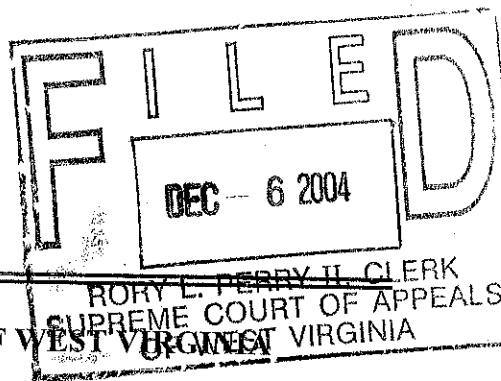


Case Action No. 31855



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TINA BURCH, Appellant

v.

PAUL S. [redacted], in his official capacity as
Next Friend and Guardian of
Z. [redacted] B. [redacted] S. [redacted], an infant,
Appellee

**BRIEF OF AMICI CURIAE LESBIAN & GAY RIGHTS PROJECT
OF THE AMERICAN CIVIL LIBERTIES UNION and
THE AMERICAN CIVIL LIBERTIES UNION
OF WEST VIRGINIA FOUNDATION
IN SUPPORT OF APPELLANT**

From the Circuit Court of Clay County
Civil Action No. 02-D-100

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IDENTITY AND INTEREST OF *AMICI*

The American Civil Liberties Union ("ACLU") is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 400,000 members nationwide and a long history of legal advocacy for equal protection under the law for all citizens. The American Civil Liberties Union of West Virginia is the state affiliate of the ACLU.

The ACLU has been involved extensively in litigation to combat discrimination based on sexual orientation. In 1986 the ACLU formed its Lesbian and Gay Rights Project to coordinate and direct such litigation throughout the United States. Through that Project, the ACLU has participated in many cases involving the rights of lesbians and gay men to become parents and to form and raise families, including *V.C. v. M.J.B.*, 163 N.J. 200, 748 A.2d 539 (2000), and *T.B. v. L.R.M.*, 786 A.2d 913 (Penn. 2001), in which state supreme courts recognized and protected the relationships between children and their "psychological" parents.

The issue presented by this appeal has significant implications for some of the most important civil rights that gay men and lesbians may claim – the right to form families, to raise children, and to maintain their relationships with those children.

INTRODUCTION

A young child lost one of his parents in a tragic accident. The issue before this Court is whether this child must be unnecessarily subjected to the grievous loss of his surviving parent, who wants nothing more than to continue taking care of him.

Z. B. S. was brought into this world by Christine S. and Tina Burch, who were living together in a committed relationship and decided to have a child. Final Order Granting Petition of Tina Burch for Primary Custody of Z.B.S., An Infant, July 25, 2003 (“Final Order”), Findings of Fact, ¶¶ 4, 6. Together, Christine and Tina planned for Christine’s pregnancy and Z.’s birth, and together they raised him for two and a half years until the tragedy of Christine’s sudden death shook the family. Findings of Fact, ¶¶ 4, 6. After Christine died, Z.’s grandparents on Christine’s side sought to take custody of Z. from Tina.

West Virginia law recognizes the importance of preserving children’s bonded relationships with their parents. *See, e.g.*, W. Va. Code § 48-9-102 (maintaining the “[c]ontinuity of existing parent-child attachments” is a primary objective in custody determinations). And this Court has long recognized and protected not only children’s relationships with biological and adoptive parents, but also their relationships with “psychological parents”—adults who, while not their biological or adoptive parents, have lived with them and functioned as their parents. *See, e.g., Interest of Brandon L.E.*, 183 W. Va. 113, 121, 394 S.E.2d 515, 523 (1990) (psychological parent may petition for child custody); *State of*

Florida, DHRS v. Thornton, 183 W. Va. 513, 396 S.E.2d 475 (1990).

The Family Court, after holding an evidentiary hearing, found that Tina, who had a “strong parent-child bond” with Z , had standing as his psychological parent to seek custody of her son, and that it is in Z ’s best interest to be in the primary custody of Tina. Final Order, Conclusions of Law, ¶¶ 3, 8. The Circuit Court reversed, holding that Tina lacked standing to seek custody of Z because “‘psychological parent’ does not extend to a same-sex partner, who resides with the natural parent.” Circuit Court opinion, at 15.

