Bench-Bar Conference

October 25, 2018

Juvenile & Domestic Relations Practice

9:00 a.m. - 10:30 a.m.

"Third Party Custody in Virginia: What the Judges Are Saying Now?"

Panelists:

Hon. Edward A. Robbins, Jr.
Chesterfield Circuit Court

Hon. Shannon O. Hoehl
Hanover Juvenile and Domestic Relations District Court

Hon. Randall G. Johnson, Jr.
Henrico Juvenile and Domestic Relations District Court

Hon Jayne A. Pemberton
Chesterfield Juvenile and Domestic Relations District Court

Moderator:

Melissa S. VanZile
Barnes & Diehl, P.C.

Materials for Juvenile & Domestic Relations Breakout Session

9:00 a.m. - 10:30 a.m.

"Third Party Custody in Virginia: What the Judges are Saying Now?"

"Third Party Custody in Virginia: What the Judges are Saying Now?"
prepared by
Dawn M. South, Law Offices of Deanna D. Cook, P.C.

VA Code Ann. § 20-124.1. Definitions
West's Annotated Code of Virginia
Title 20. Domestic Relations (Refs & Annos)
Chapter 6.1 Custody and Visitation Arrangements for Minor Children (Refs & Annos)
from Westlaw

809 S.E.2d 441, 68 Va.App. 462 (2018)
Denise HAWKINS v. Darla GRESE
Record No. 0841-17-1
Court of Appeals of Virginia, Newport News
from Westlaw

674 S.E.2d 845, 277 Va. 566 (2009)
Joseph C. FLORIO v. Barbara E. CLARK, et. al.
Record No. 081080
Supreme Court of Virginia
from Westlaw

581 S.E.2d 899, 41 Va.App. 77 (2003)
Andrea K. GRIFFIN v. Elbert Eddie GRIFFIN
Record No. 1214-02-2
Court of Appeals of Virginia, Richmond
from Westlaw

"Third Party Custody in Virginia: What the Judges are Saying Now?"

prepared by

Dawn M. South
Law Offices of Deanna D. Cook, P.C.

Third Party Custody in Virginia: What Are the Judges Saying Now?

I. Who Has Standing to Bring a Third Party Petition for Custody and Visitation?

1. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other **person with a legitimate interest**. Va. Code Ann. § 20-124.2

2. "**Person with a legitimate interest**" shall be broadly construed and includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child. A party with a legitimate interest shall not include any person (i) whose parental rights have been terminated by court order, either voluntarily or involuntarily, (ii) whose interest in the child derives from or through a person whose parental rights have been terminated, either voluntarily or involuntarily, including but not limited to grandparents, stepparents, former stepparents, blood relatives and family members, if the child subsequently has been legally adopted, except where a final order of adoption is entered pursuant to § 63.2-1241, or (iii) who has been convicted of a violation of subsection A of § 18.2-61, § 18.2-63, subsection B of § 18.2-366, or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation. Va. Code Ann. § 20-124.1

II. Code Sections Related to the Death of a Parent.

1. The parents of an unmarried minor child are the joint natural guardians of the person of such child with equal legal powers and legal rights with regard to such child, provided that the parents are living together, are

respectively competent to transact their own business, and are not otherwise unsuitable. Upon the death of either parent, the survivor shall be the natural guardian of the person of such child. If either parent has abandoned the family, the other parent shall be the natural guardian of the person of such child. Va. Code Ann. § 64.2-1700

2. A. Every parent may by will appoint (i) a guardian of the person of his minor child and (ii) a guardian for the estate bequeathed or devised by the parent to his minor child for such time during the minor's infancy as the parent directs. A guardian of a minor's estate shall have custody and control of the estate committed to his care. **A guardian of the person of a minor other than a parent is not entitled to custody of the person of the minor so long as either of the minor's parents is living and such parent is a fit and proper person to have custody of the minor.** Va. Code Ann. § 64.2-1701 (West)

III. The Parental Presumption and Overcoming It

1. "In a custody dispute between a parent and a non-parent, the law presumes that the child's best interests will be served when in the custody of his parent." *Brown v. Burch and McNish*, 30 Va. App. 670, 519 S.E.2d 403 (1999) quoting *Bottom v. Bottom*, 249 Va. at 413, 457 S.E.2d at 104

"The right of the parents in raising their child is a fundamental right protected by the Fourteenth Amendment." *Williams v. Williams*, 24 Va. App. 778, 783, 485 S.E.2d 651, 654 (1997), aff'd as modified, 256 Va. 19, 501 S.E.2d 417 (1998).

2. The presumption favoring a parent over a non-parent case is a strong one, it is rebutted when certain factors are established by clear and convincing evidence. *Bailes v. Sours*, 231 Va. at 100, 340 S.E.2d at 827

3. Such factors that can rebut the presumption of favoring a parent over a non-parent are: 1) parental unfitness 2) a previous order of divestiture 3)

voluntary relinquishment 4) abandonment 5) special facts and circumstances constituting an extraordinary reason for taking the child from its parent. *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986)

i. Parental Unfitness

a. Among the factors to be weighed in determining unfitness are the parent's misconduct that affects the child, neglect of the child, and a demonstrated unwillingness and inability to promote the emotional and physical well-being of the child. Other important considerations include the nature of the home environment and moral climate in which the child is to be raised. *Brown v. Brown*, 218 Va. 196, 199, 237 S.E.2d 89, 91 (1977), *Bottoms v. Bottoms*, 249 Va. 410, 419, 457 S.E.2d 102, 107 (1995)

ii. A Previous Order of Divestiture

a. Maternal grandmother did not have burden of showing that natural father was unfit in proceeding on his petition for custody of two children, but, rather, father had burden of proving that best interests of children would be served by a transfer of custody to him where a prior unappealed court order provided that custody was to be assumed by court to the exclusion of father and that the children were to be temporarily placed with grandmother. *McEntire v. Redfearn*, 217 Va. 313, 227 S.E.2d 741 (1976)

iii. Voluntary Relinquishment

a. The line of custody cases relying on the principle of voluntary relinquishment addresses circumstances in which a biological parent or custodian has completely abandoned a child's care to a non-parent then subsequently seeks to assert parental rights. See, e.g.,

Shortridge, 224 Va. at 594, 299 S.E.2d at 503; *Bidwell v. McSorley*, 194 Va. 135, 72 S.E.2d 245 (1952) (applying the principle of voluntary relinquishment in a case where a parent placed a newborn child into the exclusive care of an adopting family for almost one year before seeking rescission of the adoption); see also, e.g., *Fleshood v. Fleshood*, 144 Va. 767, 769–70, 130 S.E. 648, 649 (1925) (treating relinquishment of custody and abandonment of a child simultaneously and as essentially indistinct for purposes of a custody analysis). *Stadter v. Siperko*, 52 Va. App. 81, 93, 661 S.E.2d 494, 500 (2008)

iv. Abandonment

a. Abandonment of a child without justification establishes parental unfitness. When abandonment exists in a custody dispute between a parent and another, the general rule becomes operative, and the child's welfare is the dominant and controlling factor. *Patrick v. Byerley*, 228 Va. 691, 694–95, 325 S.E.2d 99, 101 (1985)

v. Special Facts and Circumstances

a. "The circumstances that might justify denying a parent custody of his or her child in favor of a non-parent will vary from case to case." *Brown v. Burch*, 30 Va. App. 670, 687, 519 S.E.2d 403, 411 (1999).

b. Same Sex relationships

Hawkins v. Grese, 68 Va. App. 462, 472, 809 S.E.2d 441, 445 (2018)

c. Examples of Special Facts and Circumstances Considered

i. Parent failed to document his employment or to verify the stability and dependability of his income. *Florio v. Clark*, No. 2424-06-1, 2007 WL 3144034, (Va. Ct. App. Oct. 30, 2007), adhered to on reh'g en banc, 52 Va. App. 18, 660 S.E.2d 687 (2008), aff'd, 277 Va. 566, 674 S.E.2d 845 (2009)

ii. During his entire life, the child has enjoyed a close relationship with the non-parent and resided with them for significant periods of time. *Id.*

iii. Prior to parent's death, the other parent had little contact with the child, exercised his visitation infrequently. *Id.*

iv. Parent provided no support for the child. *Id.*

v. Parent was not involved in the child's schooling, extracurricular activities, or general upbringing. *Id.*

vi. Parent had not demonstrated that he can meet the child's educational and emotional needs. *Id.*

vii. Who the deceased parent nominated to care for the child in the event of that parent's death. *Id.*

viii. Extensive record of misdemeanor and traffic offenses. *Florio v. Clark*, 277 Va. 566, 571, 674 S.E.2d 845, 847 (2009)

ix. The trial court found that Father had been "less than honest with the IRS" and "less than

forthright" with the investigators appointed by the court. *Id.*

x. The parent had no home of his own at the time of trial, residing with his father and stepmother. *Id.*

xi. The parent dropped out of high school in the 10th grade and never earned a G.E.D. *Id.*

xii. The parent had no health insurance and provided none for the child. *Id.*

4. Once the parental presumption is rebutted then it goes to best interest of the child standard under Va. Code Ann. *§20-124.3*

   Once the presumption favoring parental custody has been rebutted in a child custody dispute, the parental and non-parental parties stand equally before the court, with no presumption in favor of either, and the question is the determination of the best interests of the child according to the preponderance of the evidence. *Brown v. Burch and McNish*, 30 Va. App. 670, 519 S.E.2d 403 (1999) quoting *Walker v. Fagg*, 11 Va. App. 581, 586, 400 S.E.2d 208, 211 (1991)

IV. Awarding Visitation to a Third Party.

1. The right of parents in raising their child is a fundamental right protected by the Fourteenth Amendment. *Williams v. Williams*, 24 Va. App. 778, 783, 485 S.E.2d 651, 654 (1997). The Court of Appeals further decided that state interference with a fundamental right must be justified by a compelling state interest, and that to constitute a compelling interest, "state interference with a parent's right to raise his or her child must be for the purpose of protecting the child's health or welfare." *Id.*

   The United States Supreme Court has observed, the "liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental

liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). The Due Process Clause protects the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.*

2. Two Part Test Established in Virginia- 1st prong a finding of actual harm if there is not visitation with the third party and the 2nd prong considering the best interest of the child.

