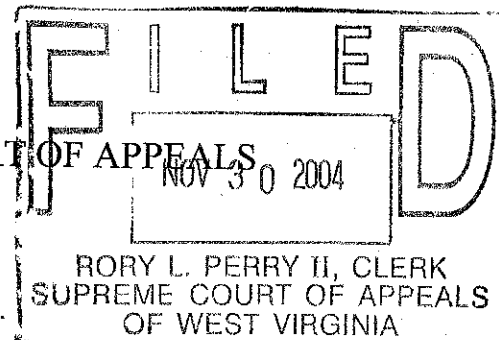


IN THE WEST VIRGINIA SUPREME COURT OF APPEALS



AT CHARLESTON

**TINA BURCH,**

Appellant,

vs.

Case Action No. 31855  
(Appeal from a **December 2, 2003**  
Order of Remand of the Circuit Court  
of **Clay County, 02-D-100**)

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

Appellee.

« »

**BRIEF OF THE APPELLANT IN SUPPORT OF APPEAL**

« »

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**November 30, 2004**

*... to give one's best years and best love to ensure  
the fate of being despised.*

— Thomas Hardy, *The Return of the Native*

## **PREFACE:**

### **WHAT THIS CASE IS ABOUT:**

*The trial court appears to have interpreted prevailing case law that one must have standing to assert a "psychological parent" position in a child custody fight. Actually, from a legal perspective, the reverse is true. Generally speaking, if the factual prerequisites for "psychological parent" are present or proven by the appropriate standard, then that is the "triggering event" that gives the third party asserting that status standing to litigate custody or visitation issues.*

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

Appellee.

**BRIEF OF THE APPELLANT IN SUPPORT OF APPEAL**

Comes now the Appellant, **TINA BURCH**, Petitioner below, by her attorney, James Wilson Douglas, pursuant to Rule 10, WVRAP, and in and for her Brief in Support of her Appeal, heretofore granted, does aver, depose and say, as follows:

**STANDARDS OF REVIEW**

Appellant maintains that the appropriate standards of review for the issues presented hereinafter are *abuse of discretion* and *de novo*.

**NATURE OF THE PROCEEDING AND RULING BELOW**

Following the June 1, 2002 death of Christina S [redacted] the single mother of the then two and one-half year old Respondent infant, Z [redacted] B [redacted] S [redacted], Appellant **Tina Burch**, the deceased's surviving same sex partner since before the birth of said child, filed a Petition with the consent and support of the infant's biological father, one Clifford Kincaid, to be awarded custody of the said infant under the "psychological parent" concept.

The deceased's father, Appellee Paul S [redacted], the Respondent below, had taken physical custody of the said infant, his grandson, by virtue of being appointed his Guardian by the County Commission of Clay County, in vacation, on June 10, 2002. Despite being named as the principal party in opposition during the litigation that ensued, the Appellee S [redacted] never asked to be awarded custody of the subject child, until he advanced an interlocutory Motion at the time of the June 18, 2003 dispositional hearing. See his July 25, 2002 verified Answer and Reply designated of record and included therein.

A temporary hearing was conducted before the Honorable Timothy R. Ruckman, Family Court Judge, on September 4, 2002. The interim result was that both the Appellee S [redacted] and the Appellant and the Petitioner Father below, Burch and Kincaid, respectively, were awarded 25% parenting time, with the

Appellee being granted 75% parenting time and designated the temporary residential parent. Moreover, a Guardian *ad Litem* was appointed who conducted an exhaustive investigation and filed a December 9, 2002 Report and Recommendation.

Two subsequent temporary hearings were held on November 13, 2002 and March 19, 2003. At the former, the Appellant and the Petitioner Father below, Burch and Kincaid, again respectively, were awarded equal parenting time, with the Appellee, which was re-affirmed, upon challenge from the Appellee, at the latter hearing<sup>1</sup>.

The final hearing was held on June 18, 2003 wherein Appellee challenged the standing of the Appellant Burch to seek custody of her life partner's infant son whom she had co-parented since birth. On July 25, 2003 a written custody decision was rendered by the Family Court Judge in favor of the Appellant Burch, finding, upon the basis of uncontroverted expert (psychologist) written findings<sup>2</sup> and testimony, and the comprehensive report of the Guardian *ad Litem*, that Appellant had a strong psychological bond with the child in issue, and

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<sup>1</sup>Both orders emanating from these proceedings divided the parenting time between the sides at the middle of the month.

