DISTRICT OF COLUMBIA COURT OF APPEALS

No. 99-FM-1138

W.D.,

Appellant,

v.

C.S.M., *et al.*,

Appellees.

No. 99-FM-1299

B.T.,

Appellant,

v.

C.S.M., *et al.*,

Appellees.

BRIEF *AMICUS CURIAE* OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA IN OPPOSITION TO THE PETITION FOR REHEARING OR REHEARING *EN BANC*

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INTEREST OF THE AMICUS CURIAE

The Legal Aid Society is the oldest general civil legal services program in the District of Columbia. Legal Aid was founded in 1932 to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, Article II, § 1. Legal Aid represents indigent parents in child custody proceedings, including two mothers in cases before this Court who were sued for custody of a child by a non-parent.[1] As a result of those representations, Legal Aid has extensive experience with the legal question before the Court, which is whether existing District of Columbia law provides a private right of action in a domestic relations proceeding by which a non-parent may seek custody of a child from a parent.

REHEARING SHOULD BE DENIED

The Division correctly rejected appellees' request to create a private right of action for non-parents to sue parents for custody of their children. Such a non-statutory right of action would be inconsistent with the existing statutory framework for adoption and permanent guardianship as well as with the constitutional protections to which parents are entitled when faced with a request to sever the parent-child bond.

1. The Division's Statutory Analysis Was Correct. In its unanimous opinion, the Division correctly analyzed the District of Columbia Council's enactments in this general area: the domestic relations statute authorizing custody actions by parents and the statutes providing for adoption and permanent guardianship by non-parents of a neglected child. As the Division recognized, District law provides means, through adoption or permanent guardianship, by which a non-parent can obtain permanent custody of a child notwithstanding the parents' withholding

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[1] *K.H., Sr. v. R.H.*, No. 03-FM-477 (argued June 23, 2004); *Cooper v. Francois*, Nos. 04-FM-588 & 04-FM-923 (summarily affirmed Sept. 15, 2006).

of consent. In order to do so, the non-parents must satisfy the same factors that apply when the District of Columbia seeks to terminate parental rights, through proceedings in which the parents are entitled to appointed counsel if they cannot afford representation. In contrast, the domestic relations statute -- which does not provide the same procedural and substantive safeguards -- is limited on its face to actions between parents, each of whom has a liberty interest in custody protected by the Constitution. Applying the domestic relations statute to non-parents, the Division recognized, would mean stripping parents of important, constitutionally mandated protections contrary to the intent of the Council. Against this background, the Division concluded that "there is no reason to believe that the legislature intended to extend the reach of the court's domestic relations jurisdiction and its standards and procedures into an area where it had provided for extensive procedures specifically designed to protect abused and neglected children." Slip op. 13. Further, the Council's enactment of a comprehensive neglect scheme preempts any inherent judicial power to bypass that system through a judicially created right of action. *Id.* at 13-14. The Petition offers no reason to revisit the Division's dispositive statutory analysis.

The *amici curiae* supporting the appellees refer to two recent District of Columbia statutes -- the Standby Guardianship Act, enacted in 2002, and the Grandparent Caregivers Pilot Program Establishment Act, enacted in 2006 -- as support for their claim that anyone can bring a private domestic relations action for child custody.[2] According to *amici*, these statutes "reflect that the city council not only had knowledge, but expressly approves of the ability of non-parents

[2] *Amici* also claim the Division's opinion conflicts with a "long line of cases in this Court recognizing the right of non-parents to file for child custody." Amici Br. 1, 5. Suffice it to say that *amici* do not cite any such cases, and we know of no case, prior to this one, in which the Court resolved that question. *See* Slip op. 14 n.17. In *A.J. v. L.O.*, 697 A.2d 1189, 1191 n.5 (D.C. 1997), which was decided after all of the cases that *amici* cite at page 4 of their brief, this Court described the authority of a non-parent to bring a custody action as "not at all obvious."

to receive child custody awards from the Superior Court." Amici Br. 5. Even if *amici's* characterization of those statutes were accurate, a later Council's "approval" of a practice not authorized by law would not be any basis for rewriting a statute. To change the law, the Council must legislate, and even *amici* do not claim the Council has enacted any law authorizing non-parents to bring private domestic relations actions for custody. And, as this Court has often recognized, a later Council's views are a hazardous basis for inferring the meaning of a statute enacted by an earlier Council. *E.g., Twin Towers Tenants Ass'n v. Capitol Park Assocs. L.P.*, 894 A.2d 1113, 1120 n.14 (D.C. 2006), *pet. for reh. pending*; *Deberry v. First Govt. Mtg. Investors Corp.*, 743 A.2d 699, 702 (D.C. 1999).