   The Court of Appeals then interpreted Code § 20-124.2(B) to permit the state to interfere with the right of parents to raise their child by allowing a court to order nonparent visitation upon a showing by clear and convincing evidence that the best interests of the child would be served by such visitation. *Id.* at 784, 485 S.E.2d at 654. However, the Court of Appeals said that the language in the foregoing statute that a court "shall give due regard to the primacy of the parent-child relationship," evinces the General Assembly's intent require the court to find that a denial of nonparent visitation would be detrimental to the child's welfare before the court may interfere with the constitutionally protected parental rights. Id.

   In other words, the Court of Appeals said, "For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation." Id. at 784-85, 485 S.E.2d at 654. A court reaches consideration of the "best interests" standard in determining visitation only after it finds harm if visitation is not ordered. Id. at 785, 485 S.E.2d at 654. *Williams v. Williams*, 256 Va. 19, 21–22, 501 S.E.2d 417, 418 (1998)

3. What is Actual Harm?

   i. Expert witness testimony explained that early in their lives children develop "a very close bond" with parent figures

and that they "tend to become attached only to a small number of people." Maintaining such bonds "is crucial in ... helping the child develop neurological and physiological growth patterns." The expert opined that the child's relationships with her biological parents, teachers, and peers would be adversely affected and that she would suffer emotional scars if the non-parent was denied visitation with the child. O'Rourke v. Vuturo, 49 Va. App. 139, 149, 638 S.E.2d 124, 128–29 (2006)

ii. To justify a finding of actual harm under the clear and convincing burden of proof, the evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But *86 that is not what we meant by "actual harm to the child's health or welfare." Williams, 24 Va. App. at 784–85, 485 S.E.2d at 654 (emphasis added). If it were, any non-parent who has developed an emotionally enduring relationship with another's child would satisfy the actual-harm requirement. The constitutional rights of parents cannot be so easily undermined. *Griffin v. Griffin*, 41 Va. App. 77, 85–86, 581 S.E.2d 899, 903 (2003)

VA Code Ann. § 20-124.1. Definitions

West's Annotated Code of Virginia
Title 20. Domestic Relations (Refs & Annos)
Chapter 6.1 Custody and Visitation Arrangements for Minor Children (Refs & Annos)

from Westlaw

West's Annotated Code of Virginia
Title 20. Domestic Relations (Refs & Annos)
Chapter 6.1. Custody and Visitation Arrangements for Minor Children (Refs & Annos)

VA Code Ann. § **20-124.1**

§ **20-124.1**. Definitions

Effective: July 1, 2014
Currentness

As used in this chapter:

"Joint custody" means (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent, (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.

"Person with a legitimate interest" shall be broadly construed and includes, but is not limited to, grandparents, step-grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child. A party with a legitimate interest shall not include any person (i) whose parental rights have been terminated by court order, either voluntarily or involuntarily, (ii) whose interest in the child derives from or through a person whose parental rights have been terminated, either voluntarily or involuntarily, including but not limited to grandparents, stepparents, former stepparents, blood relatives and family members, if the child subsequently has been legally adopted, except where a final order of adoption is entered pursuant to § 63.2-1241, or (iii) who has been convicted of a violation of subsection A of § 18.2-61, § 18.2-63, subsection B of § 18.2-366, or an equivalent offense of another state, the United States, or any foreign jurisdiction, when the child who is the subject of the petition was conceived as a result of such violation.

"Sole custody" means that one person retains responsibility for the care and control of a child and has primary authority to make decisions concerning the child.

Credits
Acts 1994, c. 769; Acts 1997, c. 690; Acts 1999, c. 1028; Acts 2000, c. 830; Acts 2003, c. 229; Acts 2005, c. 890; Acts 2014, c. 653.

VA Code Ann. § **20-124.1**, VA ST § **20-124.1**
Current through End of the 2018 Regular Session and End of the 2018 Sp. Sess. I.

End of Document

809 S.E.2d 441, 68 Va.App. 462 (2018)
Denise HAWKINS v. Darla GRESE
Record No. 0841-17-1
Court of Appeals of Virginia, Newport News

from Westlaw

68 Va.App. 462
Court of Appeals of Virginia,
Newport News.

Denise HAWKINS
v.
Darla GRESE

Record No. 0841-17-1
|
FEBRUARY 13, 2018

Synopsis

Background: Former same-sex partner of child's biological mother petitioned for custody of child who was born during parties' relationship. The Circuit Court, City of Virginia Beach, Steven C. Frucci, J., awarded biological mother full custody of child. Same-sex partner appealed.

Holdings: The Court of Appeals, Robert J. Humphreys, J., held that:

[1] trial court had rational basis for limiting the term "parent" to relationship to a child through either biological procreation or legal adoption;

[2] no exception to general bar against third party standing applied to allow same-sex partner to assert constitutional right of child to associate with her; and

[3] same-sex partner failed to demonstrate special facts and circumstances sufficient to rebut presumption in favor of granting custody of child to biological mother.

Affirmed.

West Headnotes (21)

[1] **Appeal and Error**
⇨ Same effect as those of jury

Appeal and Error
⇨ Proceedings on Oral Evidence;Ore Tenus Proceedings

Appeal and Error
⇨ Sufficiency of Evidence;Clear, Manifest, Plain, or Palpable Error

Where a court hears evidence ore tenus, its findings are entitled to the weight of a jury verdict, and they will not be disturbed on appeal unless plainly wrong or without evidence to support them.

Cases that cite this headnote

[2] **Appeal and Error**
⇨ Presumptions and Burdens on Review

The appellate court should view the facts in the light most favorable to the party prevailing before the trial court.

Cases that cite this headnote

[3] **Constitutional Law**
⇨ Custody

Constitutional Law
⇨ Child custody, visitation, and support

Claim by biological mother's former same-sex partner that trial court violated her Fourteenth Amendment liberty and equality rights by declining to recognize her status as a parent and perform a best interest determination in connection with her petition for custody of child was subject to rational basis standard of review, regardless of whether the issue was that same-sex partner's rights were violated because she was a lesbian or because the trial court determined she was not a parent. U.S. Const. Amend. 14.

Cases that cite this headnote

[4] **Constitutional Law**
⇨ Strict or heightened scrutiny;compelling interest

The highest standard, strict scrutiny, applies to a challenge to the constitutionality of a statute or state action where certain fundamental rights are involved, and requires that legislation or actions limiting these rights be justified by a compelling state interest, requiring legislation and action to be narrowly

drawn to express only the legitimate state interests at stake.

Cases that cite this headnote

[5] **Constitutional Law**
⇨ Reasonableness or rationality

Under the rational basis test, the general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the circuit court is rationally related to a legitimate state interest.

Cases that cite this headnote

[6] **Constitutional Law**
⇨ Rational Basis Standard; Reasonableness

Constitutional Law
⇨ Statutes and other written regulations and rules

The rational basis standard of review is used to determine the validity of state legislation or other official action that is challenged as denying equal protection. U.S. Const. Amend. 14.

Cases that cite this headnote

[7] **Child Custody**
⇨ Particular Status or Relationship

Where child custody disputes are concerned, the term "parent" is a relationship to a child only through either biological procreation or legal adoption.

Cases that cite this headnote

[8] **Child Custody**
⇨ Particular Status or Relationship

Constitutional Law
⇨ Custody

Constitutional Law
⇨ Child custody, visitation, and support

Trial court had rational basis for limiting the term "parent" to relationship to a child through either biological procreation or legal adoption, and, thus, denying biological mother's former-same sex partner status as a "parent" when considering the same-sex partner's petition for custody of child, who was born during parties' relationship through artificial insemination, did not violate equal protection; such definition did not discriminate between same-sex and opposite-sex couples, and parties without the required qualities retained a fair legal method to intervene if a parent was unfit. U.S. Const. Amend. 14; Va. Code Ann. § 20-158(A).

1 Cases that cite this headnote

[9] **Constitutional Law**
⇨ Reasonableness or rationality

In a rational basis analysis, the reviewing court's judicial function permits it to ask only whether the judgment of relevance made by the circuit court is rational.

Cases that cite this headnote

[10] **Constitutional Law**
⇨ Perfect, exact, or complete equality or uniformity

A classification does not fail rational-basis review, as a violation of equal protection, because it is not made with mathematical nicety or because in practice it results in some inequality. U.S. Const. Amend. 14.

Cases that cite this headnote

[11] **States**
⇨ Nature, status, and sovereignty in general

States
⇨ Federal Supremacy;Preemption

The states possess sovereignty concurrent with that of the federal government, subject only to limitations imposed by the Supremacy Clause. U.S. Const. art. 6, § 2.

Cases that cite this headnote

[12] **Courts**

Decisions of United States Courts as Authority in State Courts

Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

Cases that cite this headnote

[13] **Constitutional Law**

Family law;marriage

No exception to general bar against third party standing applied to allow biological mother's former same-sex partner to assert constitutional right of child, born during parties' relationship, to associate with her, on appeal from denial of her petition for custody of child; there was no First Amendment implication for child, nor was there any matter involving preservation of child's health or safety on an emergency basis, former partner was not a parent of child under the law of the state, and there were alternative avenues for protecting child's legal interests, including appointment of guardian ad litem. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**

Third-party standing in general

Unless a statute provides otherwise, the general rule with respect to third party standing is quite straightforward, allowing an individual to challenge the constitutionality of a law only as it applies to him or her; that the statute may apply unconstitutionally to another is irrelevant, as one cannot raise third party rights.

Cases that cite this headnote

[15] **Constitutional Law**

First Amendment in General

Exceptions to the general standing rule that one cannot raise third party rights only apply to certain challenges under the First Amendment, and where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] **Parent and Child**

Rights, Duties, and Liabilities Concerning Relation

Though parental power is not absolute as against the state, it may only be contravened in rare cases where it appears that parental decisions will jeopardize the health or safety of the child or have a potential for significant social burdens.

