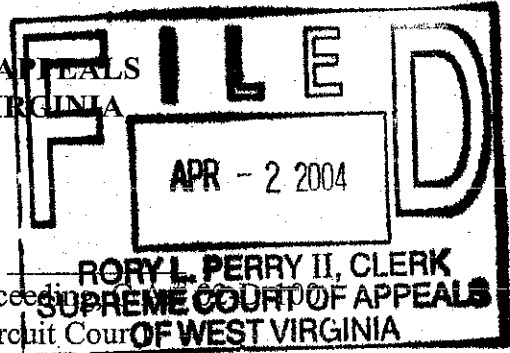


FILE COPY

DO NOT REMOVE
FROM FILE

IN THE SUPREME COURT OF APPEALS
FOR THE STATE OF WEST VIRGINIA



TINA BURCH,
Petitioner,

Vs.

Case Action No. _____
(Underlying proceeding in
Clay County Circuit Court) _____
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

PAUL S _____, in his official capacity
as Next Friend and Guardian of
Z _____ B _____ S _____ an infant,
Respondent.

BRIEF OF AN AMICUS CURIAE

Comes now Jeffrey L. Hall, the court-appointed Guardian ad Litem for Z _____ B _____
S _____ an infant, and for his brief as an amicus curiae, states as follows:

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an appeal from the December 2, 2003 Circuit Court Order of Remand (hereafter "Order of Remand") denying the Petitioner Tina Burch of the custody of Z _____ B _____ S _____; which child the Petitioner and her same-sex partner, Christina S _____ (Z _____'s biological mother), jointly raised together since the birth of said child on _____ . Christina S _____ died on June 1, 2002. The custody dispute in the underlying proceeding was initiated by Petitioner Tina Burch with the consent and encouragement of the biological father, Clifford Kincaid, a co-petitioner. The respondent Paul S _____ is the natural father of Christina S _____, and the maternal grandfather of Z _____ B _____ S _____. Your amicus curiae herein is the court-appointed Guardian ad Litem of Z _____ B _____ S _____ and has recommended that Tina Burch be awarded custody over all other parties.

The Order of Remand overruled both the recommendation of your undersigned

Guardian ad Litem and the Order of Family Court Judge Timothy Ruckman. The Order of Remand declined to extend custodial standing to Tina Burch, and said Order states that neither the legislature nor this Court have specifically extended the concept of "psychological parent" to include the former same sex partner of a biological parent. It is from that ruling that your Guardian ad Litem appeals, and seeks the reversal thereof. The Order of Remand further provides that the matter be remanded for a custodial determination between the biological father, Clifford Kincaid, and the respondent Paul S. That proceeding is still pending before the Circuit Court. By Order of December 22, 2003, the Circuit Court ruled that its Order of Remand is a final appealable order regarding the Petitioner Tina Burch.

II. STATEMENT OF FACTS

In September, 1998, the Petitioner Tina Burch (hereafter "Tina") and Christina S. (hereafter "Chris"), the natural mother of Z. B. S. (hereafter "Z."), began to live and cohabit together as a same sex couple, along with Tina's natural child, A. B., in Clay County, West Virginia. Tina and Chris enlisted the help of the Petitioner Clifford Kincaid (hereafter "Cliff") to impregnate Chris, so that Tina and Chris could have a child to raise together. Cliff and Christina were sexual partners only for the sole purpose of impregnating Chris. From April, 1999, when Chris's pregnancy was confirmed, Tina accompanied Chris to all prenatal medical appointments. Z. was born on . Subsequent DNA tests conclusively established Cliff as the biological father.

From the date of Z.'s birth until Chris's untimely death on June 1, 2002, Tina and Chris raised Z., along with Tina's daughter A., as a family unit. Both Tina and Chris shared in the normal day to day care taking functions for Z. Since it was not the intention of either Chris

or Tina to have Cliff play an extended role in Z's upbringing, Cliff only occasionally visited with Z, and he did not assert any custodial rights to Z until after Chris's death, and even in such case, he did then and does now consent to the Court awarding custody of Z to Tina. Prior to Chris's death, the respondent Paul S and his wife maintained a traditional grandparent-grandchild relationship with Z.