Neither of the recent statutes cited by *amici* supports rehearing. The Standby Guardianship Act allows a custodial parent to appoint a temporary guardian to care for the child in the event of the parent's incapacity or death. Thus, the involvement of the non-parent is triggered by the choice of a parent, and the standby guardian succeeds only to that parent's legal custody, whether or not it includes any physical custody of the child. D.C. Code § 16-4804(a), (c). Because the standby guardian fills the shoes of the dead or incapacitated parent, a hearing to resolve a dispute between the other parent and the standby guardian can "be conducted in accordance with the proceedings set forth in the District of Columbia statutes and rules relating to legal custody." D.C. Code § 16-4806(j); *see* D.C. Code § 16-4809(a) (allowing a person entitled to notice of a standby guardianship order under the Uniform Child Custody Jurisdiction Act to commence a child custody proceeding).

The Council's enactment of a statute authorizing custody actions involving the designated guardian of a child with a dead or incapacitated parent hardly implies knowledge,

much less approval, of custody actions by non-parents in general.[3] To the contrary, it is further evidence that the Council has comprehensively addressed child custody issues through legislation, expressly providing for litigation within the domestic relations custody framework when it deems that framework appropriate, and then only when the non-parent guardian legally stands in the shoes of a parent.[4] If the law already permitted non-parent custody actions, the provision of the Standby Guardianship Act authorizing custody actions involving designated guardians would be superfluous. And, as *amici* acknowledge, it is the parent, not the non-parent appointed a guardian under that Act, who commences a custody proceeding. But there has never been any doubt that a parent can bring an action for custody against a non-parent. D.C. Code § 16-1908; *Shelton v. Bradley*, 526 A.2d 579 (D.C. 1987). There is simply no way to read the Standby Guardianship Act as endowing the courts with new equitable powers over child custody or creating new rights of action in non-parents (who have not been designated by a parents as guardians) to sue for custody.

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[3] There is no basis for *amici's* claim that failing to create a right of action for non-parents to sue parents for custody would condemn children now being cared for by relatives to foster care. Amici Br. 4, 10. Existing law allows parents to designate guardians, or the court to appoint them, or to make a placement of a neglected child. To the extent that *amici*'s concern is with a failure of the exiting abuse and neglect system to place neglected children with appropriate caregivers, those concerns are appropriately directed to the political branches of government. Contrary to *amici*'s intimation (*see id.* at 9-10), domestic relations custody orders are not a prerequisite for children placed with guardians or in a neglect proceeding to receive education, medical care, or other public services. A caregiver may obtain public benefits such as TANF, Food Stamps, Medicaid, or General Assistance for Children on behalf of a child. Policy Manual, D.C. Income Maintenance Administration, 83, 106 and 108. Caregivers can also enroll children in school and add a child to a public housing lease without legal custody. D.C.M.R. §§ 5001.1(a)(1-2); 5004.1, 5004.2., 6115.2 (c).

[4] If *amici* were correct, guardians could sue the parents who designated them to retain custody of the child even after the parents recovered from their disability. But that would conflict with the express language of the Standby Guardianship Act. *See* D.C. Code § 16-4810(a) (parent may revoke authority after court has approved guardianship).