Cases that cite this headnote

[17] **Child Custody**

Welfare and best interest of child

In any child custody dispute, the best interests of the child are paramount and form the lodestar for the guidance of the court in determining the dispute.

Cases that cite this beadnote

[18] **Child Custody**

Right of biological parent as to third persons in general

In a child custody proceeding, as between a natural parent and a third party, the rights of the parent are, if at all possible, to be respected.

Cases that cite this headnote

[19] **Child Custody**

Presumption in favor of parent

The presumption favoring the parent in a child custody case is a strong one and can only be rebutted by establishing certain factors by clear and convincing evidence, including (1) parental unfitness, (2) a previous order of divestiture, (3) voluntary relinquishment,

and (4) abandonment, and (5) a finding of special facts and circumstances constituting an extraordinary reason for taking a child from its parent, or parents.

Cases that cite this headnote

[20] **Child Custody**
⇨ Welfare and best interest of child

Child Custody
⇨ Degree of proof

Once the presumption favoring parental custody has been rebutted, the natural parent who seeks to regain custody must bear the burden of proving that custody with him is in the child's best interests; this subsequent best interest determination is made by the preponderance of the evidence.

Cases that cite this headnote

[21] **Child Custody**
⇨ Presumption in favor of parent

Biological mother's former same-sex partner failed to demonstrate special facts and circumstances sufficient to rebut presumption in favor of granting custody of child, born during parties' relationship, to biological mother; same-sex partner argued only that she and biological mother intended to create a family, that she and child shared parent-child bond, and that child would be harmed if that bond was severed, but biological mother had remained a consistent parental presence in child's life and relationship between same-sex partner and child could be preserved through visitation. Va. Code Ann. § 20-124.1.

1 Cases that cite this headnote

**443 FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH, Steven C. Frucci, Judge

Attorneys and Law Firms

Elizabeth Lynn Littrell (Barbara A. Fuller; Lambda Legal Defense and Education Fund, Inc.; Fuller, Hadeed & Ros-Planas, PLCC, Virginia Beach, on briefs), for appellant.

Brandon H. Zeigler, Virginia Beach (Allison W. Anders; Parks Zeigler, PLLC, on brief), for appellee.

(Margaret V. Weaver; Weaver Law Services, on brief), Guardian ad litem for the minor child.

Present: Judges Humphreys, Malveaux and Senior Judge Frank

Opinion

OPINION BY JUDGE ROBERT J. HUMPHREYS

*467 Denise Hawkins ("Hawkins") appeals the custody determination of the Virginia Beach Circuit Court ("circuit court") awarding full custody of B.G. to his biological mother Darla Grese ("Grese").

I. BACKGROUND

Hawkins and Grese were unmarried partners in a ten-year, same-sex relationship. During this relationship they discussed having a child. Grese became pregnant via artificial insemination and gave birth to B.G. in 2007. The parties never married or formed a civil union in another state [1] nor did Hawkins ever adopt B.G. Nevertheless, B.G. was raised by Hawkins and Grese in their shared home until they ended their relationship in 2014. The parties informally shared custody of B.G. from that point for a further two years. Eventually, relations between Grese and Hawkins soured and Grese terminated B.G.'s contact with Hawkins.

On February 24, 2016, Hawkins filed a petition for custody and visitation of B.G. in the Juvenile and Domestic Relations District Court ("JDR court") for the City of Virginia Beach. The JDR court awarded joint legal and physical custody to *468 Hawkins and Grese as well as shared visitation, finding that B.G. considered both women to be his parents. The JDR court further found that B.G. was developing behavioral problems based on his separation from Hawkins, and two psychologists, as well as the guardian *ad litem*, testified that removing either

Hawkins or Grese from B.G.'s life would cause emotional and psychological harm.

Grese appealed the JDR court's decision to the Circuit Court of the City of Virginia Beach ("circuit court"). She initially appealed both the custody and visitation awards, but subsequently withdrew the visitation appeal. Addressing the remaining custody issue, the circuit court first determined that Hawkins could not be considered a parent based on Virginia's rejection of the de facto parent doctrine. It further held that Hawkins, as a non-parent, interested party, did not rebut the parental presumption in favor of Grese's custody of B.G. The circuit court couched **444 these decisions in language that clearly showed grave concern that separation from Hawkins would cause B.G. continued harm but the circuit court concluded that the law of the Commonwealth left it little option. Hawkins now appeals the circuit court's decision, alleging that the circuit court erred in determining she was not a parent to B.G., that the circuit court violated her constitutional parental rights, violated B.G.'s constitutional rights, and finally, erred in finding she had not rebutted the parental custody presumption.

II. ANALYSIS

A. Standard of Review

[1] [2] "Where, as here, a court hears evidence *ore tenus*, its findings are entitled to the weight of a jury verdict, and they will not be disturbed on appeal unless plainly wrong or without evidence to support them." Gray v. Gray, 228 Va. 696, 699, 324 S.E.2d 677, 679 (1985). Further, "the appellate court should view the facts in the light most favorable to the party prevailing before the trial court." Bottoms v. Bottoms, 249 Va. 410, 414, 457 S.E.2d 102, 105 (1995).

*469 B. The Constitutional Standard to be Applied

Hawkins points to the landmark Supreme Court decision in Obergefell v. Hodges, —— U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), and its progeny, including Pavan v. Smith, —— U.S. ——, 137 S.Ct. 2075, 198 L.Ed.2d 636 (2017), to support her contention that "non-biological parents in planned families comprising same-sex couples and their children are in fact *parents*." Hawkins argues that by refusing to so hold, the circuit court has violated the liberty and equality guaranteed her by the Fourteenth Amendment.

Hawkins' arguments regarding the manner in which her constitutional rights were allegedly violated are a bit convoluted. Hawkins asserts that

> By declining to recognize [Hawkins'] status as a parent and perform a best interest determination, the Trial Court violated the liberty and equality guarantees of the Fourteenth Amendment. First, the Trial Court impermissibly infringed upon [Hawkins'] fundamental liberty interest in parental autonomy. Second, the Trial Court impermissibly imposed a barrier to former members of same-sex couples seeking recognition of their parent-child relationships that does not exist for members of different-sex couples, and thereby discriminated with respect to the exercise of a fundamental right.

[3] In other words, Hawkins apparently alleges that it is the circuit court's action itself, rather than the law of the Commonwealth it relied on, that is unconstitutional. While this is less common than challenging the constitutionality of a statute or regulation, it is certainly a legitimate argument, as the judiciary is considered a state actor for Fourteenth Amendment purposes.[2] However, it also narrows the focus of our analysis of these assignments of error.

*470 [4] The United States Supreme Court in United States v. Carolene Prods. Co., 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), introduced the concept that challenges to constitutionality of a statute or a state action should be judged under a tiered review system, with "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution." Id. at 152 n.4, 58 S.Ct. at 783 n.4. This footnote has evolved into the modern three-tiered constitutional review standard in which by default the laxest standard, rational

basis review, applies. The highest standard, strict scrutiny, applies where "[w]here certain 'fundamental rights' " are involved, and requires **445 that legislation or actions "limiting these rights may be justified only by a 'compelling state interest,' " requiring legislation and action "must be narrowly drawn to express only the legitimate state interests at stake." Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147 (1973). Such fundamental rights include not only those listed in the Bill of Rights but additional implied rights protected by the Fourteenth Amendment.

Sexual orientation has not been characterized as a suspect or quasi-suspect classification deserving of strict scrutiny by the United States Supreme Court. Instead, the Court has chosen to rely on the rational basis test or to simply omit discussion of the proper standard when confronted with issues of homosexual rights. Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), overturned a Colorado constitutional amendment aimed at homosexuals using the rational basis test. Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), overturned Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), and invalidated a Texas anti-sodomy law on the grounds that Bowers had *471 too narrowly characterized the behavior at issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Lawrence, 539 U.S. at 566, 123 S.Ct. at 2478. Instead, the Lawrence Court apparently re-characterized the issue as derivative of the fundamental right to privacy but did not articulate a standard of review for invalidating the law. Id. at 578, 123 S.Ct. at 2483–84. In her concurrence, Justice O'Connor suggested rational basis grounds for the Court's decision. Id. at 579-85, 123 S.Ct. at 2484–88. Though the legal history on this point is confusing, presently it appears that sexual orientation based classifications are subject to rational basis review.

Turning to parental rights, the United States Supreme Court has held that the liberty guaranteed by the Fourteenth Amendment encompasses "not merely freedom from bodily restraint but also ... to marry, establish a home and bring up children." Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). However, the principal cases addressing this right of child rearing, Meyer and Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), predate the adoption of the modern tiered system of constitutional application. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), later addressed this right but did so in tandem with religious concerns. As such, the United States Supreme Court has not stated clearly what level of scrutiny applies in addressing parental rights. See generally, Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). However, this Court has held that "the parents' right to autonomy in child rearing is a fundamental right protected by the Fourteenth Amendment of the United States Constitution and that state interference with that right must be justified by a compelling state interest." Williams v. Williams, 24 Va. App. 778, 780, 485 S.E.2d 651, 652 (1997), modified and aff'd on appeal, 256 Va. 19, 501 S.E.2d 417 (1998). Hawkins, however, is seeking an initial determination that she is a parent and thus has at least an equal right to the custody of B.G. as Grese, B.G.'s biological parent. Therefore, whether the issue is that Hawkins' rights were violated because she is *472 a lesbian or because the circuit court determined that she is not a parent, we conclude that the rational basis test applies in either case to the constitutionality of the circuit court's judgment.

[5] [6] Under the rational basis test, "[t]he general rule is that legislation [or, in this case, judicial action] is presumed to be valid and will be sustained if the classification drawn by the [circuit court] is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). This standard is used to "determin[e] the validity of state legislation or *other official action* that is challenged as denying equal protection." Id. (emphasis added). This test applies equally to the liberty guarantees of the Fourteenth Amendment. Thus, with the rational basis test in mind, we return to Hawkins' assignments of error.

