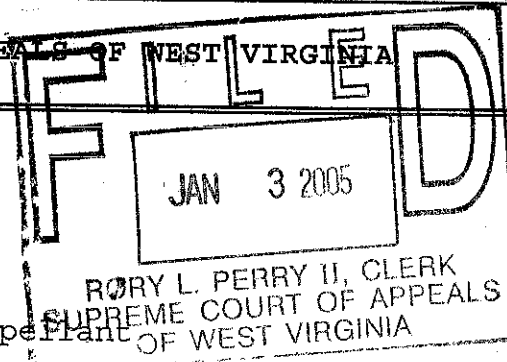


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



TINA BURCH, Appellant

v. No. 31855

PAUL S , in his official capacity as  
Next Friend and Guardian of  
Z E S , an infant,  
Appellee

**BRIEF OF APPELLEE**

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

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 31855

TINA BURCH,

Appellant,

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 APPELLEE, PAUL S

I. THE KIND OF PROCEEDING AND NATURE OF THE  
RULING OF THE LOWER TRIBUNAL

The proceeding below involves the claim of the Appellant, Tina Burch, for custody of a minor child, Z B S, (hereinafter "Z.B.S.") now years of age. The Appellee and respondent below is Paul S, the maternal grandfather of Z.B.S.

On June 1, 2002, Christina S the single mother of Z.B.S., died as a result of a one vehicle motor vehicle accident

in which the Appellant was the negligent driver. The Appellant alleges and the Family Court found that the Appellant and Christina S lived together in a same sex relationship from November 1, 1998, through June 1, 2002.

On June 1, 2002, Z.B.S. came to live with his maternal grandparents, Paul S and Janet S. Following the death of Christina S, the Appellee, Paul S, was appointed guardian of Z.B.S. by the County Commission of Clay County, West Virginia, on June 10, 2002.

Thereafter, the Appellant, Tina Burch, filed a petition for custody of Z.B.S. based upon her claim that she is "the affected child's psychological parent, during a period when the respondent and his spouse as the natural grandparents of the infant, had the right to maintain continuing substantial contact with the child, and they, respondent and his wife, failed to do so". (Appellant's Petition, Paragraph X). The petition of Appellant, Tina Burch, for custody of Z.B.S. was filed with the consent and support of Z.B.S.'S biological father, Clifford Kincaid.

After three Family Court temporary hearings, a final hearing was held on the custody petition on June 18, 2003. Following this hearing the Family Court of Clay County, Honorable Timothy R. Ruckman, issued a final order granting the petition of

Tina Burch for permanent custody of Z.B.S. on July 25, 2003. The family court designated Appellant as the primary custodian of Z.B.S. The court awarded the Appellee, Paul S , visitation with Z.B.S. on the first, third and fifth weekends of each month, alternate major holidays, and four weeks of custodial time each summer.

The Appellee, Paul S , appealed the Family Court ruling to the Circuit Court of Clay County, West Virginia.

After hearing, the Clay County Circuit Court, Honorable Jack Alsop, entered an order of remand on December 2, 2003. Judge Alsop ruled that under applicable West Virginia statutes, the Appellant, Tina Burch, did not as a matter of law have a standing to seek custody of the infant, Z.B.S., as the former same sex partner of the infant child's mother. The Circuit Court further found that the Appellant, Tina Birch, was not the psychological parent of Z.B.S. for the reason that the West Virginia psychological parent concept does not extend to a same sex partner, who resides with the natural parent. The Circuit Court transferred custody of Z.B.S. to the Appellee, Paul S , and awarded the Appellant, Tina Burch, visitation with the infant child. The court further remanded this action to the Family Court of Clay County for further proceedings to determine permanent custody of Z.B.S. between the biological father of the

child, Clifford Kincaid, and the maternal grandfather of the child, Paul S .

The Appellant now appeals the December 2, 2003, Clay County Circuit Court Order. The Circuit Court further ruled that the December 2, 2003, was a final order with respect to the Appellant, Tina Burch.

