

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Jersey ("ACLU-NJ") is a private, non-profit, non-partisan membership organization devoted exclusively to protecting the basic civil liberties of all New Jersey residents, and extending those protections to groups that have traditionally been denied them. Founded in 1960, the ACLU-NJ has approximately 8,000 members in the State of New Jersey. The ACLU-NJ is the state affiliate office of the American Civil Liberties Union, which was founded in 1920 for identical purposes, and is composed of over 300,000 members nationwide.

The ACLU-NJ has a long history of involvement, both as *amicus curiae* and as direct counsel, in defending the civil liberties of gay and lesbian families and individuals. See, e.g., V.C. v. M.J.B., 163 N.J. 200, cert. denied sub nom., M.J.B. v. V.C., 531 U.S. 926 (2000); Dale v. Boy Scouts of America, 160 N.J. 562 (1999) rev'd 530 U.S. 640 (2000) (challenge to boy scouts' prohibition of gay scoutmasters); In the Matter of the Adoption of Two Children by H.N.R., 285 N.J. Super. 1 (App. Div. 1985) (interpreting state adoption statute as permitting one partner in unmarried same sex couple to adopt other partner's child without a termination of parental rights); Holden v. Division of Youth and Family Services, No. C-203-97 (Ch. Div., Bergen County, filed 7/19/97) (challenge to state policy of refusing to consent to adoption of foster children by both parents in unmarried couple).

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Amicus adopts the procedural history and statement of facts recited by plaintiffs-petitioners A.B and S.B.W.

ARGUMENT

- I. THE APPELLATE DIVISION ERRED BY FAILING TO PROTECT THE PARENT-CHILD RELATIONSHIP THAT IT RECOGNIZED BETWEEN A.B. AND K.W.

Having found that plaintiff A.B. meet the criteria for being a psychological parent, as set out by this Court in V.C. v. M.J.B., 163 N.J. 200, cert. denied sub nom., M.J.B. v. V.C., 531 U.S. 926 (2000), the Appellate Division erred in denying A.B.'s request for visitation based on its holding that V.C. did not apply retroactively. This opinion was error for two reasons. First, refusing to recognize A.B.'s presumptive right to visitation gives short shrift to the important parental rights that this Court recognized in V.C. Second, visitation determinations are never totally final and therefore applying V.C. to A.B.'s motion to modify the original denial of visitation would not be a retroactive application of the rule in V.C.

- A. A.B. Meets the V.C. Standard For Psychological Parentage And Therefore Is Presumptively Entitled To Visitation.

The Appellate Division correctly found that A.B. would have easily met the standard of a psychological parent under V.C. had her case been heard after, rather than before, this Court decided V.C. See Pa8. The Appellate Division went on to explain that as a psychological parent A.B. would have been presumptively

entitled to visitation. Id. The Appellate Division also correctly noted that the only grounds for denying visitation to a parent (psychological or otherwise) is a showing that such visitation would "cause physical or emotional harm" to the child or if the parent seeking visitation was "unfit." Id. (quoting V.C., 163 N.J. at 229). The court noted that these "disqualifications ... are not present in the record." Id.

Finally, the Appellate Division explained that "[i]t seems to us, therefore, that should V.C. be applied to this case, visitation would almost certainly be granted. Perhaps with some counseling or other restrictions to smooth the transition, but some visitation would be granted." Pa8-9. Thus, the Appellate Division's only objection to ruling that A.B. is entitled to visitation was "that to reach this result, V.C. must be applied retroactively to a case that was not even pending at the time V.C. was decided." Id. For the reasons discussed below, *amicus* believes the Appellate Division erred in denying A.B. visitation after recognizing her as a psychological parent.

1. A.B. is a psychological parent with respect to K.W. and therefore has important parental rights that must be recognized.

When, in V.C., this Court recognized the existence of psychological parents and set out the standard under which psychological parents would be recognized, it was not creating a legal fiction, but rather, was recognizing actual parent-child relationships that already existed, *de facto*, in families

throughout society. As Justice Long explained in her concurring opinion in V.C.:

What is crucial is to realize that a parent-child bond is not simply a court-bestowed determination for the purpose of resolving litigation. Certainly, it affects the status of custody and visitation litigation, but that is secondary. The finding of the existence of such a bond reflects that the singular emotional and spiritual connection, ordinarily only expected in the relationship of a legal parent and child, has been created between an adult and a child who are not related by blood or adoption. V.C. 163 N.J. at 233 (Long, J., concurring).