C. Whether Hawkins is a Parent to B.G.

All but one of Hawkins' assignments of error rely on the foundational assertion that **446 she is B.G.'s parent, and thus we begin by examining this underlying contention. In essence, she claims that the circuit court violated her constitutional rights as a parent by holding that she was not a parent. This begs two questions: How is a parent defined for statutory purposes; and is that definition constitutional?

[7] Turning first to the statutory definition of parentage, the laws of the Commonwealth do not expressly define the term "parent" in the context of custody. Nevertheless, by looking to other areas within the Code of Virginia where parent is used, it is clear that the term "parent" contemplates a relationship to a child based upon either the contribution of genetic material through biological insemination or by means of legal adoption. For example, the Code provides that parentage may be established by "scientifically reliable genetic tests," "[a] voluntary written statement of the father and mother made under oath acknowledging paternity," or "proof of lawful adoption." Code § 20-49.1. In the case of children *473 that are the result of assisted conception such as B.G., the law is clear that Grese, but not Hawkins, is a parent of B.G.[3] Further, the most germane section of the Code, dealing with custody and visitation, defines "person with a legitimate interest"—as a party *other than a parent* who may seek custody and visitation—as including but not limited to "grandparents, step-grandparents, stepparents, former steppareuts, blood relatives and family members." Code § 20-124.1. If such "person[s] with a legitimate interest" are in contention with parents for custody they cannot simultaneously also be parents. It seems clear, and we hold that where custody disputes are concerned, the term "parent" is a relationship to a child only through either biological procreation or legal adoption.

This definition of a parent was implicitly employed by the circuit court in this case and is also consistent with the Commonwealth's refusal to adopt wider parental definitions through other legal constructions such as the de facto or psychological parent doctrines adopted by some of our sister states and urged on us by Hawkins.[4] In fact, the case relied upon by the circuit court expressly rejecting the de facto parent doctrine in Virginia, Stadter v. Siperko, 52 Va. App. 81, 661 S.E.2d 494 (2008), is factually similar to this one. In Stadter a woman sought visitation with her ex-partner's biological *474 child after the end of their same-sex relationship. She asked the court to treat her as a parent under the de facto parent doctrine. This Court noted that the de facto parent doctrine was simply being urged as a tool for overcoming a constitutional presumption in favor of parents in custody disputes. Id. at 90-91, 661 S.E.2d at 498. We pointed out that such a tool already exists in Virginia—the "person with a legitimate interest" classification of Code § 20-124.1. Id. at 91-92, 661 S.E.2d at 499.

In sum, the Commonwealth uses a definition of parent tied to blood or adoption, while also providing a method for parties without these ties, but with similarly close relationships, to intervene as "persons with a legitimate interest" under some circumstances.

[8] We now must consider whether this definition of parentage passes the rational basis test for constitutionality. Hawkins argues that Obergefell and its progeny have implicitly redefined "parent" or "family" in a **447 manner that obviates the Commonwealth's definition and mandates a holding that, because her relationship with Grese was the functional equivalent of marriage, her relationship with B.G. was constitutionally a parent-child relationship.

We disagree with Hawkins on this point. The Commonwealth's definition of "parent" is not inconsistent with United States Supreme Court jurisprudence regarding the nature of the family and parentage. "[T]he usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977). When the state defers to the family, it is with the recognition that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children, ... *as well as from the fact of blood relationship.*" Id. at 844, 97 S.Ct. at 2109 *475 (emphasis added) (internal citations omitted). There is no "serious[ ] dispute that a deeply loving and interdependent relationship between an adnlt and a child in his or her care may exist even in the absence of blood relationship," but natural, biological parentage is a unique relationship predating any legal arrangement. Id. A judicial expansion of the term "parent" to iuclude someone not bound by blood or law would be a legal construct which, rather than greatly predating the bill of rights, would be "an arrangement in which the State has been a partner from the outset." Id. at 845, 97 S.Ct. at 2110.

Further, this definition of parentage does not discriminate between same-sex and opposite-sex couples. If the couple is not married, the non-biological/non-adoptive partner is not a parent irrespective of gender or sexual orientation.

It is true that when Hawkins and Grese began their relationship, the law of the Commonwealth barred Hawkins and Grese from marrying, but the record does not indicate this was the sole reason they remained unmarried. While those laws previously banning same-sex *marriage* were discriminatory, the Commonwealth's definition of parent is not as it applies equally regardless of an unmarried couple's gender or sexual orientation.

In applying the rational basis test, the United States Supreme Court has noted that "[a]ll laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment." Toll v. Moreno, 458 U.S. 1, 39, 102 S.Ct. 2977, 2997, 73 L.Ed.2d 563 (1982). Here, the law classifies as parent and non-parent through the circuit court's application of the definition discussed above.

[9] [10] In a rational basis analysis, "our judicial function permits us to ask only whether the judgment of relevance made by the [circuit court] is rational." Id. The relevant characteristics which classify here are entirely rational—people are considered parents on either biological or adoptive grounds, parties without these qualities retain a fair legal method to intervene if a parent is unfit. Further, "[a] classification ***476** does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.' " Heller v. Doe, 509 U.S. 312, 321, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257 (1993) (quoting Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491 (1970)). Though Hawkins undoubtedly has a close relationship with B.G. and is in a sympathetic and difficult position, the circuit court did not violate her constitutional rights by declining to recognize her as a parent of B.G.

In Obergefell, the Supreme Court held only that same-sex *marriage* was a constitutionally protected right. The majority's analysis in Obergefell is ordered around four principles which, according to the Court, demonstrate why constitutional marriage guarantees must apply with equal force to same-sex couples. These principles do indeed stress that confusion surrounding the status of children of same-sex couples is a source of social instability and suffering, stating that the right to marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, ****448** and education." Obergefell, —— U.S. at ——, 135 S.Ct. at 2600. Further, the Court described these rights as a "unified whole," identifying the conglomerate right to " 'marry, establish a home and bring up children' " as " 'a central part of the liberty protected by the Due Process Clause.' " Id. (quoting Zablocki v. Redhail, 434 U.S. 374, 384, 98 S.Ct. 673, 680, 54 L.Ed.2d 618 (1978)). More starkly, the Court stated that "[t]he marriage laws at issue here ... harm and humiliate the children of same-sex couples." Id. at —— – ——, 135 S.Ct. at 2600-01. Pavan relied on Obergefell to overturn an Arkansas law which required the father of a child to be listed on that child's birth certificate. The consolidated appellants in Pavan were two legally married lesbian couples. As with B.G., the fathers were anonymous sperm donors. The law was invalidated because it infringed "the constellation of benefits that the States have linked to marriage." Pavan, 137 S.Ct. at 2077 (quoting Obergefell, —— U.S. at ——, 135 S.Ct. at 2601). In sum, the entire basis of the holding of Obergefell is the significance and importance of *marriage* as an institution ***477** that should not be withheld from same-sex couples. Barring procreation or adoption, pre-Obergefell, different-sex marriages did not automatically result in the spouses becoming legal parents of each other's children and the analysis of the Obergefell majority opinion does not compel a different conclusion with respect to same-sex marriages, far less unmarried couples of any sexual orientation.

Hawkins suggests that the "special facts and circumstances," of this case provide an avenue for carving out an exception in this admittedly exceptional case. However, were we to do so, it is clear to us that the constitutional presumption of parental fitness would begin the process of suffering a death by a thousand cuts.

We certainly acknowledge that society has evolved new family structures while simultaneously concluding that qualitatively and quantitatively assessing which among a kaleidoscope of those structures should be given legal recognition is more properly the province of the people's representatives in the General Assembly rather than the courts and Obergefell does not require a different conclusion.[5] Were we to adopt the "know it when we see it," "special circumstances" definition of parentage urged on us by Hawkins, it would open a Pandora's box of unintended consequences to hold that a legal parent-child relationship is created simply by virtue of such factors as the amount of time a child spends with, or the strength of

an emotional bond that exists between, another living in the same household. It is not hard to imagine profound consequences for society and the courts if a parent knows that an ex-wife, ex-husband, ex-boyfriend, ex-girlfriend, former nanny, au pair or indeed virtually anyone not related to their child through biology or legal adoption, can be placed on equal footing as a ***478** biological or adoptive parent solely through a significant emotional bond with the child.

Much of the Obergefell language Hawkins cites is aspirational, seeking normality for same-sex families. It would be ironic for us to hold that the very decision expressing these aspirations became a tool for the erosion of the object of its aspiration—a family structure based upon marriage. The logical fallacy of this approach is apparent as well, if restricting marriage to opposite sex couples was unconstitutional because it denied same-sex couples the "constellation of benefits" heterosexual couples received, it could not possibly also then require the redefinition of every star in that constellation.

More fundamentally, Hawkins did not adopt B.G. during her relationship with Grese and thus relies upon her construction of Obergefell for relief. However, Obergefell provides no help for Hawkins because she and Grese were never married. Hawkins does not expressly ask us to recognize a formal "marriage" to Grese, but her reliance on Obergefell implies that we should retroactively construct an informal one. Our Supreme Court has recently held that ceremonial intent trumps legalistic form in marital ****449** matters and that solemnization is the *sine qua non* of any marriage, which need not coincide with the formal licensing of the union by the Commonwealth. See Levick v. MacDougall, 294 Va. 283, 805 S.E.2d 775 (2017). Even given this wide latitude, there is no marriage here. Hawkins concedes that the parties made no attempt to marry. Whatever a "solemnization" of marriage may be, it is not present in this record. That Hawkins and Grese were legally forbidden to marry in the Commonwealth at the time they began their relationship does not establish that they would have exercised the option if it were available. Moreover, currently, for civil matters, the general rule of retroactivity for Supreme Court precedent holds that

> [w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of ***479** whether such events predate or postdate our announcement of the rule.

Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993).

How retroactivity applies to the "constellation of rights" discovered in Obergefell is a question which has not yet been answered, nevertheless, this principle of retroactivity does not license this Court to engage in forensic retrospective marriage construction. For all of these reasons, Hawkins is not a parent to B.G. and the circuit court did not err in reaching that conclusion. Therefore, we need not further consider Hawkins' assignments of error dependent upon that status.

