IN THE

Supreme Court of New Jersey

No. 53,012

PATRICK MORIARTY

Plaintiff-Respondent,

v.

JULIA BRADT *(deceased)*

Defendant,

v.

LYNN JACK BRADT *and* **PATRICIA BRADT**

Intervenors-Petitioners.

ON A PETITION FOR CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT, APPELLATE DIVISION, DOCKET NO. A-2866-00T5 (SAT BELOW: HON. DAVID BAIME, P.J.A.D., RICHARD NEWMAN, J.A.D., ROBERT FALL, J.A.D.)

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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STATUTES:

Amicus American Civil Liberties Union of New Jersey (ACLU-NJ) respectfully submits this brief in the above captioned matter. In this brief, Amicus ACLU-NJ seeks to articulate the constitutionally appropriate standards by which to determine whether government intervention in parental decisions with regard to visitation by non-parents is warranted. It takes no position on whether those standards have been met in this case, and therefore does not suggest whether granting expanded visitation to petitioners in this case should ultimately be granted.

INTERESTS OF AMICUS CURIAE

The American Civil Liberties Union of New Jersey (ACLU-NJ) is a nonprofit, nonpartisan organization with approximately 8000 members. It is the state affiliate of the national American Civil Liberties Union, an organization of nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the ACLU has appeared before numerous courts in cases involving the right to family autonomy, both as direct counsel and as amicus curiae, and the ACLU-NJ in particular has appeared in New Jersey courts in many such cases. This case raises those issues again, and its proper resolution is therefore a matter of direct concern to the ACLU-NJ and its members.

STATEMENT OF CASE

Although this contentious litigation had resulted in a lengthy record, certain core facts are not disputed. Patrick Moriarty is the father of Brian Moriarty (currently age 15) and Tara Moriarty (currently age 12). Since the dissolution of his marriage to Julia Bradt (now deceased), he has had custody of his children, whom he has raised along with his second wife. Notably, there has been no contention that he is anything other than a fit parent.[1]

Lynn Jack Bradt and Patricia Bradt are the maternal grandparents of Brian and Tara, and have established a loving grandparental relationship with the children. Mr. and Mrs. Bradt understandably wish to maintain and foster their relationship with their grandchildren. Despite the intense animosities that clearly exist between Mr. Moriarty and his former parents-in-law, he is now apparently willing to allow them visits once a month for four hours within New Jersey. The Bradts, however, desire more frequent visits, including bimonthly overnight visits at their home in Pennsylvania. At the outset, therefore, it is

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[1] Amicus is aware that the record reveals various instances of contumacious conduct by Mr. Moriarty during the course of this litigation that reflects adversely both on his candor and his sense of decorum towards the parties, and to the judiciary. Mr. Moriarty could be, and indeed has been, sanctioned for such conduct by the trial court. While Amicus ACLU-NJ of course in no way condones lack of candor or disrespectful conduct to the courts, the trial judge ultimately concluded, and the respondents do not dispute, that Mr. Moriarty is a fit parent to Brian and Tara. That factual finding is the core predicate for the ensuing constitutional analysis.

important to note that this is not a case in which the custodial parent is seeking to sever completely a relationship between grandparent and grandchild, but rather merely seeks to limit those visits in a manner which, in his judgment, is consistent with their best interests of the children.

After an extensive plenary hearing, and after having received diagnostic evaluation reports from social services professionals, the Family Part granted the Bradts' application for more extensive visits than Mr. Moriarty was prepared to allow, including overnight visits every other month at the Bradt's home in Pennsylvania. In deciding to override the judgment of Mr. Moriarty in limiting visits to four hour visits once a month, the trial court relied upon the testimony of Dr. Judith Greif, the Bradt's expert, who opined that limiting the visits with the children in the way determined by their father would cause psychological "harm" to them by fostering the perception that Mr. Moriarty's plan to alienate them from their grandparents was succeeding.

On appeal, the Appellate Division reversed to the extent that the trial court's order required visitations on terms more expansive than Mr. Moriarty was prepared to allow, i.e. monthly visits of four hours duration. Interpreting Troxel v. Granville, 530 U.S. 57 (2000), the Appellate Division concluded that Mr. Moriarty's judgment regarding the extent of visitations should be sustained. This Court thereupon granted the Bradts' petition for certification.