Amici agree with petitioner and *amici* Lambda Legal Defense and Education Fund, et al., that the Family Court correctly applied state law in holding that Tina is Z ’s psychological parent, and that the Circuit Court erred in carving out an exception to the psychological parent doctrine for same-sex partners of biological parents. We write to add that interpreting the law to exclude families like this one from the protections available to psychological parent-child relationships would violate the constitutional rights of both Tina and Z .

The Constitution protects the integrity of parent-child relationships, and that protection exists whether those relationships originate in biology or the reality of family life. There is also a constitutional right to equal treatment under the law. Thus, treating Tina and Z as legal strangers and denying them the protection afforded other psychological parent-child relationships would violate the constitutional right to due process and equal protection.

ARGUMENT

Excluding some psychological parents—those raising a child together with the child's biological parent in the context of a same-sex relationship—from the state's mechanisms for protecting psychological parent-child relationships would violate constitutional guarantees of due process and equal protection.

I. **The Constitution Recognizes and Protects the Relationship Between Children and Psychological Parents.**

All people have the right to join together and form families and the parent-child relationships which result are protected by the Constitution. The parent-child relationship, which is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), is "far more precious than any property right." *M.L.B. v. S.L.J.*, 519 U.S. 102, 105 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982)). A parent's "right to the companionship, care, custody, and management of her children is an important interest that undeniably warrants, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Constitution protects "the integrity of the family unit." *Id.*, at 649; *see also Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("the Constitution protects the sanctity of the family."). Thus, the Constitution places significant substantive and procedural limits on state interference with the relationship. *See, e.g., Santosky*, 455 U.S. 745; *Stanley*, 405 U.S. 645.

The constitutional rights that protect families safeguard the interests of the child as well as the parent. *See, e.g., Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); *Santosky*, 455 U.S. at 760 ("the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (the "right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the 'companionship, care, custody and management of his or her children,' and of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association,' with the parent.") (internal citations omitted).

This constitutional protection extends beyond the traditional nuclear family, *Moore*, 431 U.S. at 502 (grandmother who was raising her grandsons had constitutionally protected relationship with them); beyond families headed by married couples, *Stanley*, 405 U.S. at 649 (unwed father's right to seek custody of child protected); *Levy v. Louisiana*, 391 U.S. 68 (1968) (children of unmarried parents entitled, like other children, to bring action for the wrongful death of their mother); and beyond biological and adoptive parent-child relationships, *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) (certain foster parent-child relationships could be protected by Constitution). Since at least *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Supreme Court has recognized that it is not biological parents alone whose interest in their

relationships with their children is entitled to constitutional protection. The Supreme Court treated the relationship between Sarah Prince and Betty Simmons (Sarah's "custodian" and aunt) as a constitutionally protected parent-child relationship. *Prince*, 321 U.S. at 159, 169; *Smith*, 431 U.S. at 843, n. 49 (citing *Prince* as example of parental due process rights extending beyond biological parents).

The core of the family interest protected by the due process clause, according to the United States Supreme Court, is the emotional bond that develops between family members as a result of shared daily life. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). As the Court put it in *Smith*, 431 U.S. at 844:

[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.

See also Moore, 431 U.S. at 504-506 (recognizing that the constitutional right to parental autonomy extends to relatives who take on the responsibility of child rearing).

Thus, there are circumstances in which families with neither biological nor adoptive parental connections fall within the shelter the Constitution provides for parent-child relationships. *Smith*, 431 U.S. at 844. In *Smith*, the Court offered guidance on how to evaluate whether a particular non-biological family relationship merits constitutional protection. The Court instructed that three factors should be considered:

i) does the family have the "emotional attachments that derive from the intimacy of daily association"?

ii) was the relationship created and limited by state law?; and

iii) would recognition of a constitutionally protected family impinge on the rights of an existing biological family?

Smith, 431 U.S. at 844-46; *Alber v. Illinois Dep't of Mental Health and Developmental Disability*, 786 F. Supp. 1340, 1368 (N.D. Ill. 1992).