<sup>2</sup>See the October 15, 2002 report of Olga E. Gioulis, attached hereto as Exhibit "A".

therefore, the Appellant had standing under the "psychological parent" analysis, to seek and to be awarded primary custody of the infant. Co-Petitioner Kincaid and Appellee S. were accorded lesser parenting time.

Appellee S. filed an appeal to Circuit Court of Clay County on the custody ruling of the Family Court Judge, pursuant to West Virginia Code §51-2A-11, citing the lack of standing ground, *inter alia*. After an October 20, 2003 hearing on the appeal brought by the Appellee, the Circuit Court of Clay County, the Honorable Jack Alsop presiding, issued a December 2, 2003 ruling that, as a matter of law, a same sex partner did not have standing to seek custody of a child on any recognized legal basis, including psychological parent status. Significantly, in arriving at his decision, the Circuit Court did not set aside, vacate or disturb any factual finding made by the Family Court Judge, including the presence of the strongest bond (as among the Parties) between the Appellant Burch and the affected child.

The December 2, 2003 Order of Remand from the trial judge below, aside from reversing the Family Court Judge's award of custody to the Appellant Burch, returned temporary custody of said infant to the Appellee, with minimal visitation for the Appellant Burch, despite her proclaimed lack of standing, and remanded the case to the Family Court Judge for a determination of permanent

custody, as between the Appellee, and the natural father, the Co-Petitioner below, Clifford Kincaid.

Appellant Burch filed a Motion for a Stay before the trial judge, which was heard on December 22, 2003. The circuit judge denied the stay, and by his January 6, 2004 Order on Motion for Stay, the learned jurist deemed his December 2, 2003 Order of Remand to be a final order as to the Appellant Burch.

Thus, Appellant asks this Court for appellate relief from the December 2, 2003 Order of Remand entered by the Circuit Court of Clay County, herein complained of.

#### **STATEMENT OF THE FACTS OF THE CASE**

The late Christina Dawn S and the Appellant Tina Burch were lesbians. Since November 1, 1998, the couple had engaged in an exclusive and committed domestic and physical relationship in Clay County.

Christina S had had previous lesbian partners, but she had never engaged in any conventional or unconventional marriage. Appellant Burch, on the other hand, had been a party to a heterosexual marriage, from which union a female child, A.B., now ( ) years old, had been born. After a much earlier divorce, the now 37 year old Appellant Burch and her daughter, of whom she had custody, moved to Maysel, West Virginia when Ms. S and Appellant

Burch commenced their November 1998 cohabitation.

Appellant Burch and Ms. S decided that they wanted children in their home. An arrangement was then made in March 1999 whereby, Appellant Burch's sister's boyfriend, Co-Petitioner Clifford Kincaid below, would father a child for the couple through impregnation of S. The plan was successful, and Z. S. was born on .

Appellant Burch and Ms. S went to prenatal doctor visits together, kept calendars on the progress of the pregnancy together and shopped for baby items together. Appellant Burch was present at the birth of the child, and, in general, both Appellant Burch and Ms. S acted as parents for Z., engaging in all caretaking and parenting functions, and providing financial support, exclusive of any significant involvement by the latter's father, Paul S.; the Respondent below and the Appellee before this Court. Also, the Co-Petitioner below Clifford Kincaid, the natural father, had continuing and regular contact with Z. and he provided in-kind support. In fact, from September 2001, Clifford Kincaid either cohabited with Appellant Burch and Ms. S., or he resided within a short distance of their home.

The Appellee Paul S. steadfastly denies to the present day that his late daughter, Christina S., engaged in an alternate life style, although the fact

was accepted generally by the community as a whole.

Following the untimely death of Christina S. in an automobile accident on June 1, 2002, the Appellee Paul S., Christina S.'s father and Z.'s grandfather, rushed to be appointed Guardian of said child by the Clay County Commission on June 10, 2002, in vacation, but *on the very day* of Christina S.'s death, the Appellee, through the agency of his sons-in-laws, one Robert Jones and one Kenneth Morton, brothers-in-law of the deceased and strangers to said child, forcibly took said infant from the Appellant Burch. The sons-in-law then delivered said child to the Appellee with whom said infant, despite his consanguineous relationship as a grandchild, only infrequently visited.