D. Hawkins' Standing to Assert B.G.'s Constitutional Rights

The final constitutional concern Hawkins raises are B.G.'s constitutional rights to association with Hawkins. Hawkins argues that the circuit court wrongly denied her third party (*jus tertii*) standing to assert B.G.'s constitutional right to association with her. Hawkins claims that B.G. has a constitutional right "to be raised and nurtured by [his] parents," meaning herself, and attempts to assert that right on his behalf. D.B. v. Cardall, 826 F.3d 721, 740 (4th Cir. 2016) (quoting Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002)).

The Supreme Court of the United States has divided standing issues into two categories, Article III Standing and Prudential Standing. The former restricts federal jurisdiction to "cases" and "controversies." U.S. Const. art. III, § 2, cl 1. While the latter traditionally encompasses third party standing as well as other areas where the Court has restrained itself through " 'judicially self-imposed limits on the exercise of federal jurisdiction.' " Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11-12, 124 S.Ct. 2301, 2308, 159 L.Ed.2d 98 (2004).

Further, the Supreme Court has recently signaled doubt on whether third party standing doctrine is rightly considered prudential, noting that, though most cases

address it as such, *480 "[t]he limitations on third-party standing are harder to classify" and that it might be more suited to an Article III case and controversy analysis. See Lexmark Int'l, Inc. v. Static Control Components, Inc., —— U.S. ——, 134 S.Ct. 1377, 1387 n.3, 188 L.Ed.2d 392 (2014).

[11] [12] However, "under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Tafflin v. Levitt, 493 U.S. 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). This concurrent sovereignty has led the United States Supreme Court to "recognize[ ] often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Coustitution or, in this case, a federal statute." ASARCO, Inc. v. Kadish, 490 U.S. 605, 617, 109 S.Ct. 2037, 2045, 104 L.Ed.2d 696 (1989) (citatious omitted). This includes federal standing rules. "Although the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on **450 their own interpretations of federal law." Id. This means that the federal standing grounds which Hawkins and Grese argue while persuasive, are not binding on this Court. Neither party has addressed the Commonwealth's standing requirements in their argument.

[13] [14] [15] The Commonwealth's third party standing exceptions are much narrower than those found in the federal system. In the Commonwealth, unless a statute provides otherwise, [6] the geueral rule with respect to third party standing is quite straightforward: "[An individual] may challenge the constitutionality of a law only as it applies to him or her." See *481 Coleman v. City of Richmond, 5 Va. App. 459, 463, 364 S.E.2d 239, 241 (citation omitted), reh'g denied, 6 Va. App. 296, 368 S.E.2d 298 (1988). "That the statute may apply unconstitutionally to another is irrelevant; one cannot raise third party rights." Id. at 463, 364 S.E.2d at 242. See also Pedersen v. Richmond, 219 Va. 1061, 1066, 254 S.E.2d 95, 99 (1979) (finding one lacks standing to assert the privacy rights of third parties). "Simply put, one cannot raise third party rights. Exceptions to the standing rule only apply to certain challenges under the First Amendment, and where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." Tackett v. Arlington County Dep't of Human Servs., 62 Va. App. 296, 325, 746 S.E.2d 509, 523 (2013) (internal quotations omitted).

With respect to whether this latter exception should apply to B.G., we examine the requirements of federal prudential third party standing for its persuasive impact on this Court. Under federal precedent, an exception to the general bar on third party standing requires that the party seeking standing must show that they themselves have suffered an injury and then further demonstrate both "a 'close' relationship with the person who possesses the right" and "a 'hindrance' to the possessor's ability to protect his own interests." Kowalski v. Tesmer, 543 U.S. 125, 130, 125 S.Ct. 564, 567, 160 L.Ed.2d 519 (2004). While the United States Supreme Court has "been quite forgiving with these criteria in certain circumstances," namely in cases involving the First Amendment and where "enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights," id. (quoting Warth v. Seldin, 422 U.S. 490, 510, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975)), "[b]eyond these examples ... [the Supreme Court has] not looked favorably upon third-party standing," id.

[16] By contrast, the United States Supreme Court has repeatedly demonstrated its reluctance to interfere with the rights of parents to represent the interests of their children unless absolutely necessary, having recognized that the "primary *482 role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Yoder, 406 U.S. at 232, 92 S.Ct. at 1541–42. Though this parental power is not absolute as against the state, it may only be contravened in rare cases where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." Id. at 233-34, 92 S.Ct. at 1542. Many of these contraventions have occurred in medical scenarios. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52, 74-75, 96 S.Ct. 2831, 2843–44, 49 L.Ed.2d 788 (1976) (iuvalidating statutory requirement for parental consent to minor's abortion as challenged by abortion providers). However, even in the medical context, "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer

the power to make that decision from the parents to some agency or officer of the state." Parham v. J.R., 442 U.S. 584, 603, 99 S.Ct. 2493, 2504–05, 61 L.Ed.2d 101 (1979). There are no First Amendment implications for B.G. here nor is Hawkins a doctor or medical provider seeking to preserve B.G.'s health or safety on an emergency basis.

Even with respect to parents, the third party standing issue in such a situation is ****451** less than clear. In Elk Grove an atheist father sought third party standing to prevent his daughter's school from forcing her to recite the pledge of allegiance daily. The child's mother sought to intervene as the child's custody was governed by a court order granting her sole control over the child's health, education, and welfare. The father contended that, despite this order, he retained a constitutional right to control his child's education. See Elk Grove, 542 U.S. at 15, 124 S.Ct. at 2310–11. The Court held that the father's rights, "as in many cases touching upon family relations, cannot be viewed in isolation." Id. The father's claimed standing was entirely based on third party standing which the Court refused to grant because, "the interests of this parent and this child are not parallel and, indeed, are potentially in conflict." Id. The Court recognized that the question of parental constitutional standing must follow the state law determination of ***483** parental status. Id. at 15-16, 124 S.Ct. at 2310–11. The present case is no different. Hawkins is not a parent under the law of the Commonwealth and therefore does not attain *jus tertii* standing to assert B.G.'s constitutional rights where the court has determined Grese is not an unfit parent and has custody of B.G.

Finally, we note B.G. is not without an "effective avenue of preserving [his] rights." The Commonwealth provides alternative avenues for protecting a minor third party's legal interests. First, the law provides for a guardian *ad litem*, as was appointed in this case, whose role "is to rise above the fray of the contending parties to ensure that the interests of persons under a legal disability are 'represented and protected.' " Wiencko v. Takayama, 62 Va. App. 217, 233, 745 S.E.2d 168, 176 (2013) (quoting Code § 8.01-9). Hawkins does not assign error to the manner in which the guardian *ad litem* exercised her statutory responsibilities toward B.G. in this case. Second, the "person with a legitimate interest" provisions of Code § 20-124.1, discussed in detail below, as we noted in Stadter, are sufficient to protect the rights of minor third parties. See Stadter, 52 Va. App. at 91-92, 661 S.E.2d at 499.

E. Whether Special Facts and Circumstances Rebut the Presumption in Favor of Custody with a Biological Parent.

[17] [18] [19] [20] Although Hawkins is not B.G.'s parent, all parties concede and the circuit court found that she is a "person with a legitimate interest" as defined by Code § 20-124.1. This term is to be broadly construed in the best interests of the child and includes non-blood relatives. See Code § 20-124.1. In any child *custody* dispute, "the best interests of the child are paramount and form the lodestar for the guidance of the court in determining the dispute." Walker v. Brooks, 203 Va. 417, 421, 124 S.E.2d 195, 198 (1962). However, "as between a natural parent and a third party, the rights of the parent are, if at all possible, to be respected." Id. This presumption favoring the parent is a strong one, and can only be rebutted by establishing certain factors by clear and convincing evidence, ***484** including "(1) parental unfitness ...; (2) a previous order of divestiture, ...; (3) voluntary relinquishment, ...; and (4) abandonment, ... [and (5)] ... a finding of 'special facts and circumstances ... constituting an extraordinary reason for taking a child from its parent, or parents.' " Bailes v. Sours, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986) (quoting Wilkerson v. Wilkerson, 214 Va. 395, 397-98, 200 S.E.2d 581, 583 (1973)) (internal citations omitted). "Once the presumption favoring parental custody has been rebutted, the natural parent who seeks to regain custody must bear the burden of proving that custody with him is in the child's best interests." Florio v. Clark, 277 Va. 566, 571, 674 S.E.2d 845, 847 (2009). This subsequent best interest determination is made by the preponderance of the evidence. See Walker v. Fagg, 11 Va. App. 581, 586, 400 S.E.2d 208, 211 (1991).

[21] Hawkins claims that the circuit court erred as a matter of law in finding that she did not demonstrate special facts and circumstances sufficient to rebut the presumption in favor of Grese, thereby justifying a best interest determination by the court. She argues that the circuit court's findings that Hawkins and Grese intended to create a family, that Hawkins and B.G. share a parent-child bond, and that B.G. would be ****452** harmed if that bond was severed are sufficient evidence to overcome the presumption in favor of Grese. She notes that in Bailes, where a stepmother was awarded custody instead of a

biological mother, the court predicated its award on "the likelihood of inflicting serious harm." Bailes, 231 Va. at 101, 340 S.E.2d at 827. Ergo, she reasons that since the court recognized that B.G. would be harmed by severing his bond with Hawkins, she is entitled to custody of B.G. as a matter of law. The problem with Hawkins' argument is that the special facts and circumstances required by Bailes must be such as to "constitut[e] an extraordinary reason for taking a child from its parent...." Id.

In Bailes, the court found the biological mother was a virtual stranger to her son, who had only visited with him "eight or ten times" over a nine-year period despite having *485 visitation rights. Id. at 98, 340 S.E.2d at 826. Under these extreme circumstances, the Court found that stripping the child from the only mother he had ever known rendered "the presumption favoring the mother ... repugnant to the child's best interest." Id. at 101, 340 S.E.2d at 827-28. The same cannot be said of Grese, who has remained a consistent parental presence in B.G.'s life. Given that B.G. would benefit from a continuing relationship with Hawkins, that alone does not rebut the presumption that Grese is a fit mother capable of making child rearing decisions for B.G.