For the lower courts to have recognized that such a parent-child relationship exists between A.B. and K.W., but to nonetheless deny that any legal recognition flows from such a relationship is inconsistent with this state's tradition of protecting family relationships rather than interpreting laws in an overly-rigid manner. Additionally, the lower courts' failure to protect the existing parent-child relationship between A.B. and K.W. is a dereliction of their duty to use their *parens patriae* power to protect the best interest of the children involved in this case.

Even before this Court's decision in V.C., many individuals who were neither the legal custodians nor biological parents of a child were allowed to petition for visitation or custody. See, e.g., Hoy v. Willis, 165 N.J. Super. 265 (App. Div. 1978) (custody awarded to a paternal aunt over the objection of biological mother); Palermo v. Palermo, 164 N.J. Super. 492 (App. Div. 1978) (custody of child granted to stepmother over the objection of biological father); S. v. H.M., 111 N.J. 553 (App. Div. 1970)

(awarding custody to maternal aunt over objection of biological mother); S.M v. S.J., 143 N.J. Super. 379 (Ch. Div. 1976) (custody of children awarded to stepfather rather than biological mother); see also Klipstein v. Zalewski, 230 N.J. Super. 567, (Ch. Div. 1988) (Holding that "visitation rights can arise either by statute or general principles of equity.").

In none of these cases was there any explicit statutory authorization naming the plaintiffs as one of the categories of persons authorized to seek custody or visitation. Nevertheless, the courts were willing to consider the claims, in order to protect the best interests of the minor children involved. A.F. v. D.L.P., 339 N.J. Super. 312, 325 (App. Div. 2001) ("New Jersey unequivocally recognizes the potential right of a child to maintain a bonded relationship with a third party when that relationship was fostered by the parent in the context of a couple's relationship and an intentionally shared family life.")

With regard to the obligation of courts to protect the interests of children when deciding whether to recognize the status of third parties who act as parent figures, *amicus* cannot improve upon the words of the Appellate Division in In the Matter of the Adoption of Two Children by H.N.R., 285 N.J. Super. 1 (App. Div. 1985), where it recognized "step-parent" adoptions in families with same-sex parents. There the court stated:

our paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare, and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate that public interest in children's financial support and emotional well-being by developing theories of parenthood, so the "legal strangers" who are de facto parents may be awarded custody or visitation or reached for support. Matter of the Adoption of Two Children by H.N.R., 285 N.J. Super. at 11 (quoting Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. Sup. Ct. 1993)).

Thus, the lower courts here underestimated their authority and duty once they recognized that A.B. was a psychological parent to S.W. V.C., 163 N.J. at 227 ("Once a third party has been determined to be a psychological parent to a child ... he or she stands in parity with the legal parent."); Watkins v. Nelson, 163 N.J., 235, 254 (2000) ("when a third party, such as a stepparent, establishes psychological parentage with the child, the third party stands in the shoes of a natural parent.")

At the point where the court recognized A.B. as a psychological parent the court should have acted to protect the parent-child relationship that it had recognized by granting some form of visitation. Wilke v. Culp, 196 N.J. Super. 487, 496 (App. Div. 1984) ("It is well settled that the law favors visitation and protects against the thwarting of effective visitation rights."); see also N.J.S.A. § 9:2-4 (public policy of

the state is to assure that children maintain their relationship with non-custodial parents after separation).

The opinion of the Appellate Division, that A.B., as a result of fortuitously bad timing, is forever barred from asserting a right to visitation is quite literally a decree terminating her parental rights. In re Matter of Baby M, 109 N.J. 396, 451 (1988) ("It seems obvious to us that since custody and visitation encompass practically all of what we call 'parental rights' a total denial of both would be the equivalent of termination of parental rights.") This harsh result cannot be squared with either the equities involved in a case regarding the preservation of a parent-child relationship nor with constitutional position of parental rights as a fundamental liberty interest. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("it is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'") (citation omitted).

Indeed, the Appellate Division itself recognized these concerns but felt that this Court, rather than itself, should

address them when it stated, "[p]erhaps this case is different and the retroactivity law ought to be shaped by our strong concern for the well-being of children. But, we conclude that any such approach should be crafted by the Supreme Court and not an intermediate appellate court." Pa.9.

2. Because the original order regarding A.B.'s request for visitation was not a final order, the Appellate Division's concerns regarding its modification were unfounded.

Because orders concerning custody and visitation remain within the continuing jurisdiction of the courts, they can be modified based on changed circumstances as justice and the best interest of the children involved require. The comments to Rule 4:50-3[1] of the New Jersey Court Rules state: "It should be noted that applications for relief from equitable distribution provisions in a judgment of divorce are subject to this rule [R. 4:50] and not, as in the case of alimony, support, custody, and other matters of continuing jurisdiction of the court, subject to a 'changed circumstances' standard." Pressler, Current N.J. Court Rules, Comment R. 4:50-3[1]. Thus, it is clear that matters involving custody are not governed by R. 4:50, but rather remain under the continuing jurisdiction of the court.