After being permitted diminishing limited access to Z. under the strict supervision of the deceased's family members, Appellant and Petitioner Kincaid filed their Petition<sup>3</sup> asking that Appellant Burch be awarded custody of Z. S., but curiously, Appellee never advanced any affirmative pleading, until the eve of a court determination, requesting an award to him of custody of said infant on a "psychological parent" ground or any other basis. See Appellee's July 25, 2002 Answer and Reply, designated of record and included therein.

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<sup>3</sup> Appellant Burch filed her Petition for custody with the consent and support of the infant's biological father, Clifford Kincaid. See Appellant's July 16, 2002 Petition, designated of record and included therein.

A September 4, 2002 temporary hearing before Family Court Judge Timothy R. Ruckman resulted in a make-shift visitation schedule between the Parties regarding Z on a generally 75-25 basis, with the Appellant being accorded the lesser parenting time. The Appellee was still deemed interim legal custodian.

Because the Co-Petitioner below, Clifford Kincaid, had not been judicially determined to be the biological father of Z, paternity and psychological testing was ordered. A LabCorp report of October 15, 2002, found a 99.99% probability that Petitioner Kincaid was the biological father of said infant based upon genetic markers, and Petitioner Kincaid thereupon was legally adjudged to be the biological father of Z by Order of October 17, 2002.

A report from psychologist Olga Gioulis was submitted on October 15, 2002 finding a bond between the infant and Appellant Burch. On the other hand, the Appellee's psychologist, Jeffrey Harlow, by his October 11, 2002 report failed to note any bond between said infant and the Appellee. See the Gioulis and Harlow reports attached hereto, as Exhibit "A" and Exhibit "B", respectively.

During the temporary hearing referred to hereinabove, the court-appointed as Guardian *ad Litem*, former Family Law Master, Jeffrey L. Hall, who, after conducting what can only be termed an exhaustive investigation, issued his

December 9, 2002 Report and Recommendations, recommending that Appellant Tina Burch, based upon the best interests of the child standard, be awarded legal custody of said infant. The Guardian *ad Litem* also found that a strong bond existed between the Appellant's teenage daughter, A.B., and the infant Z. See the Guardian *ad Litem* report designated of record and included therein.

On June 18, 2003, the Family Court Judge conducted a full evidentiary hearing, the first order of business of which was the argument on the standing issue raised by the Appellee in his pleading as an affirmative defense to Appellant Burch's invocation of the psychological parent concept as a basis for being awarded primary custody of Z. The Family Court Judge concluded that uncontroverted facts from discovery, including that the Appellee had stipulated through his admissions contained in his October 15, 2002 Reply to Requests for Admission, Paragraphs 2. and 16., to the long term possession of Z (prior to Christina S.'s death) and his strong attachment to Appellant Burch, established that a prima facie case of standing had been made out on the part of Appellant Burch as a psychological parent of Z/S, under the holdings of *In Interest of Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515, 15 A.L.R.5th 1093 (1990).

Taking the matter under advisement, the Family Court Judge issued

his written decision on July 25, 2003 awarding primary residential parent designation to Appellant Burch, on the basis that the best interests of the child and the equitable rights of the child to an undisturbed environment that promoted his overall stability and general welfare, dictated that he remain with the Appellant Burch, his psychological parent. The Appellee S. [redacted] was reserved shared parenting time on the 1<sup>st</sup>, 3<sup>rd</sup> and 5<sup>th</sup> weekends, alternating holidays and 4 weeks summer vacation.

With new counsel who cited lack of Appellant's standing as one of his grounds, the Appellee immediately appealed the July 25, 2003 ruling of the Family Court Judge to the Circuit Court of Clay; however, the Appellee failed to notify the Guardian *ad Litem* of his August 27, 2003 Petition for Appeal. The appeal hearing was conducted on October 20, 2003 before the Honorable Jack Alsop, Judge of the Circuit Court of Clay County. Following extensive argument, the trial judge took the matter within the breast of the court, and then issued his written Order on Remand ruling to the Parties on December 2, 2003.