SUMMARY OF ARGUMENT

The decisions of a fit parent regarding the upbringing of his or her minor child are constitutionally entitled to a heavy presumption of validity. This presumption embraces and protects decisions by a fit parent on whether visitation by a non-parent should be permitted, and the extent of such visitation. Absent a showing of significant and immediate harm to the child, the decision of the parent regarding visitations should be immune from governmental second guessing or judicial review. (Part I). This showing of significant and immediate harm must be established by clear and convincing evidence. (Part I.A.) The "best interests of the child" standard was designed to resolve disputes between parents and is not appropriate to resolve disputes between a parent and a non-parent. Thus, N.J.S.A. 9:2-7.1 as heretofore applied in this case does not meet constitutional standards. (Part I.B.)

ARGUMENT

I. N.J.S.A. 9:2-7.1 AS CURRENTLY APPLIED UNCONSTITUTIONALLY INFRINGES UPON THE RIGHT OF A FIT PARENT TO MAKE DECISIONS REGARDING HIS OR HER CHILD'S CARE AND UPBRINGING.

It is well established that the Due Process Clause protects family relationships from undue state interference. "It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the state can neither

supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Included among these protections is a fundamental right to autonomy in parent-child relationships, which encompasses a parent's right to make decisions about child-rearing. Id. As recently held by the Supreme Court: "It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000) (opinion announcing the judgment of the Court). The plurality holding in Troxel follows a long line of cases that seek to ensure that the decisions of parents in the upbringing of their children are not unnecessarily disturbed by the state.

Indeed, more than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923), the United States Supreme Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925), it again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." In numerous subsequent cases the Court continually recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their

children.[2] As explained by the Supreme Court, in light of this extensive precedent, the right of parents to make decisions concerning the care, custody, and control of their children "cannot now be doubted." Troxel, 530 U.S. at 66.

As the Court observed in Roberts v. United States Jaycees, 468 U.S. 609, 619-20 (1984): "Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." The process of identifying the members of that special community who will participate in a child's experiential and emotional development

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[2] See, e.g., 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)); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); 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"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (discussing "the fundamental liberty interest of natural parents in the care, custody, and management of their child"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children" (citing Meyer and Pierce)).

is an inherently selective and necessarily exclusive one, which involves complex judgments and subjective intuition, the accuracy of which is not susceptible to objective proof or disproof. We rely on and protect the judgment and intuition of the parents as the most reliable indicator devised in our culture and tradition to determine the best interests of the child. See Troxel, 530 U.S. at 68. Thus, statutes concerning the upbringing of children that do not afford special deference to parental judgments are constitutionally infirm. See id.

N.J.S.A. 9:2-7.1 was prompted by laudable goals. Indeed, innumerable children enjoy a loving and beneficial relationship with grandparents, siblings, and other family members who, although they may not serve a parental role, contribute to the reservoir of nurturing and beneficial experiences, and unconditional love, that establish a sense of familial intimacy. No one would wish to detract from those relationships. But the question here is whether, and under what standards, the state can override a parent's determination that a visitation regime, beyond the level already deemed appropriate by the parent, would be disruptive and thus not in the child's best interests. N.J.S.A. 9:2-7.1 does not provide standards that include the necessary deference to a fit parent's decision that is required to comport with that parent's constitutional rights.

See Troxel, 530 U.S. at 67.[3]

If a parent is fit to raise his or her child, the state cannot impose its own child-rearing determination solely because its view of what is in the best interest of the child differs from that of the parent. Indeed, it may be true that other fit parents, if they had been in the same situation, would have reached a different conclusion. But however tempting it might be for the courts or the legislature to attempt to "improve" upon the judgment of a parent in this regard, imposition of some preconceived model of customary relationships by state officials, who by definition have at best an incomplete understanding of the relevant factors, both tangible and intangible, serves neither the interests of the child nor the constitutionally protected rights of the parent to make those decisions. The "Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." Troxel, 530 U.S. at 72-73.

Only when the state is pursuing a compelling interest

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[3] N.J.S.A. 9:2-7.1. **Visitation rights for grandparents, siblings**

> a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

may it replace the parent and take on responsibility for how a child will be raised. "Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." Troxel, 530 U.S. at 68. "And, if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination." Id. at 70.