Where a parent-child bond was found to exist between the care-giver and the child, the relationship was not created and restricted by the State, and there was no competing interest of a biological parent, psychological parent-child relationships have been deemed to merit constitutional protection. *See, e.g., Alber*, 786 F. Supp. at 1366-75 (a couple who cared for mentally retarded adults for several years established that they had constitutionally protected family relationships, and thus, stated a claim for violation of family privacy based on the State's removal of their wards from their custody); *Interest of R.K.W.*, 689 S.W.2d 647, 650-651 (Mo.App. 1985) (couple who raised a child, without biological or legal connection, had a constitutionally-protected interest in the parent-child relationship that developed, and thus, had a right to a hearing before her removal); *Brown v. County of San Joaquin*, 601 F.Supp. 653, 664-665, (E.D.Cal. 1985) (a foster parent could sue the State of California for removing a child from her home without notice or a hearing because time and events had transformed the relationship from a purely legal one into "the most profound relationship" of mother and child.).

II. The Evidence Relied on by the Family Court Shows that the Parent-Child Relationship of Tina and Z Merits Constitutional Protection.

The Family Court's ruling that Tina is a parent to Z is supported by the evidence. The evidence presented indicates that Tina and Z shared the "strong parent-child bond" that parents and children develop as a result of shared daily life and the assumption of the parental role. These facts easily establish that Tina was not merely someone who lived in Z's house and helped take care of him from time to time, but rather that Tina and Z had a fully developed, bonded parent-child relationship. *See, e.g., V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 1999) (woman who cared for children with her partner for 2 ½ years deemed "psychological parent"); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. 1996) (woman who functioned as parent of child for 3 years deemed to stand *in loco parentis*).

Neither of the other two considerations raised in *Smith* undermine Tina and Z's relationship's entitlement to constitutional protection. First, unlike a foster family relationship, Tina's relationship with Z was not created by the State, and thus, the State imposed no restrictions on it. Second, recognizing a constitutional parent-child relationship between Tina and Z would not impinge on anyone's parental rights. Tina is Z's only living parent.¹ The

¹ This case does not involve a dispute between a psychological parent and a biological parent. But *amici* note that other courts applying the law of psychological parenthood (or analogous doctrines) have held that it applies equally to child custody and visitation disputes between a psychological parent and a biological parent who reared a child jointly as a result of the biological

S. are his grandparents and, thus, are not entitled to the treatment the Constitution affords parents.²

Thus, the facts relied on by the Family Court demonstrate that Tina and Z. have a parent-child relationship that merits the protection of the Constitution.

III. Excluding Lesbian and Gay Co-parents and their Children from the State Law Protections Afforded to Psychological Parent-Child Relationships Would Violate Constitutional Due Process and Equal Protection Guarantees

West Virginia law gives psychological parents standing to come to court and seek custody of the children they have been caring for. But even though Tina is Z. psychological parent, the Circuit Court shut her out of court and denied her the opportunity to seek custody of her child simply because the parent-

parent's consent to the creation of the parent-child relationship. *See, e.g., T.B. v. L.R.M.*, 786 A.2d 913 (Pa.,2001); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *V.C.*, 748 A.2d 539; *E.N.O. v. L.M.M.*, 429 Mass. 824 (1999). In such cases, courts recognize that the biological parent has ceded exclusive parental rights. *See, e.g., V.C.*, 748 A.2d at 552 (If a parent "wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority the exercise of which may create a profound bond with the child."). Thus, courts have also noted that ordering visitation to maintain the relationship between a child and a psychological parent does not violate the biological parent's constitutional right to parental autonomy. *See, e.g., Rubano*, 759 A.2d at 967; *E.N.O.*, 711 N.E.2d at 832.

² Grandparents do not have the right to dictate custodial arrangements over the objection of a fit parent. *See Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (court ordered visitation with grandparents over the parent's objection without giving any material weight to the parent's determination violated the constitutional right to parental autonomy).

child relationship developed in the context of her domestic relationship with Z's biological mother. This violates Tina and Z's constitutional right to due process and equal protection.

A classification that creates differential access to a fundamental federal right is subject to strict scrutiny and can be upheld only if it is narrowly tailored to achieve a compelling government interest. *Zablocki v. Redhail*, 434 U.S. 374, 383-390 (1978) (since the right to marry is fundamental, state law that limits ability of "deadbeat dads" to remarry is subject to close scrutiny); *Police Dep't. of Chicago v. Mosley*, 408 U.S. 92 (1972) (since ordinance that prohibited all pickets near schools except for labor pickets constituted differential access to the right to free speech, strict scrutiny was applied); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (differential burden on right to travel subjected to strict scrutiny).