## II. STATEMENT OF FACTS

The Clay County Family Court in its order entered July 25, 2003, made certain Findings of Fact and Conclusions of Law.<sup>1</sup> Upon appeal, Judge Alsop did not specifically overturn any of the Family Court's Findings of Fact. Thus, these Findings of Fact are the facts for the purpose of this appeal.

The Family Court found that Z.B.S. was born on , and is the natural child of Clifford J. Kincaid and Christina D. S. who were never married. (Finding of Fact ¶3).

The Family Court found that the Appellant, Tina Burch and Christina S lived together in a same-sex relationship in Clay County, West Virginia, with Z.B.S. and A.B. the natural child of Tina Burch, from November 1, 1998 until the death of Christina S on June 1, 2002. (Finding of Fact ¶4).

The Family Court found that the Appellee, Paul S

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<sup>1</sup>All citations in this section are to the Findings of Fact" section or "Conclusions of Law" section of the Clay County court's order entered July 25, 2003,

and Janet S , are the maternal grandparents of Z.B.S. and Paul S qualified as guardian of Z.B.S. on June 10, 2002, in Clay County, West Virginia, after the death of his daughter, Christina S . (Finding of Fact ¶5). The Family Court further found that Paul S and Janet S , his wife, have had significant contact with Z.B.S. since his birth, having performed baby-sitting services, and a strong child-grandparent bond exists between Z.B.S. and the S . The S often performed baby-sitting service for Z.B.S. prior to the death of their daughter, Christina S , and the child Z.B.S. has lived in the S 's home since Paul S qualified as guardian in June, 2002. (Finding of Fact ¶8).

Regarding Z.B.S.'S father, Clifford Kincaid, the Family Court made the following Finding of Fact: Apparently no relationship existed between Clifford Kincaid and Christina S before conception of Z.B.S. Although, Clifford Kincaid has had contact with Z.B.S. since the child's birth, he has performed limited care-giving functions in his planned as well as actual involvement with the child has been limited. Clifford Kincaid would not have sought primary custody of Z.B.S. but for the death of Christina S in June, 2002. The bond between Clifford Kincaid and Z.B.S. is not as strong as the bond between Z.B.S. and Tina Burch. (Finding of Fact ¶7).

The Family Court found that Tina Burch and Christina S. planned the birth of Z.B.S. and enlisted the involvement of Clifford Kincaid only for the purpose of impregnating Christina S. Further it was their apparent intension to raise Z.B.S. and A.B. (a child of Appellant, Tina Burch) as a "family" unit. (Finding of Fact ¶6).

Christina S. died intestate and did not have a will stating her wishes regarding the custody of Z.B.S. Appellee's present counsel was not counsel for the Appellee in the June 18, 2003, family court hearing. Thus, counsel is unable to explain how the family made a Finding of Fact regarding the intention of the deceased, Christina S., in light of the West Virginia Dead Man's Statute, §57-3-1 et seq. of the West Virginia Code.

Regarding assets belonging to the child, Z.B.S., the Family Court found that Z.B.S. has acquired a significant estate totaling approximately \$208,000.00 since the death of Christina S. and now receives social security benefits as a result of her death. Paul S. administers the estate of Z.B.S. as the child's guardian. (Finding of Fact ¶9).

Paul S., as the administrator of the estate of Christina S., received net insurance proceeds in the amount of \$176,000.00 from a wrongful death settlement with the liability insurance carrier of the Appellant, Tina Burch. In a separate

infant summary proceeding, the Circuit Court of Clay County, Judge Alsop, approved the settlement and ordered Paul S. , as guardian of Z.B.S., to invest the net wrongful death proceeds in an interest-bearing account in a federal insured financial institution. Further, Paul S. , is ordered not to spend any of this money prior to Z.B.S. becoming eighteen years of age without specific written authorization of the Circuit Court of Clay County. Appellee, Paul S. has deposited and handled this money pursuant to the order of the Circuit Court.

