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

Maynard, Justice, dissenting:

I am dismayed that this Court has written an opinion that is so anti-family. The majority's decision in this case places a child in a single-parent home with a person who is not a biological relative even though a two-parent home consisting of the child's biological relatives – his grandparents – is available. I am simply at a loss to understand the majority's reasoning, and therefore, I dissent.

Contrary to the majority, I do not believe that Tina B. had standing to seek custody of Z.B.S. pursuant to W.Va. Code § 48-9-103 (2001). The majority's decision in this case to afford Tina B. "psychological parent" status and allow her to gain custody of Z.B.S. is yet another example of this Court's willingness to make law in areas reserved to the Legislature. Although this Court has previously acknowledged that it "does not sit as a superlegislature" and that it is the duty of the Legislature, not this Court, to "consider facts, establish policy, and embody that policy in legislation," *Boyd v. Merritt*, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986), the majority does so in this case under the guise of doing what is in the best interests of Z.B.S. Unfortunately, to me at least, it is not clearly in the best interests of Z.B.S. to be placed in the custody of Tina B.

What is clear to me is that it is the province of the Legislature, not this Court, to extend custodial rights to the same sex partner of a biological parent. In that regard, virtually all of our law with respect to family matters is statutory in nature. Since divorce and custody are purely statutory and the common law is not implicated, this Court must look to the Legislature to make or change family law. It is improper for this Court to make new law in this area. While the Legislature recodified our family law statutes in 2001, it did not address the right of same sex partners of biological parents to seek custody and visitation upon the dissolution of their relationships through death or separation. The majority, however, has done so with this case by construing language in W.Va. Code § 48-9-103(b) allowing intervention “by other persons or public agencies” in “exceptional cases” in such a manner as to create a substantive right where none existed before. The majority has effectively broadened the three categories of persons who have standing to participate in custodial determinations pursuant to W.Va. Code § 48-9-103(a) to include a fourth entirely new category it calls “psychological parents.” I do not believe that this judge-made category was contemplated when the Legislature enacted subsection (b) of W.Va. Code § 48-9-103 to deal with “exceptional cases.”

I am afraid that the majority has headed down a slippery slope with its decision in this case. I say this because I think that the following scenario is likely to be presented to courts all over West Virginia. Bob and Jane get married, have a child, and soon after, they divorce. Jane and the child then begin living with Freddy, but Jane does not marry Freddy. After Jane and her child have lived with Freddy for three or four years, Jane dies. Can

Freddy then claim that he is the “psychological parent” of the child with standing to litigate and oppose biological father Bob’s right to custody? I believe the majority’s decision in this case creates that right for Freddy. Furthermore, it may also allow Freddy to sue Jane for custody of the child if they merely separate and she and the child move out. If Freddy could sue one biological parent for custody, why not the other? After all, if Tina B. is a psychological parent, then Freddy is also a psychological parent, and there is nothing to prevent him from having standing to sue Jane for custody. Pursuant to the majority’s decision, Freddy clearly has standing, that is unless the majority intended this case to give standing only to same-sex partners of biological parents. However, the majority did not say such was the case so it must also apply to and give standing to heterosexual partners as well.

I certainly sympathize with the parties in this case. They suffered a tragic loss and each is attempting to fulfill what they believe were Christina S.’s wishes for Z.B.S. I also recognize that this Court has always resolved custody disputes by considering first and foremost the best interests of the child. *See, e.g., Michael K.T. v. Tina L.T.*, 182 W.Va. 399, 405, 387 S.E.2d 866, 872 (1989) (“[T]he best interests of the child is the polar star by which decisions must be made which affect children.”). That is the precedent of this Court, it should be followed, and it is the right thing to do. However, in order to achieve what it believes is in the best interests of Z.B.S., the majority has resorted to legislating a new class of persons who will now have standing to take part in custodial disputes even though they have no biological or other statutorily recognized right to do so. Although families in our

society today have taken on new forms, many have not yet been recognized by our Legislature. In my opinion, this Court should not impose its judgment where the Legislature has not spoken.

Surprisingly, the majority has actually chosen to ignore the guidance the Legislature has provided on this issue. In that regard, W.Va. Code § 49-3-1(a) (2001) provides for grandparent preference in determining adoptive placement for a child where parental rights have been terminated. While this is not an abuse and neglect case, I believe that the public policy set forth in this statute – to place children who cannot live with a natural parent in the custody of a grandparent where possible – should have been considered here. Obviously, this preference for grandparent custody is derived from the natural right to custody of a biological parent. See Syllabus Point 1, *Leach v. Bright*, 165 W.Va. 636, 270 S.E.2d 793 (1980) (“A parent has the natural right to the custody of his or her infant child and, unless the parent is an unfit person because of misconduct, neglect, immorality, abandonment, or other dereliction of duty, or has waived such right, or by agreement or otherwise has permanently transferred, relinquished or surrendered such custody, the right of the parent to the custody of his or her child will be recognized and enforced by the courts.”). In my opinion, the majority’s decision to create a new class of “psychological parents” to resolve the custody issue in this case was simply unwarranted given the public policy expressed in W.Va. Code § 49-1-3(a).

In this case, there was no evidence presented indicating that placing Z.B.S. in the custody of his maternal grandparents would not be in his best interests. To the contrary, the record reflects that Z.B.S. has spent a considerable amount of time with his maternal grandparents and that a strong child-grandparent bond exists. Given these circumstances, I can see no reason why Z.B.S. could not have a happy and healthy childhood in their care.

While Z.B.S.'s relationship with Tina B. should be respected and allowed to continue, I do not believe there was any statutory basis for this Court to place him in her custody. Like the circuit court below, I believe that the question of whether to extend the concept of "psychological parent" to reach these circumstances is a question better left to the Legislature in its capacity as a voice of the people of the State of West Virginia. Accordingly, I respectfully dissent to the majority's decision in this case.