On the day of Chris's death, Paul S through the assistance of certain relatives, obtained physical custody of Z from Tina. On June 10, 2002, the Clay County Commission granted Paul S's request that he be appointed as guardian of Z. On July 16, 2002, Tina filed her petition for custody and she was joined in her petition by Cliff, who consented to and supports her claim for custody of Z. Your undersigned Guardian ad Litem was appointed by Family Court Judge Timothy Ruckman to conduct an investigation and make a report to the Court regarding the facts of this matter, which report was filed December 9, 2002.

An independent psychological report confirmed your Guardian ad Litem's finding that a strong parent-child bond exists between Tina and Z. The Family Court Judge adopted this finding in his custodial order. Your Guardian ad Litem also found that a strong sibling bond exists between Z and Tina's natural child, A. The Family Court Judge likewise adopted this latter finding. In addition, your Guardian ad Litem found that no party raised any parental fitness issue regarding Tina's shared upbringing of Z. Again, this finding was ultimately adopted by the Family Court Judge.

On July 25, 2003, Judge Ruckman awarded primary custody of Z to Tina, stating that Tina has standing to seek custody of Z as a "psychological parent" due to the significant care taking services she provided prior to Chris's death and the strong parent-child bond that exists between Tina and Z. The respondent Paul S and co-Petitioner Cliff were accorded lesser

parenting time, the equivalent of traditional visitation rights. Judge Ruckman also noted that Tina did not rely upon her lesbian relationship with Chris to claim psychological parent status. The relationship between Chris and Tina was not considered material by Judge Ruckman and it only served as a backdrop to explain how and why Z. came to be in custodial contact with Tina.

Respondent S. appealed the July 25, 2003 Order to Circuit Court Judge Jack Alsop, who issued the December 2, 2003 Order of Remand overturning the award of custody to Tina. On December 22, 2003, Judge Alsop issued a further Order which deemed the December 2, 2003 Order of Remand as a final appealable order as it affects Tina. Although Judge Alsop did not disturb any factual findings made by Family Court Judge Ruckman, Judge Alsop nonetheless ruled that Tina lacked standing as a psychological parent to seek custody of Z.

Interestingly, and as something of a post-script, at the remand hearing before Judge Ruckman held on February 24, 2004, the respondent S. did not seek to have a further evidentiary hearing, but rather was satisfied with relying upon the findings of fact previously made by Judge Ruckman in his July 25, 2003 Order granting custody to Tina. That Order again found that no claim of unfitness has been raised with regard to Tina's exercise of custodial responsibility of Z.

III. ASSIGNMENTS OF ERROR

1. In a custody dispute with the biological maternal grandfather, the same-sex partner of a deceased biological mother has standing as a psychological parent to be awarded custody of a year old child she helped raise with said biological mother from birth, particularly where the biological father consents to custody being awarded to the non-biological mother.
2. The judiciary, and not the legislative branch, is the proper forum for interpreting prior court rulings, to include whether a same sex partner of a deceased biological mother has

standing to be awarded custody, unless her lifestyle is demonstrated to have a deleterious effect upon the subject child.

IV. POINTS, AUTHORITIES, & DISCUSSION OF LAW

A. In a custody dispute with the biological maternal grandfather, the same-sex partner of a deceased biological mother has standing as a psychological parent to be awarded custody of a year old child she helped raise with said biological mother from birth, particularly where the biological father consents to custody being awarded to the non-biological mother.

The facts in this case are not in dispute. Even when the Circuit Judge overturned the Family Court Judge's award of custody to Petitioner Tina, he repeated verbatim the findings of fact made by the Family Court Judge. Further, at the February 24, 2004 remand hearing, the respondent did not request an additional evidentiary hearing, but was satisfied, as were all other parties, to rely upon said findings of fact.