Further, Z.B.S. receives Social Security Survivors' benefits as a result of the death of his mother, Christina S. . Paul S. , as guardian, receives these Social Security monthly benefits. Because Paul S. is retired and has adequate income, he does not need Z.B.S.'S Social Security benefits for the payment of household expenses. Thus, he has deposited all the Social Security benefit monthly checks in a guardian account for the benefit of Z.B.S. The only expenditure from the Social Security benefit account has been to the West Virginia College prepaid tuition plan to prepay Z.B.S.'S college education.

The only other relevant fact to the issue of Z.B.S.'s assets occurred in August 3, 2003. The Family Court order awarding custody of A.B.S. to Appellant, Tina Burch, was entered July 25, 2003. Nine days later on August 3, 2003, Appellant Tina

Burch's counsel wrote Appellee, Paul S [redacted]'s counsel, Donald K. Bischoff as follows: "...Also, will Mr. S [redacted] voluntarily resign his position as guardian ad litem of Z [redacted] s funds and estate without further counsel action? Please advise within three(3) days from even date herewith. Thanks, Jim Douglas." (see Exhibit A attached herewith).

The most significant finding of the Family Court for the purpose of this appeal is that the Family Court found "Prior to the death of Christina S [redacted] on June 1, 2002, Christina S [redacted] was the primary custodian and caretaker of Z.B.S..." )Finding of Fact ¶10)

Based upon these Findings of Fact, the Family Court concluded that Appellant, Tina Burch, was a psychological parent of Z.B.S. The Family Court made no Finding of Fact that the Appellant, Tina Burch, served as Z.B.S.'S psychological parent, "during a period when a natural parent had a right to maintain continuing substantial contact with the child and failed to do so." Obviously, this was not the case because the Family Court correctly found that prior to her death on June 1, 2002, Christina S [redacted] was the primary custodian and caretaker of Z.B.S.

Between the temporary hearings in this action, the family court appointed Jeffrey L. Hall as guardian ad litem for Z.B.S. Based upon counsel's best information and belief, the

guardian ad litem at the time of his appointment, was the only West Virginia lawyer who has formally expressed and published his opinion regarding gay parent issues. See Jeffrey L. Hall, "Coming Out in West Virginia: Child Custody and Visitation Disputes Involving Gay or Lesbian Parents, 100 W.Va. L. Rev. 107 (1997). Counsel does not know how or why the family court happened to make this guardian ad litem appointment in a custody case involving a gay litigant, although in retrospect it seems clearly inappropriate.

Appellant's brief discusses and attaches the psychological custody evaluations of Olga E. Gioulis for the Appellant and Jeffrey Harlow for the Appellee. Both of these evaluations took place when Z.B.S. was approximately two years and ten months old. Both psychologists said that Z.B.S.'S speech was difficult to understand or that he would not speak to the psychologist. Although, Z.B.S. did not verbally communicate with either psychologist, Ms. Gioulis found that a bond exists between Z.B.S. and the Appellant. Dr. Harlow did not mention the concept of bonding in his report. However, Dr. Harlow did state regarding the Appellant that "Paul is still completing the grief process in response to the loss of this daughter. He is a gentle and kind person who takes a practical no-nonsense approach to life. Paul is a deeply religious man who is dedicated to his

wife, family, and Z . Further, Dr. Harlow opined that "results of this examination indicate that Paul and Janet S are mentally healthy people, with excellent parenting skills. They use appropriate discipline techniques and appear to truly love their grandson, Zachary S . Certainly, they have substantial parenting experience, having successfully reared five children." Dr. Harlow concluded that "Janet and Paul S have excellent parenting capacity and Z S would benefit greatly by being reared by them."

To bring the court up-to-date after Judge Alsop's order of remand that is the subject of this appeal was entered on December 2, 2003, the Family Court held a remand hearing. At the hearing held on February 24, 2004, the family court reiterated it's prior Findings of Fact including the following:

7. Apparently no relationship existed between Clifford Kincaid and Christina S before conception of Z.B.S. Although he had contact with Z.B.S. since the child's birth he has performed limited care-giving functions and his planned as well as actual involvement with the child has been limited. Clifford Kincaid would not have sought primary custody of Z.B.S. but for the death of Christina S in June, 2002. The bond between Z.B.S. and Clifford Kincaid is not as strong as the bond between Z.B.S. and Tina Burch.