Further, Hawkins alleges the psychological evidence shows that harm will necessarily flow from the severance of the relationship between herself and B.G., but such severance is not a necessary outcome of this dispute. Hawkins also cites O'Rourke v. Vuturo, 49 Va. App. 139, 638 S.E.2d 124 (2006), for her premise. In that case the non-biological father was awarded *visitation* rights, not *custody*.[7] Id. at 146, 638 S.E.2d at 127. Thus, the standard required that "a court must find an actual harm to the child's health or welfare without such visitation." Id. at 148, 638 S.E.2d at 128 (quoting Williams, 256 Va. at 22, 501 S.E.2d at 418).

The JDR court awarded Hawkins visitation with B.G., and Grese withdrew her appeal on this issue. If a new visitation dispute is forthcoming, that proceeding will take place under the more favorable standard discussed in O'Rourke. The guardian *ad litem* argues on brief that the established emotional bond between Hawkins and B.G. is more appropriately a relevant factor supporting "special facts and circumstances" with respect to appropriate *visitation* of B.G. with Hawkins but that issue is not currently before us and we offer no opinion on that point.

*486 Finally, in what amounts to a "catch-all" argument, Hawkins asserts that the recent judicial changes regarding same-sex marriage embodied in Obergefell are, themselves, sufficient evidence to warrant ignoring the Bailes factors and moving straight to a best interest determination. Her arguments regarding the scope of Obergefell are addressed above, but, to reiterate, we do not read Obergefell as mandating the wholesale rewriting of the Commonwealth's domestic relations statutes. A redefinition of marriage does not render the Bailes factors a nullity.

III. CONCLUSION

Taking the evidence in the light most favorable to Grese, the prevailing party below, the circuit court's judgment that Hawkins was not a parent of B.G. and that the evidence presented by Hawkins was insufficient to rebut the parental presumption in favor of custody of B.G. by Grese is not plainly wrong and therefore should not be overturned. For these reasons, the judgment of the circuit court is affirmed.

Affirmed.

All Citations

68 Va.App. 462, 809 S.E.2d 441

Footnotes

1 Same-sex marriages were not legal in the Commonwealth until 2014 following the decision of the United States Court of Appeals for the Fourth Circuit in Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).

2 E.g., "Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government." Shelley v. Kraemer, 334 U.S. 1, 18, 68 S.Ct. 836, 844, 92 L.Ed. 1161 (1948). More relevantly, in Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), the Supreme

Court overturned a Florida custody order using the strict scrutiny test, the highest tier of review, because it had been based on racial considerations.

3 Code § 20-158(A) in pertinent part provides that

> the parentage of any child resulting from the performance of assisted conception shall be determined as follows:
>
> 1. The gestational mother of a child is the child's mother.
>
> 2. The husband of the gestational mother of a child is the child's father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that he did not consent to the performance of assisted conception.

4 See, e.g., Conover v. Conover, 450 Md. 51, 146 A.3d 433 (2016) (adopting de facto parent status in Maryland in a same-sex custody dispute); Ramey v. Sutton, 362 P.3d 217, 220-21 (Okla. 2015) ("The [same-sex] couple's failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis*, of a best interests of the child hearing.").

5 The current definition of "parent" that we hold in this case represents the intent of the General Assembly for use in custody cases, may well require that one or both spouses in a same-sex marriage formally adopt any children intended to become part of the family unit but the process of legal adoption provides a mechanism and forum for the rights of all the parties in interest to be considered.

6 See e.g. Yokshas v. Bristol City Dep't of Soc. Servs., No. 0065-17-3, 2017 WL 5329291, 2017 Va. App. LEXIS 286 (Va. Ct. App. Nov. 14, 2017).

7 Visitation does not consider the Bailes factors but does include a best interest determination. The visitation standard requires that a court must find "an actual harm to the child's health or welfare without such visitation" before reaching a best interest determination. Williams, 24 Va. App. at 785, 485 S.E.2d at 654.

End of Document

674 S.E.2d 845, 277 Va. 566 (2009)
Joseph C. FLORIO v. Barbara E. CLARK, et. al.
Record No. 081080
Supreme Court of Virginia

from Westlaw

277 Va. 566
Supreme Court of Virginia.

Joseph C. FLORIO
v.
Barbara E. CLARK, et al.

Record No. 081080.
|
April 17, 2009.

Synopsis

Background: Following mother's death, biological father petitioned for custody of child. Child's maternal grandmother, and maternal aunt and uncle also filed petitions for custody. The Circuit Court, Gloucester County, Von L. Piersall, Jr., J., awarded custody of child to aunt and uncle. Father appealed. The Court of Appeals reversed and remanded. On remand, the Circuit Court again awarded custody to aunt and uncle, and father appealed. On rehearing en banc, the Court of Appeals, 52 Va.App. 18, 660 S.E.2d 687, affirmed. Father appealed.

[Holding:] The Supreme Court, Charles S. Russell, Senior Justice, held that presumption that child's best interests would be best served in custody of natural parent was adequately rebutted by evidence in record.

Affirmed.

West Headnotes (3)

[1] **Child Custody**
☞ Presumption in favor of parent

Presumption that child's best interests would be best served when in custody of natural parent was adequately rebutted by evidence that biological father agreed to leave child with mother and showed little interest in child, that father never paid child support, that father had multiple alcohol-related convictions that resulted in revocation of driver's license, that child had special needs, that father had no health insurance and provided none for child, and that child's aunt and uncle had supported and cared for child for several years. West's V.C.A. § 20-124.2(B).

8 Cases that cite this headnote

[2] **Appeal and Error**
☞ Sufficiency of Evidence;Clear, Manifest, Plain, or Palpable Error

A trial court's findings based on hearing evidence ore tenus are entitled to the weight given to a jury verdict and will not be disturbed on appeal unless, upon a review of the whole record, they are plainly wrong or without evidence to support them.

1 Cases that cite this headnote

[3] **Child Custody**
☞ Welfare and best interest of child

In a custody dispute between a natural parent and non-parent, once the presumption favoring parental custody has been rebutted, the natural parent who seeks to regain custody must bear the burden of proving that custody with him is in the child's best interests. West's V.C.A. § 20-124.2(B).

9 Cases that cite this headnote

Attorneys and Law Firms

****845** Kenneth B. Murov, Newport News, for appellant.

Breckenridge Ingles (Martin, Ingles & Ingles, on brief), Gloucester, for appellees.

Present: HASSELL, C.J., KEENAN, KOONTZ, KINSER, LEMONS, and GOODWYN, JJ., and RUSSELL, Senior Justice.

Opinion

****846** OPINION BY Senior Justice CHARLES S. RUSSELL.

***568** This is an appeal by a parent from an order awarding custody of his child to non-parents.

Facts and Proceedings

Applying familiar principles of appellate review, we will state the facts in the light most favorable to the parties prevailing in the trial ***569** court. In January 1996, Mary Childers gave birth to a child, Jacob Florio. Jacob's biological father was Joseph C. Florio, but the parents never married and were separated by the time of Jacob's birth. In April 1997, the Gloucester County Juvenile and Domestic Relations District Court (JDR court) entered an order that provided: "By agreement of parties, custody of the above named child is hereby granted to his mother, Mary L. Childers. Liberal visitation to his father, Joseph C. Florio." In July 1996, when the infant was six months old, the mother and Jacob moved in with the mother's sister, Barbara E. Clark and her husband, William B. Clark. Twelve months later, in July of 1997, the mother, with Jacob, moved from the Clarks' home to live with the mother's new boyfriend, who lived just "two cornfields" away from the Clarks.

During the next four years, the Clarks visited Jacob and his mother two to three times every week and took vacations together. Florio exercised his visitation rights infrequently during this period. He would state his intention to pick Jacob up, usually on a Sunday, but "most of the time he did not show up." During those years, William Clark acted as a surrogate father to Jacob, ensuring that he did his homework, taking him to sports activities and on trips, including his first visit to a dentist.

In 2001, Mary Childers developed serious heart disease and the Clarks assumed more of Jacob's day-to-day care. Jacob went back to live with the Clarks in January 2002 and his mother died two months later. Shortly before her death, Mary Childers executed a will in which she nominated her sister, Barbara Clark, as Jacob's guardian.

Two days after Mary Childers' death, without notice to the Clarks, Florio filed a petition in the JDR court for custody of Jacob. That court entered an order transferring custody to Florio, *pendente lite.* Joyce Childers, Jacob's maternal grandmother, and the Clarks, filed petitions for custody. The court appointed a guardian ad litem for Jacob and continued the case, ordering home studies, counseling for Jacob, and a substance abuse evaluation of Florio. Florio had custody of Jacob for five months in 2002, during which the two of them lived in a trailer on Florio's mother's farm. Florio had no driver's permit during this time and Florio's mother and stepfather had to meet his and Jacob's needs for transportation.

In August 2003, the JDR court awarded Jacob's custody to the Clarks, ruling that Florio was not a fit person to have Jacob's custody. Florio appealed to the circuit court, which entered a final order ***570** on October 6, 2004, awarding custody to the Clarks. Florio appealed to the Court of Appeals, which, by unpublished memorandum opinion dated July 26, 2005, reversed the circuit court's judgment for error in the admission of evidence and remanded the case for further proceedings. The circuit court reheard the case on remand and entered a final order on September 3, 2006, awarding custody to the Clarks. Florio took a second appeal to the Court of Appeals, which affirmed the judgment of the circuit court by a divided panel decision. Florio requested a rehearing *en banc,* which was granted. The Court of Appeals, sitting *en banc,* approved the panel decision and adopted its majority opinion by order entered May 13, 2008, awarding custody of Jacob to the Clarks. We awarded Florio an appeal. With the exception of the five-month period in 2002 mentioned above, Jacob has lived with the Clarks from January 2002 until the present.

Analysis

[1] [2] The circuit court heard the evidence *ore tenus.* Its findings are entitled to the weight given to a jury verdict and will not be disturbed on appeal unless, upon a review of the whole record, they are plainly wrong or without evidence to support them. ****847** *Gray v. Gray,* 228 Va. 696, 699, 324 S.E.2d 677, 679 (1985). Code § 20–124.2(B) provides in pertinent part:

> In determining custody, the court shall give primary consideration to the best interests of the child.... The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest.