Given that it is not factually disputed that Petitioner Tina served as a psychological parent of the infant Z (as found by the Family Court), this Court should address whether custodial standing as a psychological parent can be denied to Tina because she was in a same sex relationship with Z's biological mother. Further, this Court should address whether custodial standing as such psychological parent can be denied to Tina where the biological father of Z consents to and supports Tina's custodial claim where the real dispute is between Tina and the biological grandfather, who has not been found to be a psychological parent of Z.

In *In re Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515 (1990), this Court recognized the concept of awarding custody to a "psychological parent." This Court 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 alter the child's 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 benefit to him, notwithstanding the parent's assertion of a legal right to the child.

Id. At 121 and 523. See also *Ortner v. Pritt*, 187 W.Va. 494, 419 S.E.2d 907 (1992) and *Snyder v. Scheerer*, 436 S.E.2d 299 (W.Va. 1993). No where in these rulings did this Court state that the concept of a psychological parent is limited to those parties biologically related to the subject child. In that regard, Tina's non-biological connection to Z does not prevent her from claiming custodial status as a psychological parent.

In his Order of Remand, the Circuit Judge denied standing to Tina by apparently relying in part on that portion of the above holding in *In re Brandon L.E.* that states "... during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so..." It can be surmised from this that the Circuit Judge believed that since Christina (the natural parent) did not fail to maintain continuing substantial contact with Z, that Tina can not be classified as a psychological parent. This interpretation of Judge Alsop's reasoning is further buttressed by his reliance on *In re Jade E.G. and James A.G.*, 329 S.E.2d 325 (W.Va. 2002), wherein he suggested that in order for a third party to seek custody of a child from a fit natural or adoptive parent, a "transfer" of custody must first have occurred.

Clearly, Christina never transferred custody to Tina, nor did she fail to maintain contact with Z. It was the intention of this couple to raise this child together, and those facts are not in dispute. If Judge Alsop's above rationale is adopted to deny standing to Tina, then there are no parties, including Respondent S who can claim standing as a psychological parent as Christina never transferred custody to any party, nor did Christina fail to maintain contact with Z while he was in any other party's custody. Your Guardian ad Litem would suggest that cases

subsequent to *In re Brandon L.E.* do not rely on that portion of its holding (dealing with maintaining contact and failing to do so) in finding that a party had standing to seek and be awarded custody as a psychological parent. See *In re Jade E.G. and James A.G., infra, Overfield v. Collins*, 483 S.E.2d 27 (W.Va. 1996), and *Bowman v. Blevins*, 557 S.E.2d 303 (W.Va. 2001).

The Circuit Judge further denied standing to Tina by relying on cases which involved a dispute between a non-biologically related party such as Tina and such party's former same sex partner, who was the biological parent of the subject child. In such disputes, as noted by Judge Alsop in his Order of Remand, the vast majority of decisions of Courts in other States ruled in favor of the biological half of the same sex relationship. Your undersigned Guardian ad Litem agrees with Judge Alsop that in a dispute involving such parties, the rights of the biological half of the same sex relationship should generally prevail.

However, as should be obvious in this case, the surviving biological father has consented to and supports the custodial claim of Tina in her dispute with respondent S. As such, the rationale of all of such cases cited by Judge Alsop, who relied on an ALR reference to West Virginia Code § 48-9-103 (Parties to an Action under this Article), 80 A.L.R. 5th 1, are not applicable to the dispute which this Court must now address.

In almost all of the cases cited by Judge Alsop, standing was granted to the non-biological partner to at least seek visitation rights. The rationale of these cases would in fact support Petitioner Tina's claim of standing as a psychological parent, particularly where the opposing party, as in this case, is not the natural parent of the subject child. In this regard, the Circuit Judge's statement on page 15 of the Order of Remand that the concept of a psychological parent "does not extend to a same sex partner, who resides with the natural parent" is simply contrary to the holdings in such cases.

