

No. 31855 Clifford K. and Tina B., Petitioners Below, Tina B., Petitioner Below,
Appellant, v. Paul S., in his official capacity as next friend and guardian of
Z.B.S., an infant, Respondent Below, Appellee

FILED

August 8, 2005

released at 3:00 p.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring, in part, and dissenting, in part:

Ours is a consideration of rights, not politics; of law, not agendas. The determination of Z.B.S.'s best interests, being the touchstone in this case, must derive from the law of this State and not from generalized preconceptions, or misconceptions, interjected by the parties or by groups with outside partisan agendas to foster. Justice requires that we, as a court, apply this law to the actual findings specific to this case. Justice likewise demands that we decline the invitation from some to pander to derisive prejudices and from others to engage in social engineering from behind the closed doors of our chambers. Fundamental to the justice we do must be our adherence to the principle that individuals be judged on who, not what, they are. We do justice for Z.B.S. when we apply the law, clear as it is here, equally and dispassionately. We do justice to the people of West Virginia when we go no further.

The facts of this case are as compelling as they are tragic. What is clear in this case is that Z.B.S. does not need to become the latest means to a political end; a forgotten footnote in the annals of competing national political agendas.¹ I concur with the majority that Tina B. does not meet the requirements for standing under W. Va. Code § 48-9-103(a). I likewise agree that standing

¹ I applaud the majority's admirable rejection of the parties' and amici's invitation to politicize the Court's determination of this child's best interests.

for Tina B. is dependent on her ability to meet the specific requirements of W. Va. Code § 48-9-103(b). I dissent from the majority's resurrection and expansion of the legal fiction called "psychological parent" which is unnecessary and, I believe, ill-advised.² I likewise dissent from the

² Prior to legislative changes regarding child custody in West Virginia enacted between 1999 and 2001, the "psychological parent" concept created by this Court was at best one of limited duration, restricted application and questionable provenance. The concept was created to recognize that, where a legal parent was no longer an emotional part of a child's life, another person might become a *de facto* parent for custody purposes. The concept was used only in custody disputes where a child had lived for extended periods with non-parents, was never used where a legal parent had custody, and was always limited to relatives by blood or marriage to the child. Ironically, the "psychological parent" concept was most often used for grandparents seeking custody. In such situations, the Court considered the equitable interests of the child where the welfare of the child and the natural rights of the legal parent were in conflict. Under no reading of the "psychological parent" concept heretofore used by this Court could Tina B. have qualified as a "psychological parent" because at all times when she could have been considered for such a concept, Z.B.S. was always with his natural mother, Christina S.

With the 1999 legislative session, West Virginia began a total reformation of its child custody law. Between 1999 and 2001, the Legislature supplanted the former law, much of it common-law. For example, the new legislative changes favored a shared parenting arrangement where possible, rather than the former primary caretaker presumption. See W. Va. Code §§ 48-11-101 to 48-11-603 (1999) (amended and recodified at W. Va. Code §§ 48-9-101 to 48-9-604 (2003)). The current law is comprehensive and necessarily bears upon the precedential value of this Court's prior holdings. That includes this Court's experiment with the "psychological parent" concept. Exercising its prerogative, the Legislature has set forth the statutory standards by which custody in this matter should be determined. I believe that the Legislature has ably considered the competing considerations of parental rights, child interests, and the limitations of state intervention into family life to mold a practical, workable statutory formula for consideration of custody which establishes West Virginia's public policy on custody determinations. To the extent that there remained any viability of the "psychological parent" concept at the time of the comprehensive legislative changes of 1999 to 2001, I believe it to have been codified by the Legislature in W. Va. Code § 48-9-103(b). To the extent that legal fictions creating *de facto* relationships should be created, the Legislature has shown that it will do so when it desires to do so. See W. Va. Code § 48-5-707 (2001) (governing "reduction or termination of spousal support because of *de facto* marriage). Recently, we acknowledged the problems attendant to the creation by the courts of legal relationships based on *de facto* labels when we rejected the invitation to create a psychological "foster child" relationship in *Glen Falls Insurance Co. v. Smith*, ___ W. Va. ___, ___ S.E.2d ___ (No. 31972 filed July 1, 2005).

majority's decision to, on appellate review, rule with finality on the standing and the custody issue. W. Va. Code § 48-9-103(b), by its express terms, leaves both determinations to the sound discretion of the Family Court. The orders below reveal both the Family Court and the Circuit Court to have considered standing only under the provisions of W. Va. Code § 48-9-103(a). We do not therefore have before us for our review a consideration of standing under the remainder of W. Va. Code § 48-9-103. The resolution of this custody matter must rest with the judgment of the Family Court. The Family Court has the opportunity to factually hear testimony, observe witnesses and their demeanor, evaluate fitness of the parties, and consider the child's needs better than can we on appeal. This case should therefore be remanded to the Family Court for consideration of Tina B.'s standing under W. Va. Code § 48-9-103(b).