Essentially, as a matter of law, the trial court below sided with the Appellee that, notwithstanding the strong psychological bond that she (and her daughter, A.B.), had with the infant, Z. [redacted], since his birth and over a 4 year period of discharging parenting and caretaking functions, Appellant Burch had no

standing to bring the original petition for custody. Relying almost exclusively upon the cases cited in 80 A.L.R. 5<sup>th</sup> 1 (2000) from other jurisdictions that treated standing disputes between a separated lesbian partner and a *living* female parent, the learned trial judge held that a surviving same sex partner could not avail herself of psychological parent constructs to seek custody of Z. . . ., as against the Appellee grandfather, a biological relative. Consequently, the Circuit Judge then ordered the temporary custody of Z: . . . back to Appellee S: . . .; pending further ancillary proceedings before the Family Court Judge.

Counsel for Appellant Burch was in New England when the December 2, 2003 Order of Remand was entered, and, once again, within days, the Appellee seized the subject child from Appellant Burch where he had been since July 25, 2003, and before a Appellant Burch could file either a motion for a stay or reconsideration before Judge Alsop. Nevertheless, Appellant Burch did lodge a December 10, 2003 Motion for a Stay pending appeal to this august body which was not heard by the Circuit Court until December 22, 2003, and denied through his January 6, 2004 Order on Motion for a Stay; hence this Appeal.

An epilogue is necessary here. Family Court Judge Ruckman did indeed convene a remand hearing for the purpose of evidentiary development on February 24, 2004, as directed by the circuit court; and after counsel for the

Appellee announced that he had no evidence that he wished to present, the Family Court Judge pronounced Permanent Custody Order, entered on March 2, 2004, that essentially returned possession of Z , if not custody, to the Appellant. Following a second Petition for Appeal brought by the Appellee and heard on April 19, 2004, and based upon what appellant's counsel perceived was an effort to put the Family Court Judge "in his place", rather than what was in the best interests of the affected child, Circuit Court Judge Alsop, again, reversed the Family Court Judge whose factual findings he did not disturb, and, with some caustic remarks revealing pre-formed notions on the issue, directed the subject child to be re-delivered to the Appellee, by Second Order of Remand, entered on May 3, 2004. See both the March 2, 2004 and May 3, 2004 Orders in the designated record and included therein.

As something of a post-script, the current respective ages of the Parties to the affected infant are: Appellant Burch: 37; Appellee S : 66<sup>4</sup>; and the child, Z : who will be

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<sup>4</sup>Appellee S r also disclosed at the June 18, 2003 hearing before the Family Court Judge that he had "heart problems". Notation of this fact is made because a grandparent's health at times militates against being awarded custody when the grandparent cannot be expected to live until the affected child attains majority, thereby exposing the child to the trauma of changing homes yet again. See 30 A.L.R. 3d 290, §10 (1996).

## ISSUES PRESENTED

- I. Can standing to assert psychological parent status in a custody case be denied because of sexual preference?
- II. Is standing to assert a psychological parent position in a custody case limited to persons of blood relation to the child?
- III. Even if psychological rather than by blood, should sibling bonding or sibling reinforcement be considered in awarding custodial allocations?
- IV. Does consideration of sexual preference in determining standing to assert psychological parent status in a custody case offend the equal protection and *substantive* due process provisions of the United States Constitution?

## ARGUMENT

### ISSUES I. and II.

#### A. Standing and Consanguinity:

Appellee below and on appeal raised the issue of standing as an affirmative defense, as if standing may create some procedural or substantive obstacles to a favorable resolution of the Appellant's claim. Such is not the case.

Over a half decade ago, the West Virginia Supreme Court of Appeals recognized that a grandparent may advance a petition for custody of a child that

has been in his or her possession for a protracted period of time, providing certain procedural safeguards are observed. **Overfield v. Collins**, 199 W.Va. 27, 483 S.E.2d 27 (1996).