The family court further confirmed, adopted and approved it's Conclusion of Law regarding Clifford Kincaid as follows:

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4. Clifford Kincaid as natural parent standing as a legal parent under West Virginia Code §48-9-103 to seek custody of Z.B.S..... because his involvement with the child has been limited, it would not be in the best interest of Z.B.S. for Clifford Kincaid to be designated primary custodian.

After making the above Finding of Fact and Conclusion of Law the Family Court awarded Clifford Kincaid the designation as primary caretaker of Z.B.S. The Family Court further imposed the parenting plan and limited visitation upon the Appellee that the Court had originally ordered in it's July 25, 2003, Family Court order. Lastly, in a written conclusion of law, the family court concluded that "the aforesaid Remand Order(the circuit court's order appealed from in this action) operates to unconstitutionally penalize her (the Appellant) by removing her right to seek custody of the subject infant under the "psychological parent" cause of action because of her same-sex relationship with the late Christina S. ...."

Appellee again appealed the Family Court order to the Circuit Court, after hearing the Circuit Court of Clay County again reversed the Family Court, directed that Z.B.S. be re-delivered to the Appellee by Second Order of Remand entered on May 3, 2004.

A time line of where Z.B.S. has resided during his life would hopefully be helpful to the Court. From December 25,

1999, until his mother's death on June 1, 2002, Z.B.S. lived with his mother, Christina S , in a residence owned by Ms. S and also occupied by Appellant, Tina Burch and her daughter. From Ms. S 's death on June 1, 2002, until September 4, 2002, Z.B.S. lived with his grandfather, the Appellee, Paul S

Pursuant to the first Family Court temporary order from September 4, 2002, until November 13, 2002, the Family Court's first shared custody order allocated seven days a month to the Appellant and the remainder of the month to the Appellee. The second Family Court shared custody order from November 11, 2002, until July 25, 2003, allocated custody to the Appellant, Tina Burch, from the 1st day of the month to the 15th day of the month and to the Appellee, Paul S , from the 16th day of the month until the end of the month. Pursuant to the third Family Court shared custody order of June 25, 2003, the Appellant, Tina Burch, was awarded custody of Z.B.S. and the Appellee, Paul S , was awarded visitation on the first, third and fifth weekends of each month, alternate major holidays and four weeks in the summer. By the Clay County Circuit Court order which is appealed in this action from December 2, 2003, until March 2, 2004, the Appellee, Paul S , was awarded custody of Z.B.S. and the Appellant, Tina Burch, was awarded visitation on non-

alternate Saturdays. The Family Court's fourth shared custody order in effect from March 2, 2004, until May 3, 2004, awarded 50/50 custody to the Appellant and the Appellee alternating physical custody each two weeks. The Circuit Court's order in effect from May 3, 2004, until September 2, 2004, awarded Appellee, Paul S , custody of Z.B.S. and the Appellant, Tina Burch, visitation on alternate Saturdays. By order and stay entered by this Court on September 2, 2004, Appellant, Tina Burch, was awarded custody of Z.B.S. and the Appellee, Paul Si , was awarded visitation on the first, third and fifth weekends of each month, alternate holidays, and four weeks in the summer.

Z.B.S.'S parenting plan has been changed seven times from September 4, 2002 until the present.

### III. RESPONSE TO ASSIGNMENTS OF ERROR

- A. THE APPELLANT DOES NOT HAVE STANDING TO SEEK CUSTODY OF Z.B.S. PURSUANT TO WEST VIRGINIA CODE §48-9-103.
- B. THE APPELLANT, THE FORMER SAME SEX PARTNER OF THE CHILD'S DECEASED MOTHER, IS NOT A PSYCHOLOGICAL PARENT TO Z.B.S.
- C. THE QUESTION OF WHETHER TO EXTEND THE PSYCHOLOGICAL PARENT CONCEPT TO THE FORMER SAME SEX PARTNER OF THIS CHILD'S DECEASED MOTHER IS BETTER LEFT TO THE LEGISLATURE THAN THE JUDICIARY.