In *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986), we set forth the principles governing a custody determination between a parent and a non-parent:

> In all child custody cases, including those between a parent and a non-parent, the best interests of the child are paramount and form the lodestar for the guidance of the court....
>
> ***571** [I]n a custody dispute between a parent and a non-parent, the law presumes that the child's best interests will be served when in the custody of its parent.
>
> Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence. We have held that such factors include: (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; ... (4) abandonment[; and (5)] special facts and circumstances ... constituting an extraordinary reason for taking a child from its parent, or parents.

Id. at 99–100, 340 S.E.2d at 826–27 (citations and internal quotation marks omitted).

[3] Once the presumption favoring parental custody has been rebutted, the natural parent who seeks to regain custody must bear the burden of proving that custody with him is in the child's best interests. *See Shortridge v. Deel*, 224 Va. 589, 594, 299 S.E.2d 500, 503 (1983).

Applying those principles to the record in the present case, we conclude that the trial court's judgment was supported by clear and convincing evidence sufficient to rebut the presumption in favor of the natural father, and that Florio did not carry the burden of proving that custody with him would be in the child's best interests. We find no merit in Florio's contention that the trial court applied an incorrect legal standard.

Among the factors considered by the trial court were the following:

(1) Florio had agreed to leave Jacob in his mother's sole custody during her lifetime and sought Jacob's custody for the first time, after her death, when Jacob was six. During those formative years, Florio showed little interest in Jacob, visiting him very rarely.

(2) Florio never paid any child support for Jacob, either during the six years Jacob was with his mother or during the subsequent years when Jacob was in the Clarks' custody.

(3) Florio has an extensive record of misdemeanor and traffic offenses from 1993 until 2001, including seven "drunk in public" convictions, three "driving under the influence" convictions, two other traffic infractions, one conviction each of "trespassing," "hit and run," and "obstructing a law enforcement officer by threat or ***572** force in the performance of his duty." His driver's permit was suspended three times and ultimately revoked.

(4) Jacob has special needs, having been diagnosed by a clinical psychologist with attention deficit hyperactivity disorder and a learning disorder.

(5) At 39 years of age, Florio had no home of his own at the time of trial, residing with his father and stepmotber. He was building a house for himself on his father's land but it was uncompleted. He dropped out of high school in tbe 10th grade and never earned a G.E.D. He worked with his father in a dog grooming and kennel business on his father's property. The trial court found that he had been "less than honest with tbe IRS" and "less than forthrigbt" with the investigators appointed by the court. Florio had no health insurance and provided none for Jacob. He has shown no ability to deal with Jacob's emotional, educational and health needs.

(6) The Clarks have supported and cared for Jacob continuously since 2002, providing him with a very good home. Both Clarks served in the U.S. Air Force and have college degrees. William Clark has a master's degree in business management and has ****848** worked continuously as an air traffic controller employed by the Federal Aviation Administration for 24 years. The Clarks have furnished Jacob with health insurance since 2002 and have been attentive to his emotional, educational and health needs.

It is clear that Florio has a very strong desire to have Jacob's custody and that father and son have an affectionate relationship. Florio has, according to the report of the guardian ad litem, "turned his life around" in recent years. Florio testified that he had attended many Alcoholics Anonymous meetings, had ceased drinking

alcohol entirely, and had become religious. He had no record of criminal offenses after 2001.

At age 10, Jacob expressed a preference to live with his father, although he was fond of the Clarks and was relaxed, happy, and comfortable in their home. The guardian ad litem was of the opinion that Florio was unfit as a custodian in 2001, but no longer unfit in 2006. She recommended joint custody between Florio and the Clarks, but primary physical custody with the Clarks. The trial court rejected that disposition because of strong animosity between Florio and the Clarks, and awarded custody to the Clarks with frequent, specified visitation to Florio.

***573** *Conclusion*

Even if we assume, without deciding, that no single factor outlined above would be sufficient to rebut the presumption in favor of the natural father, the totality of the record is sufficient to support, by clear and convincing evidence, the trial court's holding that the presumption was rebutted by "special facts and circumstances ... constituting an extraordinary reason for taking a child away from its parent." *Bailes*, 231 Va. at 100, 340 S.E.2d at 827. After that holding, a clear preponderance of the evidence supports the conclusion that the child's best interests would be served by the disposition made by the trial court and affirmed by the Court of Appeals. We will, therefore, affirm the judgment of the Court of Appeals.

Affirmed.

All Citations

277 Va. 566, 674 S.E.2d 845

End of Document

581 S.E.2d 899, 41 Va.App. 77 (2003)
Andrea K. GRIFFIN v. Elbert Eddie GRIFFIN
Record No. 1214-02-2
Court of Appeals of Virginia, Richmond

from Westlaw

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Koshko v. Haining, Md.App., May 2, 2006

41 Va.App. 77
Court of Appeals of Virginia,
Richmond.

Andrea K. GRIFFIN
v.
Elbert Eddie GRIFFIN.

Record No. 1214–02–2.
|
June 17, 2003.

Synopsis
In divorce proceeding, after paternity test established that mother's estranged husband was not the biological father of child, and the juvenile and domestic relations court awarded husband weekly visitation of child, wife appealed. The Circuit Court, Albemarle County, Paul M. Peatross, Jr., J., granted husband visitation with child. Wife appealed. The Court of Appeals, D. Arthur Kelsey, J., held that: (1) the trial court was required to apply the clear and convincing evidence of actual harm test, rather than the best interests of the child standard, in proceeding by non-parent for visitation with minor child, and (2) mother's estranged husband was not entitled to visitation.

Reversed and vacated.

West Headnotes (5)

[1] **Constitutional Law**
☞ Parent and Child Relationship

The Due Process Clause protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. U.S.C.A. Const.Amend. 14.

9 Cases that cite this headnote

[2] **Parent and Child**
☞ Maternity in general

A single mother has no less constitutional right to parent her son than a married mother.

Cases that cite this headnote

[3] **Child Custody**
☞ Welfare and best interest of child

Child Custody
☞ Degree of proof

The trial court was required to apply the clear and convincing evidence of actual harm test, rather than the best interests of the child standard, in proceeding by non-parent for visitation with minor child; the best interests standard was to he applied only after the trial court found clear and convincing evidence of actual harm to the child if visitation was not ordered, and if actual harm was not found then the parents constitutionally protected interest in their children prevailed over the best interests of the child. West's V.C.A. § 20–124.2, subd. B.

22 Cases that cite this headnote

[4] **Child Custody**
☞ Stepparents

Evidence was insufficient to establish actual harm to child's health or welfare, and thus mother's estranged husband, who was not the biological father of child, was not entitled to visitation with child; evidence established that child "could be" emotionally hurt if visitation with husband ended.

9 Cases that cite this headnote

[5] **Child Custody**
☞ Right of biological parent as to third persons in general

Absent a showing of actual harm to the child, the constitutional liberty interests of fit parents take precedence over the best interests of the child, in a proceeding for non-parent visitation with a child; as a result, a court may not impose its subjective notions of best interests of the child in derogation of parental rights protected by the Constitution.

25 Cases that cite this headnote

Attorneys and Law Firms

**900 *79 Steven L. Raynor (Christopher A. Jones; Martin & Raynor, P.C., on briefs), Charlottesville, for appellant.

Christopher J. Smith (Jones & Green, LLP, on brief), Charlottesville, for appellee.

Present: FELTON and KELSEY, JJ., and WILLIS, Senior Judge.

Opinion

KELSEY, Judge.

Andrea Griffin appeals a decision of the trial court granting her estranged husband weekly visitation with her son—a child fathered by another man while the Griffins were separated. On appeal, she argues that (i) the trial court incorrectly applied the legal standard governing visitation with a non-parent, and (ii) under a correct application of the standard, the evidence does not justify awarding visitation over her parental objection. Agreeing with both contentions, we reverse the trial court's visitation order.

I.

Andrea Griffin (wife) and Elbert Griffin (husband) married in 1996 and separated in September 1997. During the separation, wife became sexually involved with Michael Groh. Wife continued, however, to have sexual relations with husband during this period of separation. In October 1997, wife learned that she was pregnant and informed husband that he was tbe father. In December 1997, husband was injured in an automobile accident and spent six to seven weeks in the hospital. Upon husband's discharge from the hospital, wife returned to the marital home to care for him. Husband suffered extensive injuries, leaving him with significant physical and mental impairments. During this period of recuperation, *80 however, the couple did not reconcile or express any joint interest in saving the marriage.

Wife gave birth to a boy on June 25, 1998. Husband believed at that time, based on what wife had told him, that he was the child's father. As a result, husband treated the child as his own and participated in his early development. In September 1999, wife and her son moved in with her mother. Wife agreed to allow husband weekly visitation with the child. In December 1999, however, a court-ordered paternity test established that Michael Groh was the child's father. Upon learning the results of the paternity test, wife denied husband any further weekly visitation with her son.

In August 2000, over wife's objection, the juvenile and domestic relations district court awarded husband temporary visitation rights with the child despite the results of the paternity test. In June 2001, the JDR court expanded the visitation schedule and made its order final. The final order stated that the JDR court applied the best-interests test codified in Code § 20–124.3. Wife appealed to the circuit court on the ground that, as a non-parent, husband could not obtain visitation rights over her son on a mere showing of best interests. In February 2002, the circuit court held a hearing concerning the visitation issue. The child's biological father, Michael Groh, appeared and testified that he paid child support, but did not intend to foster a relationship with the child.

Wife called Dr. Patricia Martin, a clinical psychologist, as an expert witness. Dr. Martin testified that the best interests of the child would be served by ending husband's visitation. Dr. Martin concluded that, given the animosity between them, wife and husband were not "able to co-parent effectively." Dr. Martin noted wife's legitimate concerns over her son's "safety" when he was with husband as well as husband's "history of **901 drinking." In addition, Dr. Martin testified, husband's psychological tests revealed "dysfunctional personality characteristics." Husband engaged in chronic disparagement of wife in her son's presence and displayed an attitude of "revenge" stemming from a sense of betrayal by wife.