*The appellant asserts that the family law master did not have jurisdiction to entertain the appellees' petition. However, we recognized the jurisdiction of a court to entertain such a petition in the case of **Overfield v. Collins**, 199 W.Va. 27, 483 S.E.2d 27 (1996). Syllabus Point 1 of **Overfield** states:*

*Any attempt by a non-parent to judicially change the care and custody of a child from a natural parent must precede that attempt with: (1) the filing of a petition setting forth all of the reasons why the change of custody is required; and (2) the service of that petition, together with a reasonable notice as to the time and place that petition will be heard. Following the filing and service of the petition and notice of hearing upon that petition, the natural parents whose rights are being affected shall have the right to: (1) present evidence as to the reasons why custody should not be changed; and (2) obtain a decision from a neutral, detached person or tribunal.*

*The appellees followed the procedure described in **Overfield**.*

**Bowman v. Blevins**, 210 W.Va. 249, 251, 557 S.E.2d 303, 305 (2001).

Since the Appellee herein has stipulated through his admissions contained in his October 15, 2002 Reply to Requests for Admission, Paragraphs 2. and 16., to the long term possession and strong attachment to Appellant Burch, and the unrefuted October 15, 2002 report and evidence of the psychologist, Olga E. Gioulis, that a substantial psychological bond existed the subject infant and the Appellant and the subject child, standing has been satisfied by the **Overfield** and **Blevins** rules.

Recently, the Supreme Court spoke again regarding the deference to

be given to long term placements of children:

... **Overfield**, a court must decide whether the natural parent is fit and then analyze whether returning the children to their natural parent(s) would cause a significance disturbance to the children. In **Overfield**, this Court stated:

*When a natural parent transfers temporary custody of their child to a third person and thereafter seeks to regain custody of that child, the burden of proof shall be upon that parent to prove by clear and convincing evidence that he or she is fit; thereafter the burden of proof shall shift to the third party to prove by clear and convincing evidence that the child's environment should not be disturbed because to do so would constitute a significant detriment to the child notwithstanding the natural parent's assertion of a legal right to the child. Syllabus Point 2, in part, Overfield v. Collins, 199 W.Va. 27, 483 S.E.2d 27 (1996).*

*In re Jade E. G. and James A. G., 212 W.Va. 715,719, 575 S.E.2d 325, 329 (2002).*

Moreover, Appellant does not rely solely upon the prevailing case law. West Virginia Code § 48-9-103 sets who may be a Party to a custody action under article 9:

*(a) Persons who have a right to be notified of and participate as a party in an action filed by another are:*

*(1) A legal parent of the child, as defined in section 1-232 of this chapter;*

*(2) An adult allocated custodial responsibility or decision-making responsibility under a parenting plan regarding the child that is then in effect; or*

*(3) Persons who were parties to a prior order establishing custody and visitation, or who, under a parenting plan, were allocated custodial responsibility or decision-making responsibility.*

*(b) In exceptional cases the court may, in its discretion, grant permission to intervene to other persons or public agencies whose participation in the proceedings under this article it determines is likely to serve the child's best interests. The court may place limitations on participation by the intervening party as the court determines to be appropriate. Such persons or public agencies do not have standing to initiate an action under this article.*

Acts 2001, c. 91, eff. Sept. 1, 2001.

“Legal parent” as utilized in the foregoing statute is: “ ... *an individual defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds.* West Virginia Code § 48-1-232; Acts 2001, c. 91, eff. Sept. 1, 2001. (Emphasis supplied).

Certainly the “psychological parent” principle, which is a derivative of the best interests of the child standard, and its application in West Virginia, must be conceded to be a legal parent on “other recognized grounds” for 48-1-232 and 48-9-103 purposes. *In Interest of Brandon L.E.*, 183 W.Va. 113, 394 S.E.2d 515, 15 A.L.R.5th 1093 (1990).<sup>5</sup> Appellant would argue that the second prong of the *Brandon* test; i.e., the requirement that significant, cumulative time possession of a child by a non-parent during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, does not apply to this case, and the same has been discarded by subsequent holdings. See *Overfield, Jade* and *Blevins, supra*.

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<sup>5</sup>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 significant benefit to him, notwithstanding the parent's assertion of a legal right to the child. At pp. 121 and 523.

The upshot of this historical review is that both case law and the applicable statutes, cited above, have never limited psychological parent status to either grandparents or other relatives of blood. *Id.* Indeed, both classes of authority speak in terms of “third parties”, “third persons” “adults”, “persons” and “an individual”. See *Overfield* and Code §§48-9-103 and 48-1-232.