#### IV. DISCUSSION OF LAW

##### A. STANDARD OF REVIEW

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review." Syl. Pt.1, Chrystal R.M. v.Charlie A.L. 194 W.Va. 138, 459 S.E.2d 415 (1995).

##### I. The APPELLANT DOES NOT HAVE STANDING TO SEEK CUSTODY OF Z.B.S. PURSUANT TO WEST VIRGINIA CODE, §48-9-103.

A threshold issue when a non-parent seeks custody of a child is whether the non-parent has standing to assert the custody claim. In the domestic context, whether the third party has standing to obtain custody depends upon the law of the individual state. Court's tend to strictly construe the statutory predicates for standing and third parties who fail to meet these requirements will be deemed to lack standing.

West Virginia law relating to standing in a custody action is §48-9-103 of the West Virginia Code. This section provides as follows:

- (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 [§ 48-1-232] 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. (2001, c.91.)

§48-1-232 of the West Virginia Code defines a legal parent as follows:

"Legal parent" means an individual defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds. (2001 c. 91.)

The Appellant has not been allocated custodial or decision making responsibility under a parenting plan regarding Z.B.S. as set out in sub-section (a)(2). The Appellant was not a party to a prior order establishing custody and visitation or under a parenting plan for Z.B.S. as set out in sub-section (a)(3). Because the Appellant instituted the custody action in this case section (b) does not apply.

Thus, in order to have standing the Appellant must fit

in under §48-9-103 (a) (1) by into the definitions set out in §48-1-232. Analyzing the requirements §48-1-232 as they apply to this action are as follows: The Appellant is not a legal parent based on biological relationship, presumed biological relationship or legal adoption. The only other recognized ground to be a legal parent in this jurisdiction is the concept of "psychological parent."

The Appellant is not psychological parent to Z.B.S. because from Z.B.S.'S birth on , , until the death of his mother, Christina S , on June 1, 2002, Christina S was the primary custodian and caretaker of Z.B.S. Thus, Z.B.S. never resided with an individual other than his mother (i.e. the Appellant) for a significant period of time..."during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so."

The Appellant meets none of the requirements set by the West Virginia Legislature in 2001 to acquire standing in this custody action.

In the order appealed from in this case, the Circuit Court Order of Remand entered December 2, 2003, Judge Alsop wrote a thoroughly researched and carefully reasoned decision upon the issue of standing. Judge Alsop cites persuasive

authority from nine different states. Counsel defers to Judge Alsop's analysis on the issue of standing and requests the Court to thoughtfully review Judge Alsop's decision.

II. THE APPELLANT, THE FORMER SAME SEX PARTNER OF THE CHILD'S DECEASED MOTHER, IS NOT A PSYCHOLOGICAL PARENT TO Z.B.S.

The West Virginia Supreme Court of Appeals first discussed the psychological parent concept in, In The Interest of Brandon L.E., 183 W.Va. 113 (1990). In Brandon L.E., this Court recognized the right of a maternal grandmother to be awarded custody of her grandson under specific factual circumstances. In Syl. Pt 4 of that decision the Court held as follows:

4. 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 clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child. (EMPHASIS ADDED)

The Court's decision cited Lemley v. Barr, 176 W.Va. 378 (1986). In Lemley, the court determined that despite an

invalid adoption a determination should be made of what physical custody arrangement was in the best interest of the five year old child who had spent almost his entire life with an adoptive mother. In Brandon L.E., Supra, the Court pointed out that Brandon had lived with or been taken care of by his maternal grandmother for the majority of his young life.

The present case is readily distinguishable from the factual situation in, In Brandon L. E. In this case Z.B.S. lived with his mother, Christina S , from his birth on , until the death of his mother, Christina S , on June 1, 2002. The Appellant, Tina Burch, lived in the same home as Z.B.S. and his mother, Christina S , during this period. However, Z.B.S.'S mother, Christina S , resided with Z.B.S. Christina S both maintained continuing substantial contact with Z.B.S. by residing with him and being his primary custodian. Thus, the psychological parent concept enumerated in Brandon L.E. is not triggered by the facts in the present case.

