail her involvement with Ms. B l.

69 That the Court interviewed the child and finds, consistent with Dr. Saar's testimony, that she is intelligent and engaging, but not of sufficient emotional maturity to make a decision as to where she should live, nor does she want to make such a decision.

70. The Court finds that the child is torn between her love and affection for her psychological mother, Brooke B , and her paternal grandmother, and also between her family and friends in Charleston, West Virginia and Man, West Virginia.

71. Both Brooke B and Tonette C are fit and proper persons to have custody of the subject child.

72. That the child was involved in school, her friends , children's theater, children's music/choir and Brooke B 's family and the T family while living in Kanawha County, West Virginia.

73. That the child was involved with friends and family in Man, West Virginia.

74. Leslie F has not participated in these proceedings other than appearing once before this Court. She did not appear in the Boone County proceedings although she nominally consented to Tonette C being the guardian. A has seen her mother one time in 2013 and that was arranged

by Brooke B . The Court finds she has abandoned her role as mother to the subject child.

C. Conclusions of Law

75. That this is an exceptional case and Brooke B properly filed a Motion to Intervene in the matter that was originally filed in Cabell County, West Virginia and then transferred to Kanawha County, West Virginia. This is an exceptional case because Brooke B was the primary adult in the day-to-day child-rearing of A since she left her biological mother's home in 2004 and for a period of over six years thereafter. In doing so, Brooke B clearly became the psychological mother of this child as was recognized by ALL of the parties. She took the child to doctors' appointments, dental appointments and to activities of all kinds and nature. The child had a long-term dependent relationship with Brooke B that was only interrupted by Mr. C 's fear of prison and his attempt to destroy Ms. B through protracted and mean-spirited litigation. Based upon the long-term relationship between the child and Brooke B between 2004 and January 2011, when this matter was initiated, there is simply no question that Ms. B was the psychological mother of A . Her intervention in this case is without doubt in the child's best interests.

76. The Court further finds that prior to the institution of this litigation that Donald C acquiesced in, facilitated, and encouraged the psychological

parent relationship between Al and Brooke B . He did this in a variety of ways: he lived with Brooke B ; he brought his biological daughter into Ms. B s home; he facilitated a family type relationship between 2004 when A first came to live with them until April 2009 when they separated; he left Al with Brooke when he would travel and while he would go about his mine supply business and his real estate development business; he allowed Brooke to sign consents for medical and dental treatment (see records in the notebook introduced in the hearings); he allowed Brooke to be the parent figure who participated at Sacred Heart Elementary School and fulfilled the parent obligations there; he allowed Brooke to make the decision as to where A would go to school; he allowed Brooke to be the parent who went to extracurricular activities and arranged the extracurricular activities. In short, the father allowed Brooke to do all of the things that a normal mother would do. In addition, and most tellingly, when Brooke and Donald separated, he allowed Brooke to *take A with her* and then allowed Al to move into Brooke's new home on Park Avenue in Charleston, Kanawha County, West Virginia, where Ms. B established a *separate* residence from him for herself and her child.

77. That to the extent Mr. C now argues that he has a constitutional right as a parent to make decisions about where his child lives, the record reflects that he has already made those decisions by facilitating, encouraging and allowing Brooke B to be the parent on a continuing day-to-day basis from 2004 up through and including the filing of this action in

January 2011, ceding to her the duties to care for A and provide the essential parental support and guidance that a young child needs. Therefore, a Court Order recognizing the decision the father made for his daughter by allowing Brooke B to become the psychological mother before the instigation of this litigation is not a usurpation of his rights as a parent to make decisions for his child, but rather a recognition of his decision making as evidenced by his own actions. Having allowed an obviously deep bond to occur and Brooke B , he cannot now run roughshod over the best interests of the child.

78. This Court is not persuaded by the argument that since A has lived in Man, West Virginia since June 2011that she should stay there. Her residency in Man resulted from this prolonged litigation designed to destroy the bond between Ms. B and A and was built upon a guardianship appointment proceeding from which Ms. B was intentionally and unlawfully excluded. The appointment of Tonette C as guardian for A C is, therefore, hereby VACATED.

79. In its decision in this case, the Supreme Court of Appeals held that the Court should not just consider the rights of the adults, but must also give due regard to the child's rights and best interests. The Court, therefore, must make an evaluation of what is in her best interest. In that regard, the Court finds that A has a good and valuable relationship with her grandparents. The Court further finds that the biological father is incarcerated and from time-to-time he has attempted to control both his mother, as well as his daughter,

from having contact with Ms. B . Finally, the Court concludes on the basis of all of the evidence that Brooke B is the psychological mother/parent of this child and since she is fit and proper person to have custody, since the child loves her and is happy with her and since for the vast majority of the child's life Ms B has been there for A on a day-to-day and continuing basis, it is in the child's best interest to resume primarily residing with Brooke B , effective immediately. Consistent with the recommendation of Dr. Saar, Ms. B , shall begin a course of counseling for A as soon as possible and is afforded exclusive decision-making authority over her, including educational and medical decision making, until Mr. C is released from prison and he can return to Court.