The experience of other jurisdictions has been identical in this regard. Cf. *Riepe v. Riepe*, 91 P.3d 312; 2004 Ariz. App. LEXIS 70 (June 29, 2004)(where the widow of the child’s natural father, or the unrelated step-mother, qualified for *loco parentis* status in order to secure child visitation against the wishes of the biological mother); *Buness v. Gillen*, 781 P.2d 985, 988 (Alaska 1989) (standing granted to non-parent with ‘significant connection’ to the child to assert custody claim); and *P.B. v. T.H.*, 370 N.J. Super. 586; 851 A.2d 780 (July 8, 2004) (An unrelated neighbor was accorded psychological parent classification and thus had standing to seek custody of the minor child in a contest with the child’s blood aunt).

Moreover, the learned jurist below failed to note in his reliance upon 80 A.L.R. 5<sup>th</sup> 1 (2000), the rulings of sister states regarding the standing issue were invariably disputes between lesbian couples who had separated and the non-biological party was trying to secure custody or visitation from the still living

*biological mother*. Of course, the facts of the case *sub judice* are quite the opposite. Here a surviving lesbian partner who, together with the deceased mother, *planned* her involvement and participation in the subject child's creation, birth and upbringing, is in conflict with a maternal grandparent who was *not* part of the parenthood scheme.

Only one case cited in the annotation used by the court below dealt with a situation where a surviving lesbian partner, who was the non-biological relative of the child, was attempting to be designated a custodial parent as against the surviving biological father.<sup>6</sup> Again, the forgoing case does not square with the facts of the case before the Court. Here the surviving biological father *has joined in the Petition* asking that the Appellant Burch be awarded custodial designation of his son Z . See Appellant's July 16, 2002 Petition, designated of record and included therein.

Paradoxically, the New York State case cited by the trial court for another proposition, styled *In re matter of Guardianship of Astonn H.*<sup>7</sup>, is the only authority that is factually similar to the case at bar. In *Antonn H.*, the biological mother of a special needs child of a biracial lesbian couple died shortly

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<sup>6</sup> *McGuffin v. Overton*, 214 Mich. App. 95, 542 N.W.2d 288 (1995).

<sup>7</sup> 167 Misc. 2d 840, 635 N.Y.S.2d 418 (1995).

after birth, which the partner had attended. The lesbian survivor met the child's medical requirements and she was the only mother the child ever knew. After nearly a year, the deceased's former mother-in-law and her former husband attempted to change custody from the surviving partner on the basis of racial and sexual differences, and the former's custody of a half sibling.

The New York court denied the custody ambitions of the former mother-in-law and her former husband, holding that the lack of blood relationship does not bar an application for child guardianship (custody), and sexual lifestyle, whether homosexual or heterosexual, is only relevant if it is shown to be detrimental to the child's well-being. Accord (on sexual issue): *Rowsey v. Rowsey*, 174 W.Va. 692, 329 S.E.2d 57, 61 (1985) and *S.H. v. R.L.H.*, 169 W.Va. 550, 289 S.E.2d 186 (1982).<sup>8</sup>

Not cited and apparently ignored by the trial court is the jurisdiction of Pennsylvania which recognizes that a lesbian partner from a dissolved relationship has standing to seek custody pursuant to the *in loco parentis* doctrine.

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<sup>8</sup> The proverbial bottom line is that "... in a domestic custody situation the focus of an examination of a parent's conduct is not normally on whether the conduct is morally pure, but upon whether the conduct has a deleterious effect upon the [child]". *Moses v. Moses*, 187 W.Va. 755, 421 S.E.2d 506 (1992). In short, fact based and evidentiary driven inquiries must precede adverse results for a parent of homosexual preferences. *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).

*T.B. v. L.R.M.*, 567 Pa. 222, 228, 786 A.2d 913, 916 (2001). Other jurisdictions have followed suit. See *A.C. v. C.B.*, 113 N.M. 581, 586, 829 P.2d 660, 665 (1992)(standing conferred where lesbian couple had allegedly entered into a parenting agreement), and followed in *Barnae v. Barnae*, 123 N.M. 583, 943 P.2d 1036 (1997); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999)(standing approved for non-biological lesbian parent); *V.C. v. M.J.B.*, 163 N.J. 200, 218, 748 A.2d 539, 548 (2000)(standing recognized where lesbian couple had lived in a familial setting with the children of one partner, and the children, with the consent and the encouragement of the natural mother, had bonded with the non-biological partner); *In the Interest of E.L.M.C.*, 2004 Colo. App. LEXIS 1186 (July 1, 2004; Cert. denied 2004 Colo. LEXUS 851 [October 25, 2004])(in construing a statute that permitted non-parents to seek parental responsibilities for a child, the fact that a psychological parent and an adoptive parent were of the same gender and former domestic partners was deemed irrelevant); and *Carvin v. Britain*, 121 Wn. App. 460; 89 P.3d 271; 2004 Wash. App. LEXIS 833, May 3, 2004, Motion to vacate denied by, in part *Carvin v. Britain*, 2004 Wash. LEXIS 663 (Wash., Oct. 6, 2004) (although a lesbian did not state a cause of action under the Washington Uniform Parentage Act, she did have a claim for recognition as a *de facto* or psychological parent under the Washington common law; consequently, she was permitted to