Nor is N.J.S.A. 9:2-7.1 cured of its constitution infirmities by the fact that subsection (b) of the statute enumerates eight particular factors that the trial court should consider in determining whether to order visitation over the objection of a fit parent.[4] The presence of these criteria does

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[4] N.J.S.A. 9:2-7.1:

> b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:
>
> (1) The relationship between the child and the applicant;
>
> (2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;
>
> (3) The time which has elapsed since the child last had contact with the applicant;
>
> (4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
>
> (continued...)

not address the constitutional infirmity at issue in this case. It is true that if a challenge had been made that the statute was void on grounds of vagueness, or if a due process objection had been made that a government official was vested with unbridled or standardless discretion, then articulation of specific criteria by which to interpret ambiguous provisions or cabin that discretion may comprise a constitutionally relevant response. See generally Kolender v. Lawson, 461 U.S. 352 (1983) (finding statute unconstitutionally vague under Due Process Clause when it failed to define proscribed conduct); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)(striking down, on First Amendment grounds, law limiting right of free speech without narrow, objective, and definite standards).

But the issue in this case is not one of procedural due process, and thus the question is not whether the statute is vague, or whether the court is vested with unlimited power to make arbitrary decisions. Rather, the constitutional infirmity

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[4](...continued)

> (5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;
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> (6) The good faith of the applicant in filing the application;
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> (7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and
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> (8) Any other factor relevant to the best interests of the child.

is the very fact that the court, rather than the fit parent, is given the primary decision-making role at all, and thus is based upon substantive due process. Additional procedural layers, therefore, are ineffective to address the constitutional concern. Nothing in the statutory scheme of N.J.S.A. 9:2-7.1 evidences the substantive deference to parental judgment that Troxel explicitly requires. Indeed, the statute's articulation of specific factors by which the court is to determine whether visitation is warranted merely emphasizes the fact that it is the court, rather than the parent, that is balancing all the intricate considerations and circumstances that go into such a decision, and is thereby making an essentially de novo determination as to the "best interests of the child."

To be sure, a parent's right to raise her child as she sees fit is not utterly beyond scrutiny. "Parental rights, though fundamentally important, are not absolute. The constitutional protection surrounding family rights is tempered by the State's parens patriae responsibility to protect the welfare of children." In re K.H.O., 161 N.J. 337, 347 (1999). Parental judgment may be overcome in some circumstances, even when a parent is not unfit. For example, a child's own constitutional right to make important decisions for herself must take precedence over parental control. See, e.g., Bellotti v. Baird, 443 U.S. 622 (1979)(state must provide opportunity for minor to seek court order allowing her to obtain abortion without parental involvement). It has been overcome as well in order to

protect a child from harm, such as the harm addressed and sought to be remedied by the child-labor laws. See Prince v. Massachusetts, 321 U.S. 158 (1944). Thus, Amicus ACLU-NJ does not agree with a reading of Troxel that child-rearing decisions by fit parents are utterly immune from all judicial inquiry. But for the State to establish a compelling interest sufficient to override parental discretion, Amicus ACLU-NJ believes that a showing of significant "harm" to the child must be made.

In Troxel, because of the sweeping overbreadth of the Washington statute at issue (which allowed anyone, including complete strangers, to seek visitation with a minor child), the plurality found it unnecessary to determine whether a finding of "harm" was required before a fit parent's decision regarding visitations can be overridden.[5] 530 U.S. at 73. Requiring a finding of harm, however, would be completely consistent with the notion of special deference to the fit parent's decision, and indeed may be the most appropriate method by which to give that required deference a practical application. "To be sure, the

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[5] In Troxel, it was clearly the "breathtaking" breadth of the statute that theoretically gave standing to complete strangers to seek visitation that was the determinative factor in its constitutional downfall. Some state cases also suggest that they will not entertain a request to order visitation over a parent's objection unless the third party involved has a significant relationship with the child in question. See, e.g., Sightes v. Barker, 684 N.E.2d 224, 230 (Ind. App. 1997). ACLU-NJ agrees that, as a threshold matter, before a party can trigger the inevitable disruption in family life caused by an intrusive judicial proceeding, the petitioner should first prove that a familial relationship with the child already exists (as is clearly the case here).