Judge Alsop also apparently ignored a wealth of decisions that in fact grant standing to seek custody and/or visitations to a same sex partner who is not the biological parent of the subject child. *See, e.g., T.B. v. L.R.M.*, 786 A.2d (Pa. 2001)(former lesbian partner stood in loco parentis to the child and had standing to bring action against biological mother for visitation); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000)(former partner of lesbian mother had standing to seek visitation given her parent-like relationship with the child); *J.C. v. C.T.*, 711 N.Y.S.2d 295 (N.Y. Fam. Ct. 2000)(lack of biological relationship between former lesbian partner and children she and natural mother raised together was not a bar to claim for visitation rights); *S.F. v. M.D.*, 751 A.2d 9 (Md. 2000)(co-parent had standing to seek custody or visitation where lesbian couple raised child together—a case of first impression for Maryland's highest state court); *V.C. v. M.J.B.*, 163 N.J. 200 748 A.2d 539, *cert. denied*, 121 S.Ct. 302 (2000)(a lesbian co-parent had standing to seek both visitation and custody of the twins her former partner bore while they were a couple, although on the facts of the case the court denied joint custody); *E.N.O. v. L.M.M.*, 429 Mass. 824, 711 N.E.2d 886, *cert. denied*, 120 S.Ct. 500 (1999)(non-biological parent was a defacto parent and it was in best interests of child to continue visitations with her); *Barnae v. Barnae*, 943 P.2d 1036 (N.M. Ct. App. 1997)(non-biological mother can make a "colorable claim of standing" to assert a legal right to continuing relationship with subject child); *J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. Ct. 1996)(non-birth mother of lesbian couple stood in loco parentis to child and had standing to pursue custody); *In re Custody of H.S.H.-K.*, 193 Wis. 2d 649, 533 N.W.2d 419, *cert. denied*, 116 S.Ct. 475 (1995)(non-biological mother's claim for visitation permitted upon demonstration of "parent-like relationship" with child); and *A.I. v. C.D.*, No. 940902124, Court's Ruling on Standing (Utah Dist. Ct., Salt Lake, Nov. 18, 1994)(lesbian co-parent permitted to pursue visitations where she stood in loco parentis to the child and it was in the best interests of the child to permit the claim).

It must be kept in mind that the above non-exhaustive list of cases granting standing to seek custody and/or visitations involves a dispute between the biological and non-biological parents in a lesbian relationship. Nonetheless, these cases contradict Judge Alsop's pronouncement that the vast majority of cases do not grant standing to a non-biological half of a same sex relationship. Even Judge Alsop (in footnote 4 of the Order of Remand) recognized that a same sex partner such as the Petitioner Tina is entitled to visitation if in the best interests of the child. If Tina has standing to be granted visitation in cases where the dispute is with a natural parent, then certainly she has standing to be granted custody in a case like this where the dispute is with another third party.

Using language cited by this Court in the past, this is a dispute between a "third party" and a "third party" as far as the subject child is concerned. *See In re Jade E. G. and James A.G.*, 575 S.E.2d 325 (W.Va. 2002) (the language therein used relates to a dispute between a third party and a natural parent, and the dispute in the instant case does not involve a natural parent). As such, this is a case of first impression for this Court and in deciding the same this Court should continue to be guided by the "child's welfare [a]s the paramount and controlling factor in all custody matters." *David M. v. Margaret M.*, 182 W.Va. 57, 60, 385 S.E.2d 912, 916 (1989).

In this case, the best interests of Z will be promoted by awarding his custody back to Tina. Prior to Christina's death, Z's family living environment included Tina, Christina, and Tina's natural daughter. "To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of benefit to him." *In re Brandon L.E.*, *infra*. The evidence adduced in the underlying proceeding is devoid of any showing that changing Z's environment from Tina would be clearly beneficial to him.

B. The judiciary, and not the legislative branch, is the proper forum for interpreting prior court rulings, to include whether a same sex partner of a deceased biological mother has standing to be awarded custody, unless her lifestyle is demonstrated to have a deleterious

effect upon the subject child.