bring parenting and visitation claims against her partner, the biological mother of the infant child who had been conceived by artificial insemination).

There are other miscellaneous problems, both procedural and substantive in nature, that demonstrate the faulty reasoning of the noble trial court below. Firstly, the Appellee's failure to request for custody in any primary pleading prior to the Family Court Judge's July 25, 2003 decision. Secondly, and perhaps ironically, the same statute<sup>9</sup> that Judge Alsop urges as an obstacle to Appellant Burch's standing to bring a custody case, would also be a bar, by definition, to the grandparent Appellee S . . . . After all, the grandparent visitation permitted in certain circumstances, such as the death of a child, under West Virginia Code §48-10-101 *et seq.*, is not a substitute for a custody determination.

The trial court appears to have interpreted prevailing case law that one must have standing to assert a "psychological parent" position in a child custody fight. Actually, from a legal perspective, the reverse is true. Generally speaking, if the factual prerequisites for "psychological parent" are present or proven by the appropriate standard, then that is the "triggering event" that gives the third party asserting that status standing to litigate custody or visitation issues.

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<sup>9</sup> West Virginia Code §48-9-103.

See *Holtzman v. Knott*, 193 Wis.2d 649, 533 N.W.2d 419 (Wis. 1995)<sup>10</sup>; *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) and *V.C., supra*.

As something of a postscript in this section, West Virginia Code § 48-9-102 states that Legislative intent is that the best interests of a child in a custody battle be promoted by facilitating "(1) Stability of the child;". *Id.* at (a)(1).

In the case at bar, Z B S , the infant in question, resided with the Appellant 2½ years until his mother's death. Then the child was seized by agents of his the aged Grandfather Appellee to the exclusion of the Appellant for 3 months, at the end of which time he lived with the Appellant and the Appellee unequally for 2 months, and then with the Appellant and the Appellee equally for 9 months. Next, Z B S , the infant, after his award to the Appellant, was a full time resident with the Appellant for 5 months until he was returned by Judge Alsop's December 2, 2003 Order of Remand to the Appellee with minimum contact for the Appellant for a three month period. Following the remand Family Court Judge Ruckman fashioned his relief to award primary possession of the subject child to Appellant in February 2004 for nearly 2

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<sup>10</sup> Overruling *In re Interest of Z.J.H.*, 471 N.W.2d 202 (1991) cited (citation omitted and mis-cited as *In re H.S.H.-K.*) by the trial judge below, at page 434.

months, which was summarily reversed by Judge Alsop upon hearing Appellee's second Petition for Review on April 19, 2004, and which was the child's lot for 5 months, until this Court's Stay Order of September 2, 2004, where the child has remained to the present time, being nearly 3 months at this writing. The final score of possession times in this inhuman contest where Z B S, age , involuntarily serves as the "game football" is: 37 year old Appellant— 3 years, 4 months; 66 year old Appellee— 11 months, with the Parties equally sharing possession for 9 months.

How can the stability of a child be served by yet another uprooting and relocation of the subject infant, as advocated by the Appellee?

### ISSUE III.

#### **B. Sibling Reinforcement and Best Interests of a Child:**

Not to be overlooked is the familial connection between the subject infant and A.B., the biological daughter of the Appellant, who was found by the psychologist Gioulis and the Guardian *ad Litem* Hall to share a psychological bond with said child. See the attached Exhibit "A" and the designated record that includes therein the Guardian *ad Litem*'s December 9, 2002 report.

The historical public policy of West Virginia has been to aspire to unite siblings in foster care placements. *In re Shanee Carol B.*, 209 W.Va. 658,

550 S.E.2d 636 (2001). The Legislature has ordained that allocations of custodial responsibilities in West Virginia domestic relations cases should attempt ... “[t]o keep siblings together when the court finds that doing so is necessary to their welfare;”. West Virginia Code §§48-9-206 (a)(3). Even half-siblings have been recognized by this Court to have continuing visitation rights with each other.