80. The Court further Orders that the non-school year will be shared equally between Brooke B 's home and the home of Tonette C Holidays shall be equally shared. During the school year the parties will arrange an alternate weekend period for A to be with her grandmother. giving the grandmother the long weekends in the school schedule as part of her alternate weekends. Counsel are directed to submit a visitation plan consistent with this Order not later than 5 September 2013

81. The issue of Donald C 's time with A shall be addressed upon his release from prison. In the meantime, and on the basis of the evidence presented, he shall be limited to no more than two calls per week to A which shall be monitored by either Ms. B or Ms. C . All visits to the prison shall be similarly monitored by Ms. C . Any attempts to

intimidate or pressure the child must be reported to the Guardian or the Court and may result in termination of all contact until he is released and can return to Court.

82. It is clear that the child was allowed to reside in Kanawha County with Ms. B until shortly before this litigation began and that this Court has proper jurisdiction and is the appropriate venue for a guardianship proceeding. The Court therefore APPOINTS Brooke B as guardian of A C . She shall post a bond before the Clerk of this Court in the full sum of $5,000.00 secured by personal recognizance. Brooke B shall have full rights to give all reasonable and necessary consents for education or medical purposes or like purpose.

83. The Court FURTHER ORDERS that the guardianship appointment made herein shall remain in effect until such time that the appropriate conditions, as applicable, are reached and satisfied pursuant to West Virginia Code §44-10-3(c) and (d), and any other pertinent provisions arising under state law.

84. To the extent that any outstanding motion has not been ruled upon above, it is hereby DISMISSED as MOOT or clearly without merit.

The Clerk of this Court shall transmit attested copies of this Order to the Petitioner, and counsel of record, unrepresented parties, guardian or curator appointed herein, and to any fiduciary supervisor or commissioner referenced herein.

ENTER: 19 AUGUST 2013

Mike Kell

JUDGE

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE THE GUARDIANSHIP PROCEEDING OF:
A C , a Minor

BROOKE B ,

Petitioner,

and

DONALD RAY C , II,

Respondent,

and

LESLIE F

Respondent,

and

TONETTE C ,

Respondent.

CIVIL ACTION NO. 11-FIG-32
Judge Paul Zakaib, Jr.

SEALED

ORDER DENYING PETITION FOR APPEAL

This case is before the Court for consideration upon the Petition for Appeal filed by Respondents Donald Ray C II and Tonette C , by counsel, Mark A. Swartz, Esq. and Mary Jo Swartz, Esq. and Swartz Law Offices, PLLC, on August 29, 2013, from the Kanawha County Family Court "Final Order Allocating Custodial Responsibility and Appointing Guardian" entered on August 19, 2013, in the above-styled matter.

Whereupon, the Court, after giving due and mature consideration to said written Petition for Appeal and Response to Petition for Appeal, and after a thorough review of the official Court file in this matter, is of the opinion that good cause or other justification does not exist to grant said petition. Therefore, the Court is of the opinion to and does hereby **ORDER** said Petition for Appeal is **DENIED.**

The Court notes the objection and exception of all parties aggrieved by this ruling, and **FURTHER ORDERS** that the Clerk forward a certified copy of this Order to:

(1) Mark A. Swartz, Esq. and Mary Jo Swartz, Esq., Swartz Law Offices, PLLC, 601

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Sixth Avenue, Suite 201, P.O. Box 1808, St. Albans, WV 25177-1808;

(2) Andrew S. Nason, Esq., Pepper & Nason, 8 Hale Street, Charleston, WV 25301;

(3) Leslie F 2711 1st Ave., Apt. 4, Huntington, WV 25702;

(4) Sharon Childers, Esq., P.O. Box 7486, Cross Lanes, WV 25356;

(5) Meshea Poore, Esq., P.O. Box 11319, Charleston, WV 25339;

(6) Noelle Starek, Esq., Noelle A. Starek, PLLC, P.O. Box 58337, Charleston, WV 25358;

and

(7) The Honorable Mike Kelly, Family Court Judge of Kanawha County.

This is a final order disposing of the appeal.

Enter this 1st day of Oct., 2013.

PAUL ZAKAIB, JR., CIRCUIT JUDGE

RECORDED

Date: 6/12/17
Certified copy(s) mailed to
counsel of record
parties
other M Swartz, A Nason, L Fraley,
(please indicate)
By: S. Childers, M. Poore, N. Starek
certified/1st class mail
fax
hand delivery
interdepartmental
Other (if/when) accompanied