The state cannot create an exclusive system for getting access to certain constitutional rights, including the right to family integrity, and then ban someone who is entitled to those rights from using that system, without a compelling reason. In *M.L.B. v. S.L.J.*, 519 U.S. 102, 113, 116-21 (1996), the United States Supreme Court held that the "State must provide access to its judicial processes" in the context of termination of parental rights because "a fundamental interest is at stake"—maintaining a parent-child relationship. *See also Little v. Streater*, 452 U.S. 1, 13-17 (1981) (state must pay for blood test sought by indigent defendant contesting paternity suit because at issue was the creation of a parent-child relationship). Similarly, in *Boddie v. Connecticut* 401 U.S. 371, 375-77 (1972), the Supreme Court held that since a civil action is the only way to end a marriage,

and marriage is a fundamental interest, Connecticut could not effectively keep poor people from obtaining divorces by charging filing and service fees. "[G]iven the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship," due process "prohibit[s] a state from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages." *Boddie*, 401 U.S. at 374.

If West Virginia law is interpreted to deny people in families like Tina's standing as a psychological parent to seek custody, this would amount to differential access to the fundamental right to family integrity. Thus, such treatment could only stand if it were narrowly tailored to further a compelling government interest. *See, e.g., Shapiro*, 394 U.S. at 638.

It is not. Excluding lesbian co-parents from the exclusive government mechanisms for recognizing and protecting psychological parent-child relationships serves no government interest at all, let alone a compelling one. This Court has long recognized that parental sexual orientation per se is not relevant to parenting ability. *See Rowsey v. Rowsey*, 174 W. Va. 692, 695-96, 329 S.E.2d 57, 61 (1985) (sexual orientation of parent per se not relevant in custody proceeding). And even if a compelling interest could be postulated, the Circuit Court's interpretation of state law is not narrowly tailored to serve any such goal. If all lesbian and gay co-parents' psychological parent-child relationships are excluded without individual assessment, this is no tailoring at all, let alone narrow tailoring. *See Stanley*, 405 U.S. at 56-57 (requiring individualized hearings of

parental fitness, as opposed to presumptions, when the parent-child relationship is at stake).

Excluding a constitutional parent-child relationship like Tina and Z's from the system the State has established to protect the fundamental right to family integrity for psychological parents would therefore violate the constitutional guarantees of due process and equal protection.

Moreover, excluding lesbian and gay co-parents from the psychological parenthood doctrine would fail even the most deferential level of equal protection scrutiny. Because there is no legitimate reason to deny children the protection of their relationship with a parent simply because the parent is gay, the differential treatment can only be explained by disapproval of lesbians and gay men, which is not a permissible basis for government action. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).


To the extent the Circuit Court's holding denying Tina standing was based on the fact that Z's biological parent had not abandoned him, that is irrelevant to the constitutional analysis. The Constitution protects all parent-child relationships whether or not there is a second parent in the child's life. State law recognizes Tina to be the parent that she is, but even if it did not, the Constitution would prohibit the government from interfering with this family without a compelling reason for doing so.

CONCLUSION


Amici submit that to exclude Tina and Z_i 's relationship from the protection of the psychological parenthood doctrine simply because Tina's parental relationship formed in the context of a same-sex relationship with her late partner would violate Tina and Z_i 's constitutional rights to due process and equal protection.

Respectfully submitted this 6th day of December, 2004.

AMERICAN CIVIL LIBERTIES UNION
LESBIAN AND GAY RIGHTS PROJECT


By: Leslie Cooper

AMERICAN CIVIL LIBERTIES UNION
OF WEST VIRGINIA


By: Terri Baur

Counsel for *Amici*

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Appellant

v.

PAUL S. Z. B. S., in his official capacity as
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an infant,

Appellee

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and CONDITIONAL BRIEF were served upon counsel of record herein by placing true and correct copies thereof in properly addressed envelopes and by placing said envelopes in the regular course of the United States Mail on the 6th day of December 2004, addressed as follows:

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