*Lindsie D. L. v. Richard W.S.*, 214 W.Va. 750, 591 S.E.2d 308 (2003). Indeed, West Virginia has extolled the benefits from a continued sibling relationship.

*Honaker v. Burnside*, 182 W.Va. 448, 388 S.E.2d 322 (1989).

Realistically, the only way that A.B. and Z. B. S., the infant, can continue a meaningful “psychological sibling” relationship is for the Appellant, in whose home A.B. resides, to continue as the designated residential parent of Z. B. S.

#### ISSUE IV.

##### C. Federal Constitutional Implications:

Beyond meaningful dispute is the well established precept that have natural parents have a nearly exclusive liberty interest in the custody and rearing of their children, free of infringement or interference, which is often referred to generically as “parental autonomy”. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). The *substantive* (arbitrary and unreasonable deprivations) due process provisions of

the United States Constitution are not extended just to traditional families; i.e., married couples and their biological children. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

Parental autonomy, then, is a policy that also serves the liberty interests of non-biological parents acting in the capacity of natural, custodial parents. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

Equal protection has its Constitutional role to play in this argument as well. Lesbians have a due process right to engage in practices common to their lifestyle without governmental intrusion or interference. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If so, then how can a penalty in the form of a denial of standing to advocate a lesbian's liberty interest as a parent be said to comport with equal protection guarantees? Cf. *Palmore v. Sidoti*, 466 U.S. 429 (1984). The United States Constitution does not know classes of citizens, nor does it tolerate state laws "... singling out a certain class of citizens for disfavored legal status." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In short, the laws of the states that comprise the nation must respect the private lives of all of its citizens. *Lawrence v. Texas*, 539 U.S. 558 (2003).

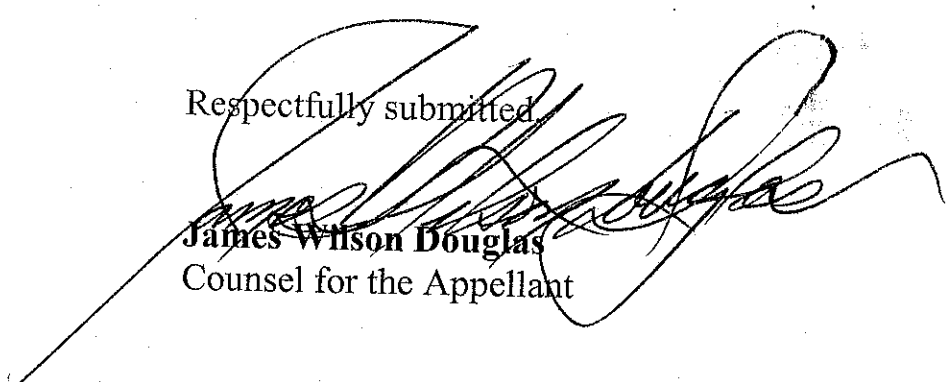
Although one may question its mention here, it is worthy of note, by comparison, that the West Virginia Constitution, Article III, §17 guarantees all

citizens access to the Courts of this State. Why, then, on either the Federal or State Constitutional levels, can a lesbian be treated differently? The legal doctrine of standing should not be perverted to prevent an alternate lifestyle person from coming to court on the important issue of her parental rights. Succinctly stated, Appellant does not want a favorable decision from this Court on the underlying case— she merely wants an opportunity to be heard.

**CONCLUSION**

**THEREFORE**, upon the authority cited and for the reasons given, the December 2, 2003 Order of Remand from the Circuit Court of Clay County, West Virginia, the trial court below in the captioned proceedings, should be **REVERSED**.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, JAMES WILSON DOUGLAS, the undersigned attorney do hereby certify that a true copy of the foregoing **BRIEF OF THE APPELLANT IN SUPPORT OF APPEAL** was deposited in the regular United States mail in an envelope properly stamped and addressed to Donald K. Bischoff, Attorney at Law, 517 Main Street, Summersville, West Virginia 26651, on this **30<sup>th</sup> day of November, 2004.**



JAMES WILSON DOUGLAS