Here, the fact that this Court's decision in V.C. made it clear that the trial court's initial order applied the wrong standard and erred in denying visitation to A.B. as a psychological parent is a sufficient and compelling reason to modify the order. See Matter of Adoption of J.J.P., 175 N.J.

Super. 420, 429 (App. Div. 1980) ("We are fully satisfied that defendant is entitled to visitation privileges, a right universally recognized for the benefit of a noncustodial parent. Absent serious wrong-doing or unfitness, the right of visitation is strong and compelling.")

In the area of custody and visitation, courts must be willing to continually reexamine, and if necessary modify, existing orders to protect the best interest of the children involved. Borys v. Borys, 76 N.J. 103, 111 (1978) ("Finality has little meaning, however, in the context of child custody adjudication. A custody decree is purely prospective, intended to secure the welfare of the child."); Wilke v. Culp, 196 N.J. Super. 487, 494 (App. Div. 1984) ("matters involving custody and visitation are generally not considered to be final.")

Once this Court's decision in V.C. made it clear that the lower court applied the wrong legal standard and improperly withheld visitation between A.B. and K.W. the proper course would have been to remedy the error with all possible speed. Such a course of action would have prevented any further harm to K.W. from being deprived of the opportunity to have a continuing relationship with A.B. Such a result is clearly mandated by decisions like those in Borys and in Wilke, which explain that orders regarding custody and visitation must be forward looking with their guiding purpose being to achieve the best interest of the child.

On the other side of the equation, there can be no legitimate benefit to anyone by irrevocably severing this parent-

child relationship based merely on the fortuitousness of A.B. asserting her right to visitation prior to this Court's decision in V.C. rather than after. Ironically, had A.B. done nothing after her relationship ended with S.E.W. -- that is, had she not sought visitation with K.W. -- then A.B. would have been able to seek visitation once the opinion in V.C. was issued and would have been presumptively entitled to that visitation. See Barron v. Barron, 184 N.J. Super. 297, 301 (Ch. Div. 1982) (visitation rights cannot be abandoned and a five year delay in seeking visitation does not cause parent to lose right to visitation); Wilke v. Culp, 196 N.J. Super. 487, 500 (App. Div. 1984) (adopting the reasoning of Barron). Thus, A.B., according to the Appellate Division's opinion, has lost her opportunity to have visitation with her child because she pursued her parental rights before they was clearly recognized. On the other hand, had A.B. been less devoted to K.W. and not sought visitation at the end of her and S.E.W.'s relationship, she would now almost certainly be entitled to such visitation. Such an absurd result is neither compelled by any law, nor does it square with this Court's history of pragmatic and worldly wise opinions in the area of visitation and child custody matters.¹

¹ For the foregoing reasons, *amicus* does not believe that the issue of retroactivity is germane to the application of V.C. to a motion to modify an order regarding visitation. However, if this Court does examine the issue under the balancing test from Coons v. American Honda Motor Co., 96 N.J. 419 (1984), *amicus* believes that the important parental rights at stake and the New Jersey courts' tradition of acting to protect family relationships militate towards the retroactive application of V.C.

- B. This Court Should Remand This Case To The Trial Court With Instructions To Order Visitation In A Manner That Is In Accord With The Best Interest Of The Children.

Procedurally this case is very much like the visitation portion of the opinion in In re Matter of Baby M, 109 N.J. at 463-68. There this Court held that on the record before it the surrogate mother of Baby M was the child's legal parent and was entitled to at least some form of visitation. There, this Court remanded the case to the trial level with instructions that there must be some visitation, but left it to the trial court to determine how to best structure the visitation. Id. at 466 ("We have decided that Mrs. Whitehead is entitled to visitation at some point, and that question is not open to the trial court on this remand.")

Additionally, the Court instructed that on remand the case should be assigned to a different trial judge. This Court stated:

As we have done in similar situations, we order that this matter be referred on remand to a different trial judge by the vicinage assignment judge. The original trial judge's potential "commitment to its findings," and the extent to which a judge "has already engaged in weighing the evidence," persuade us to make that change. Id. at 463 n.19. (citations omitted).

While *amicus* has no doubt that the judges who sat below acted in good faith to achieve what they felt was in the best interest of the K.W., *amicus* believes that, for the reasons stated by this Court in Baby M, it would be appropriate to assign this case to a new trial judge on remand.

CONCLUSION

For the foregoing reasons, this Court should grant certification, reverse the judgment of the Appellate Division, and remand the case to the trial court for a determination of how to structure the visitation.

Respectfully submitted,

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