*81 The child was "obviously aware" of the hostility between husband and wife, Dr. Martin observed. She explained that this level of antagonism, even between parents, was cause for alarm:

> One of the most significant findings in family research concerns the serious hazard posed to

> the psychological health and develop[ment] of children by continued exposure to high conflict between the parents, whether in the contexts of an intact marriage or as part of ongoing post-divorce antagonism.

It only compounded things, Dr. Martin concluded, for such hostility to exist between a mother and a non-parent seeking to play the role of a *de facto* father.

Hushand called Wendy Carroll, a family counselor, as an expert witness. Carroll testified that she thought it would be "very hard" on the child if visitation with husband did not continue. The child referred to husband as "Daddy," Carroll pointed out, and had obvious affection for him. Carroll also found it significant that "Mr. Griffiu vehemently and consistently state[s] that he views himself as [the child's] father."

Although she did not apply any "formal criteria," Carroll concluded that under "attachment theory" the child had developed an emotional tie to husband. Severing that tie, Carroll believed, would likely cause the child to consider himself "bad" and "unlovable" and to grieve over the loss. As a result, Carroll opined, it "could be" emotionally hurtful for the child if visitation ended. All in all, Carroll concluded, it would be in the child's best interests for husband to have visitation rights. [1]

The trial court ruled for husband, stating that the "best interests" of the child would be served by ordering visitation over the mother's objection and that not doing so would be ***82** "detrimental" to the child. The court advised husband to read *Wednesdays And Every Other Weekend,* a book "which talks about non-custodial parents and what's best for the child." The court's final order required wife to make the child available for visitation by husband on Wednesday afternoons and every other weekend (from Friday night until Sunday evening). The order also provided that husband "shall not consume alcoholic beverages while the child is in his care."

Wife filed this appeal, seeking a reversal of the visitation order. Before oral argument, wife filed a motion to remand the case to the trial court alleging that on March 30, 2003, husband had been in another automobile accident—this time with her son as a passenger. Police officers arrested husband for driving under the influence and endangering the child's life. By order entered April 15, 2003, we denied wife's request for a plenary remand of the case, but nonetheless granted leave for her to seek from the trial court either a reconsideration or stay of the visitation order based upon changed circumstances. In the meantime, we ordered this appeal to go forward.

II.

[1] As the United States Supreme Court has observed, the "liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49 (2000). The Due Process Clause protects the "fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Id.* at 66, 120 S.Ct. at 2060. As a result, the statutory best-interests test "unconstitutionally infringes on that fundamental parental right" if it authorizes a court to "disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third ****902** party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67, 120 S.Ct. at 2060–61.

***83** *Troxel* expressly declined to rule that all "nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 73, 120 S.Ct. at 2064. Citing *Williams v. Williams,* 256 Va. 19, 501 S.E.2d 417 (1998), as an example, *Troxel* pointed out that some state statutes have been interpreted to require a showing of actual harm as a precondition to awarding visitation to a non-parent over the objection of fit parents. *Id.* at 74, 120 S.Ct. at 2064–65. In *Williams,* the Virginia Supreme Court agreed that

> [f]or the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an *actual harm to the child's health or welfare* without such visitation.

Williams, 256 Va. at 22, 501 S.E.2d at 418 (quoting *Williams v. Williams,* 24 Va.App. 778, 784–85, 485 S.E.2d 651, 654 (1997)) (emphasis added). Thus, when

fit parents object to non-parental visitation, a trial court should apply "the 'best interests' standard in determining visitation *only after* it finds harm if visitation is not ordered." *Id.* (emphasis added).

Custody and visitation disputes between two fit parents involve one parent's fundamental right pitted against the other parent's fundamental right. The discretion afforded trial courts under the best-interests test, Code § 20–124.3, reflects a finely balanced judicial response to this parental deadlock. A very different kind of legal contest, however, exists in a dispute between a fit parent and a non-parent. In this latter situation, the best-interests test should be applied only if the trial court first finds "an actual harm to the child's health or welfare without such visitation." *Id.* (quoting *Williams,* 24 Va.App. at 784–85, 485 S.E.2d at 654).

We disagree with husband that our reasoning conflicts with *Dotson v. Hylton,* 29 Va.App. 635, 639, 513 S.E.2d 901, 903 (1999), which held: "When only one parent objects to a [non-parent's] visitation and the other parent requests it, the trial court is not required to follow the standard enumerated in *Williams.*" Unlike *Dotson,* the "other parent" in our case (Michael Groh) did not request that visitation be awarded to ***84** husband. Thus, the trial court was not asked to referee between one parent's reqnest that visitation be granted to a non-parent and the other parent's objectiou to it. The only contest here is between a parent and a non-parent.

[2] We are equally unpersuaded by husband's suggestion that wife has no constitutionally protected rights as a parent because she and the child's father cannot be considered an "intact family."[2] *Troxel* involved an unmarried, single mother. Nothing in *Troxel* implies that the legal superiority of a fit parent's rights over those of a non-parent turns on whether the parent is married, separated, divorced, or widowed. A single mother has no less constitutional right to parent her son than a married mother. "We, therefore, reject any argument that single parents are entitled to less constitutional liberty in decisions concerning the care, custody, and control of their children." *Wickham v. Byrne,* 199 Ill.2d 309, 263 Ill.Dec. 799, 769 N.E.2d 1, 6 (2002).

[3] [4] Because it exists as a means of expressing the compelling state interests necessary to overcome the constitutional parental rights recognized in *Troxel,* the actual-harm standard must be understood as conceptually different from, and significantly weightier than, the best-interests test. As we made clear in *Williams,* the actual-harm test cannot be satisfied by a showing that "it would be 'better,' 'desirable,' or 'beneficial' for a child" to have visitation with a non-parent. *Williams,* 24 Va.App. at 784, 485 S.E.2d at 654. "It is irrelevant, to this constitutional analysis, that it might, in many instances be 'better' or 'desirable' for a child" to have visitation with a non-parent. ****903** *Brooks v. Parkerson,* 265 Ga. 189, 454 S.E.2d 769, 773–74 (1995). "For the state to delegate to the parents the authority to raise the[ir] child as the ***85** parents see fit, except when the state thinks another choice would be better, is to give the parents no authority at all." *Williams,* 24 Va.App. at 784, 485 S.E.2d at 654 (citation omitted).

[5] Absent a showing of actual harm to the child, the constitutional liberty interests of fit parents "take precedence over the 'best interests' of the child." *Id.* As a result, "a court may not impose its subjective notions of 'best interests of the child' " in derogation of parental rights protected by the Constitution. *Id.* A "vague generalization about the positive influence" of non-parent visitation cannot satisfy the actual-harm requirement. *In re Herbst,* 971 P.2d 395, 396, 398–99 (Okla.1998). To be sure, in this context, forced visitation "cannot be ordered absent compelling circumstances which suggest something near unfitness of custodial parents." *Stacy v. Ross,* 798 So.2d 1275, 1280 (Miss.2001).

In addition, Code § 20–124.2(B) requires a showing of "clear and convincing evidence" before visitation may be awarded to a non-parent. This erects a "more stringent standard" than a mere "preponderance of the evidence." *Congdon v. Congdon,* 40 Va.App. 255, 263, 578 S.E.2d 833, 837 (2003). Clear and convincing evidence involves "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Id.* (quoting *Lanning v. Va. Dept. of Transp.,* 37 Va.App. 701, 707, 561 S.E.2d 33, 36 (2002) (citation omitted)).

In this case, the trial court collapsed the two legal standards together—not only in the decisionmaking sequence, but in the substance of the decision as well. In effect, the trial court's reasoning treated the actual-harm requirement as simply a restatement of the best-interests test. To justify a finding of actual harm under the clear and

convincing burden of proof, the evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But ***86** that is not what we meant by "*actual* harm to the child's health or welfare." *Williams*, 24 Va.App. at 784–85, 485 S.E.2d at 654 (emphasis added). If it were, any non-parent who has developed an emotionally enduring relationship with another's child would satisfy the actual-harm requirement. The constitutional rights of parents cannot be so easily undermined.

The evidence in this case, at its best, goes no further than supporting the inference that the child would grieve the loss of the emotional attachment he has for his mother's estranged husband and "could be" emotionally hurt if visitation with him ended. While that might satisfy a trial court's "subjective notions of 'best interest of the child,' " *Williams*, 24 Va.App. at 785, 485 S.E.2d at 654, it falls far short of satisfying by clear and convincing evidence the actual-harm test. Wife's decision to discourage her young son's relationship with husband, therefore, must be judicially respected. [3]

III.

In sum, we hold that the trial court applied an incorrect legal standard to the non-parent visitation award and that, under the correct standard, the evidence does not support a finding by clear and convincing evidence of actual harm to the child's health or welfare. For this reason, we reverse and vacate the trial court's visitation order. [4]

Reversed and vacated.

All Citations

41 Va.App. 77, 581 S.E.2d 899

Footnotes

1 Wife also contends that the trial court erred by admitting the testimony of Wendy Carroll because she was unqualified to address the psychological aspects of "attachment theory" and that, in any event, the topic was an improper subject for expert opinion in the first place. Our reasoning assumes, without deciding, that Carroll's testimony was admissible.

2 In *Dotson*, 29 Va.App. at 638, 513 S.E.2d at 903, we distinguished the situation in that case (a divorced couple with one parent requesting visitation, the other objecting to it) from *Williams*, which involved a "unified family" with both parents objecting to non-parent visitation. *Dotson* did not hold, as husband appears to contend, that the actual-harm standard applies only to married parents in an intact family.

3 Given our holding, we need not address whether husband qualifies as a "[p]erson with a legitimate interest" under Code § 20–124.1. *Cf. Kogon v. Ulerick*, 12 Va.App. 595, 405 S.E.2d 441 (1991) (defining "stepparent" for purposes of being deemed a "party with a legitimate interest").

4 We also deny husband's motion for attorney's fees.

End of Document