In its Order of Remand, the Circuit Judge was "of the opinion that the question of whether to extend the concept of 'psychological parent' to reach these circumstances is a question better left to the Legislature, in its capacity as a voice of the people of the State of West Virginia." As this Court knows, it has been the judiciary, with the legislature in tow, that has defined family law in the State of West Virginia. The concepts of "primary caretaker," presumptions of gifts to a marital estate, rehabilitative alimony, and the like have all been court defined. For this Court to address this case of first impression would not be out of the ordinary in the family law arena. In this regard, the Circuit Court's new deference to the legislature on a family law issue contradicts past judicial practice.

In point of fact, if deference is given to the legislature in this dispute between Tina and the maternal grandfather, Respondent S , the only statutory authority that would have any bearing is the Grandparent Visitation statute, WV Code § 48-10-101 *et. seq.* (2002). Application of that statute would result in only visitation rights being granted to S . That type of deference to statutory authority would not help to resolve this dispute, which therefore supplies a further reason for this Court to address the issues in controversy and not defer this to the legislature as suggested by the Circuit Judge..

The Order of Remand is replete with reliance on denying standing to Tina as the former "same sex partner" of a biological parent. Had a grandparent or step-parent served in the same role as Tina, it is reasonable to suggest that in a dispute with another third party that standing would not have been denied to the grandparent or step-parent because courts have granted standing to such individuals. *See, e.g., Overfield, infra.* It is apparent that the Circuit Court's concern focuses on the same sex relationship between Tina and Christina.

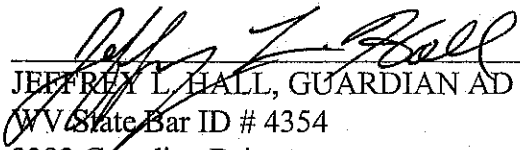
The Family Court Judge found that the relationship between Tina and Christina was immaterial to his ruling. His ruling is consistent with established case law in this State, which requires that a person's lifestyle must have a deleterious impact on the subject child before it can be used to deny custody or visitation. *See, e.g., Rowsey v. Rowsey*, 329 S.E.2d 57 (W.Va. 1985)(The speculative harm of a mother's friendship with another woman who was a lesbian does not require a change of custody.); *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W.Va. 1987)(wife's association with homosexual man, absent proof of harm to children, did not justify award of custody to husband). *See also* "Coming Out in West Virginia: Child Custody and Visitation Disputes Involving Gay or Lesbian Parents", 100 *W.Va. L.Rev.* 107 (1997). This Court should therefore adopt the Family Court Judge's conclusion that the lifestyle of Tina and Christina is immaterial, but only serves as a backdrop as to how and why Tina became the psychological parent by design of Z:

V. PRAYER FOR RELIEF

WHEREFORE, your Guardian ad Litem respectfully prays that the December 2, 2003 Order of the Circuit Court of Clay County be reversed, that custody of your Guardian ad Litem's charge, the infant Z: B S, be awarded to the Petitioner, Tina Burch, and your Guardian ad Litem prays for such other relief which this Court deems appropriate.

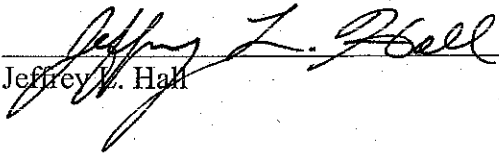
Submitted this 30th day of March, 2004.

Z: B S by


JEFFREY L. HALL, GUARDIAN AD LITEM
WV State Bar ID # 4354
3392 Guardian Drive
Diana, WV 26217
(304) 847-7390

CERTIFICATE OF SERVICE

I, Jeffrey L. Hall, Guardian ad Litem, do hereby certify that I served a true copy of the foregoing MOTION TO FILE BRIEF AS AN AMICUS CURIAE and BRIEF OF AN AMICUS CURIAE upon the Petitioner Tina Burch, by mailing a copy of the same, regular U.S. mail, to her counsel, James W. Douglas, at P.O. Box 425, Sutton, WV 26601, and upon the Respondent, F Smarr, by mailing a copy of the same, regular U.S. mail, to his counsel, Donald K. Bischoff, at 517 Main Street, Summersville, WV 26651, on this 30th day of March, 2004.



Jeffrey L. Hall