power of the parent . . . may be subject to limitation under Prince if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Wisconsin v. Yoder, 406 U.S. at 233-34. Thus, while N.J.S.A. 9:2-7.1, in Amicus's view, does not give sufficient deference to parental judgment, it may be that a carefully crafted law that permits third party visitation upon a showing of significant harm to the child might well be constitutional.[6]

ACLU-NJ stresses that this requirement of demonstrable harm in order to override the decision of a fit parent should apply only to requests for visitation by non-parents. When the request comes from a parent, then very different considerations come into play. And the definition of "parent" is not limited by biology. As this Court has recognized, one can serve as a functional or psychological parent and thereby acquire a relationship with a child that is equivalent to that of a

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[6] This Court has often engaged in "'judicial surgery' to excise a constitutional defect or engraft a needed meaning." Right to Choose v. Byrne, 91 N.J. 287, 311 (1982); see also, State v. Mortimer, 135 N.J. 517, 533, 534-35, cert. denied, 513 U.S. 970 (1994)(excising unconstitutionally vague language from statute on bias crimes); New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 75-81 (1980) (limiting election financing reporting act to avoid overbreadth); Camarco v. City of Orange, 61 N.J. 463, 466 (1972) (limiting anti-loitering ordinance to interference with others in public places or threats of immediate breach of peace). "When a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery' and through appropriate construction restore the statute to health." Town Tobacconist v. Kimmelman, 94 N.J. 85, 104 (1983).

biological or adoptive parent. See V.C. v. M.J.B., 163 N.J. 200 (2000) (former domestic partner of biological parent entitled to visitation); Sorentino v. Family & Children's Soc. of Elizabeth, 72 N.J. 127 (1976) (recognizing potential psychological harm to child caused by separation from prospective adoptive parents who have functioned as parents). Depending on the situation, for instance, it is possible that biological grandparents may have been a primary caregiver to the child and become functional or psychological parents. Under these special circumstances a very different rule applies, and a functional parent is entitled to maintain a relationship with the child unless there is convincing evidence that such visitation will cause physical or emotional harm. V.C., 163 N.J. at 229. In this case, however, no contention has been made that the Bradts have served as functional or psychological parents of Brian and Tara. They are grandparents in the conventional understanding of that term.

A. Parental Decisions Regarding Visitation Can Be Overidden Only By Clear and Convincing Evidence of Demonstrable Harm.

The existence of demonstrable harm is a fact-intensive inquiry that of course should be performed by the trial court in the first instance. It may well embrace the concept of emotional injury that a child may suffer if a previously established positive relationship with a grandparent or sibling is suddenly severed. But because the court necessarily acts with less than complete knowledge and understanding of all the complex factors

that are relevant in making this determination, and because special deference must be afforded to the wishes of the parent, an additional procedural safeguard is needed to compensate for this inherent limitation in the judicial fact-finding process. A finding that harm exists should be proved not merely by a simple preponderance of the evidence standard, but by the enhanced "clear and convincing evidence" standard that applies when individual constitutional interests are at stake. E.g. Santosky v. Kramer, 455 U.S. 745 (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); V.C. v. M.J.B., 163 N.J. 200 (2000) (requiring clear and convincing evidence of harm to deny psychological parent visitation). See generally, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (requiring clear and convincing evidence in establishing actual malice in libel case); E.B. v. Verniero, 119 F.3d 1097 (3d Cir. 1997) (requiring clear and convincing evidence, rather than mere preponderance of evidence, of probability of reoffense in Megan's Law notification in order to overcome due process and privacy interests of registrant).

In allegations of psychological harm, it is often easy, and perhaps too easy, to articulate a colorable claim of such harm and thereby undermine parental judgment. Thus, the "clear and convincing evidence" standard can be of very real assistance in mandating adherence to constitutional norms, particularly in cases such as this, where the "harm" that would allegedly result from curtailing, but not eliminating, visitation between the

Bradts and their grandchildren has been colorably articulated, but perhaps not convincingly demonstrated. In overriding Mr. Moriarty's judgment on the appropriate level of visitation, the trial judge below relied on the testimony of Dr. Judith Greif, the Bradt's psychological expert, who apparently opined that mere acquiescence in Mr. Moriarty's assertion of parental authority over the extent of contact by the grandparents would, in and of itself, foster in his children a perception that he had succeeded in alienating them from their mother's family.