In State of Florida D.H.R.S. v. Thornton, 183 W.Va. 513 (1990) this court in a per curium decision considered a custody action in which the natural mother was serving a term of life imprisonment and the natural father's whereabouts were unknown. The custody action of the infant child was between the Florida Department of Health and Rehabilitative Services and the

Thorntons. Mrs. Thornton was a grand aunt of the infant child.

The per curium opinion remanded this case to Circuit Court for an evidentiary to determine the best interest of the infant child. The per curium opinion quoted Syl. Pt. 4 of Brandon L. E., but omitted the phrase "during the period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so." The per curium decision quotes Syl. Pt. 4 of Brandon L.E., Supra, as follows:

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,... 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 clear showing of significant benefit to him....

Significantly, in Simons v. Comer, 190 W.Va. 350 (1993), Justice Thomas Miller in footnote 16 pointed out the omission from Syl. Pt. 4 of Brandon L.E. in the per curium opinion, State of Florida D.H.R.S. v. Thornton, Supra. Justice Miller noted that the cited Syl. Pt. 4 of Brandon L.E. in the Thornton per curium opinion omitted the phrase "during the period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so." Justice Miller pointed out that in Thornton, the natural mother was in

prison and the father's whereabouts were unknown. The court did not attempt to modify Syl. Pt. 4 of Brandon L. E. in Thornton, but as Justice Miller points out the per curium opinion merely omitted the relevant phrase.

In Ortner v. Pritt, 187 W.Va. 494 (1992) this court issued a per curium opinion in a custody action involving a grandmother and a biological mother. As in Thornton, Supra, the court quoted Syl. Pt. 4 of Brandon L.E. but omitted the phrase "during the period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so."

Again, significantly, Justice Thomas Miller in his decision in Simons, Supra, at footnote 16, points out that the per curium opinion omitted the phrase from Syl. Pt. 4 of Brandon L. E., Supra, "during the period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so." Justice Miller after pointing out the omission of the above phrase stated that in Ortner, Supra, it was clear that the mother had abandoned the child with her mother-in-law and the natural father was not involved. Justice Miller further opined that the original Syl. Pt. 4 of Brandon L. E. would have controlled in Ortner.

Thus, Justice Miller's opinion in Simons, not only

pointed out that Thornton, and Ortner, did not change the psychological parent requirements set out in Syl. Pt. 4 of Brandon L. E., and emphasized that a requirement of a psychological parent is that during the time the proposed psychological parent resides with the child further requires that the natural parent having the right to maintain continuing substantial contact with the child fails to do so. In contrast to the present case the child's parent, Christina S , resided with Z.B.S. and was his primary custodian.

In, In Re: Jade E.G., 575 S.E. 2d 715 (2002) this court upheld that custody issues cannot be ignored based on the concept of "primary caretaker" or "psychological parent." In Jade, paternal grandparents had cared for the children for a period of time when the biological mother was unable to care for them. Subsequent to the mother's being awarded custody in a divorce action, the grandparents began to care for the children because the mother worked at night. When the mother's living situation changed she sought the return of the children. The Family Court awarded custody to the grandparents and the Circuit Court affirmed. This court found that no "transfer of custody" had occurred between the parties and 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 have first occurred.

In Bowman v. Blevins, 210 W.Va. 249 (2001), maternal grandparents sought custody of their two grandchildren. The court citing Overfield v. Collins, 199 W.Va. 27 (1996) stated as follows:

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.

In conclusion the concept of "psychological parent" from Brandon L.E. to the present only applies when a parent or parents don't do their job. When this occurs someone else has to step up and substitute for the parent or parents. This new person then serves as the child's psychological parent. It is, of course, required that the new person or the non-parent with whom the child resides has to step up and be a psychological parent "during a period when the natural parent has the right to maintain continuing substantial contact with the child and failed to do so." That is not the case in the present action and the Appellant is not a psychological parent of Z.B.S.