The contention that Mr. Moriarty's limitation of four hour visits once a month (as opposed to the Bradt's request of five hour visits and overnight visits every other month) would cause such incremental harm seems, at first blush, to be somewhat attenuated and makeweight. But Amicus ACLU-NJ also candidly admits that it is not an expert in the field of child psychology, and does not presume to express an opinion on the ultimate fact of whether such harm would ensue. If the Bradts feel compelled to pursue this matter, then a remand to the trial court may be required for a determination of whether significant "harm" to the children has not only been theoretically parsed, but convincingly established in fact. Requiring that the trial court articulate its findings with reference to the clear and convincing evidence standard would also assist appellate courts in the exercise of independent appellate review on constitutional facts. See generally, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499, 510-11 (1984); Christ's Bride Ministries, Inc.

v. Southeastern Pennsylvania Transportation Authority, 148 F.3d 242, 247 (3d Cir. 1998) (appellate courts must engage in independent appellate review of facts undergirding constitutional rights).

B. N.J.S.A. 9:2-7.1 as Applied in this Case Does Not Contain the Necessary Constitutional Protections and Standards Against Infringing upon Parental Rights.

Amicus ACLU-NJ's position, therefore, is somewhat intermediate between the position that there is an absolute constitutional prohibition against judicial review of parental decisions, and the position that N.J.S.A. 9:2-7.1 permits a plenary inquiry by the courts into the best interests of the child. ACLU-NJ believes that the proper constitutional scheme creates a strong presumption in favor of upholding parental judgment and discretion as to who may maintain a relationship with their minor child, and the circumstances under which that relationship is maintained. That presumption may be overcome only by a showing, by clear and convincing evidence, of significant harm to the child if the parent's decision is not overridden. Judged against the foregoing standards, the statute at issue in this case, N.J.S.A. 9:2-7.1, has several constitutional defects.

Most importantly, the general standard imposed by subsection (a) that the court should assess a petition for visitation based on application of a simple "best interests of the child" standard does not give the constitutionally required

deference to the decision of the parent, but on its face is an invitation for free-wheeling judicial intervention and second guessing. While the "bests interests of the child" standard is a familiar one in family law in adjudicating child-rearing disputes between two separating parents, it is singularly inappropriate in determining disputes between a parent and a non-parent. As this Court recently held, "a presumption exists in favor of the . . . parent. That presumption can be rebutted by proof of gross misconduct, abandonment, unfitness, or the existence of 'exceptional circumstances,' but never by a simple application of the best interests test." Watkins v. Nelson, 163 N.J. 235, 237 (2000) (custody dispute between parent and grandparent resolved in favor of parent) (emphasis added).

Second, the statute requires proof only by a preponderance of the evidence, rather than by clear and convincing evidence, which does not give sufficient protection against the vagaries of imperfect fact-finding mechanisms in adjudicating constitutionally protected interests.

Finally, independent constitutional interests might reside in the minor child to maintain relationships with close family members, especially in cases, such as this one, where the children are of sufficient age and discretion to be able to articulate their own wishes. But ACLU-NJ believes that these constitutional interests are adequately addressed by permitting a showing of "harm" to override parental judgment in narrow circumstances. As for whatever constitutional interests of the

non-parent petitioners to maintain a relationship with the child may exist, ACLU-NJ also believes that they would be vindicated by providing the opportunity to seek a visitation order upon the requisite showing of harm. Given the potentially disruptive nature of such a proceeding, it already concedes much to permit the parent's decision to be subject to even limited judicial review. It is perhaps not necessary to define in isolation precisely what the constitutional rights of a non-parent third party to maintain a relationship with the child might be; it is sufficient to note that whatever those rights are, they are certainly not coequal with the constitutionally recognized right of the parent to make child-rearing decisions, and cannot override those decisions absent the special circumstances of demonstrable harm.

CONCLUSION

For the reasons described herein, amicus ACLU-NJ respectfully suggests that the Court interpret N.J.S.A. 9:2-7.1 in such a way as to give appropriate deference to parental discretion, which discretion can be overridden only upon a clear and convincing showing of harm to the child. If the parties are unable to resolve the nature of visitations among themselves, then a remand to the trial court is in order to determine whether the record establishes such a clear and convincing showing of harm.

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Respectfully submitted,

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