III. THE QUESTION OF WHETHER TO EXTEND THE PSYCHOLOGICAL PARENT CONCEPT TO THE FORMER SAME SEX PARTNER OF Z.B.S.'S DECEASED MOTHER IS BETTER LEFT TO THE LEGISLATURE THAN THE JUDICIARY.

The West Virginia Legislature recodified family law in 2001 through the passage of House Bill 2199. In that recodification, the Legislature did not specifically address the right of same sex partners of biological parents to seek custody of infant children upon the desolation of the relationship through death or separation. Clearly, the present factual situation is not included in §48-9-103 or §48-1-232 of the West Virginia Code.

The Judiciary should defer to the West Virginia Legislature which has already recently addressed the issue of standing to seek custody of infant children. Article V, § 1 of the West Virginia Constitution states "The legislature, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that the justices of the peace shall be eligible to the legislature".

In Lewis v. Canaan Valley Resorts, Inc. 408 S.E. 2d 634 (1991), this court in upholding a skiing responsibility act stated "A corollary principle is that the judiciary may not sit as a superlegislature to judge the wisdom or desirability of the

legislative policy determination made in areas that neither effect fundamental rights nor proceed along suspect lines. City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S. Ct. 2513, 2517, 49 L.Ed. 2d 511, 517 (1976)."

In Syl. Pt. 2 in West Public Employees Retirement System v. Dodd, 396 S.E. 2d 725 (1990) and in Syl. Pt. 1 in State Ex Rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740 (1965)

this court held:

"In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches, [W.Va. Const. art. V. § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislative, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt."

In State Ex Rel. Roy Allen S. v. Stone, 196 W.Va. 624 (1996) Justice Cleckly quoted Justice Harlan as follows:

"Judicial self-restraint will ... be brought about in the 'due process' area ... only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underline our society, and wise appreciation of the great roles that the doctrine [] of ... separation of powers ha[s] played in establishing and preserving American freedoms." Griswold v. Connecticut, 381 U.S. 479, 501.85 S.Ct. 1678, 1691, 14 L.Ed.2d 510, 525 (1965).

(Harlan J. concurring).

Thus, the proper forum for a change in the public policy of West Virginia to grant former same sex partners of deceased parents or any other group such as step-parents standing to seek custody is the Legislature not this Court.


V. CONCLUSION

Appellee, Paul S. , requests that this court affirm Judge Alsop's order of remand entered December 2, 2003, and allow the lower court to determine the permanent custody of Z.B.S. between his biological father, Clifford Kincaid and his maternal grandfather, Paul S.

Respectfully submitted,

PAUL S.

By Counsel

  
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"EXHIBIT NO. A"

*James Wilson Douglas, L. C.*

*Attorney at Law*

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*Telephone and Fax 304 765 2821*

Date : 8/4/03      Pages : 1

Time : 2:11:16 PM      Subject :

To : RICHARD WITT

Dear Rich:

In an effort to avoid further litigation in the captioned matter, we would respectfully request that Mr. S provide Tina Burch with Z birth certificate, social security card, shot records and toys that were originally in the Burch-S home before the June 1, 2002 death of the latter. This was mentioned by Tina to Mr. S on Friday August 1, 2003, but when the child was picked up by Tina on Sunday, August 3, 2003, Mr. S did not have said items. Also, will Mr. S voluntarily resign his position as Guardian of Z's funds and estate without further Court action? Please advise within three (3) days from even date herewith.

Thanks, Jim Douglas

*Very truly yours,*

*James Wilson Douglas*

*Attorney at Law*

CERTIFICATE OF SERVICE

I, Donald K. Bischoff, counsel for Appellee, Paul  
St. , do hereby certify that I served the foregoing Brief of  
Appellee upon:

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Sutton, WV 26601

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LESBIAN AND GAY RIGHTS PROJECT OF THE  
AMERICAN CIVIL LIBERTIES UNION AND  
AMERICAN CIVIL LIBERTIES UNION OF WEST  
VIRGINIA FOUNDATION

by mailing a true copy thereof to each of them at the above  
addresses by United States Mail, postage prepaid, on the 3rd day  
of January, 2005.



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Donald K. Bischoff  
WVSB#347  
Counsel for Appellee