The Grandparent Caregivers Pilot Program Establishment Act provides financial assistance to "grandparents" (defined to include grandparents, great-grandparents, great-uncles, and great-aunts) who are caring for children who have been left in their care by a parent. D.C. Code § 4-251.03(a)(1) requires, as a condition of eligibility for the subsidy, that "[t]he grandparent has an order granting him or her legal custody or standby guardianship pursuant to § 16-4806 of the child." Since standby guardianship proceedings can result in an order for legal custody, the most natural reading of this language is that it refers only to proceedings under the Standby Guardianship Act. There is no parallel reference to D.C. Code § 16-914, so the statute cannot be understood to imply Council approval of non-parents (even "grandparents") obtaining custody by suing parents under that provision. And, of course, a grandparent in the District of Columbia could well have legal custody under an order issued by a court of another jurisdiction.[5] In enacting the grandparent benefit, moreover, the Council anticipated and expressly rebuffed precisely the kind of implied ratification argument *amici* have made, stating "[n]othing in this chapter shall be construed to create a new cause of action or to limit the rights or remedies available to parents in custody or guardianship actions." D.C. Code § 4-251.07(b).

A parent's relationship with his or her child is constitutionally protected. *T.S. v. M.C.S.*, 747 A.2d 159, 162-64 (D.C. 2000). The Superior Court's domestic relations statute, designed to resolve disputes between parents, does not protect those interests, and cannot be applied so as to provide such protection without disregarding the words of the statute. Snippets of other statutes

[5] The Uniform Child Custody Jurisdiction and Enforcement Act addresses the adjudication of interstate custody actions that may be governed by the custody laws of other states, which sometimes allow actions by certain classes of non-parents, a policy choice to which the District must give full faith and credit. That statute has no bearing on who may bring a custody action under District of Columbia domestic relations law. Similarly, the fact that D.C. public schools will register children who are in the custody of a non-parent under the order of a court of competent jurisdiction says nothing about whether the Superior Court may issue such a custody order on the complaint of a non-parent against a parent.

referring to custody -- even if they actually evidenced the amorphous "approval" of a later Council -- do not create a statutory basis for non-parent custody actions against parents. The fact that the Council has actively legislated in the area of child custody is only further proof that there is no room for the courts to create inconsistent authority for such custody actions on their own.[6]

2. The Trial Court on Remand Has Ample Authority to Grant Appellees Permanent Guardianship or Adoption. The Petition accuses the Division of being "ruthless," "Draconian," and "gambl[ing] with a child's future" (Pet. 8, 9) by vacating the domestic relations custody order and remanding the case to the neglect judge to consider whether to order a permanent guardianship under D.C. Code § 16-2383. But there is nothing in the opinion that suggests that the Division disregarded the interests of the child or the realities of the situation.

On remand, appellees can seek permanent guardianship, which, as the Division recognized, "provides [an] additional option to the Family Court by which it can achieve permanency for the neglected child while ensuring the fundamental rights of all parties." Slip op. 16. The Division also expressly left open consideration of other permanent dispositions, such as adoption (*id.* at 17 n.19.), which would endow the child with permanent legal rights of inheritance and support that he would not have by virtue of a custody order. D.C. Code §§ 16-301-304. The Division was careful to instruct the lower court to reopen the neglect file (if closed), and made it clear that the neglect judge, on remand, should re-examine de novo whether W.D. grasped his opportunity interest within the context of the neglect case. Slip op. 17 nn.20, 21. There is every reason to believe that the neglect court will proceed on remand with due regard for the best interests of the child and the current circumstances of this unusual case. *See*

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[6] As the Division noted, *Ysla v. Lopez*, 684 A.2d 775 (D.C. 1996), allowed unmarried *parents* to bring custody actions. That construction avoided the constitutional problems that would arise if a parent's right to custody turned on marital status. *Ysla* does not imply a general power to rewrite the custody statute or to create non-statutory custody actions.

e.g., In re Baby Boy C., 630 A.2d 670, 683 (D.C. 1993) (approving consideration of child's status at the time of remand); *In re Te. L.*, 844 A.2d 333, 341 (D.C. 2004) (trial court should consider intervening developments on remand); *In re Ko. W.*, 774 A.2d 296, 309 (D.C. 2001) (same); *In re C.T.*, 724 A.2d 590, 599 (D.C. 1999) (same). If, as the Petition contends, appellees are the child's sole psychological parents, it should not be difficult for them to meet the requirements under this Court's precedents for adoption (or permanent guardianship) without the parents' consent. Certainly, there is nothing in the opinion that dictates an outcome on remand that will be unfavorable to appellees, or that justifies rehearing now based on speculation about how the case will be resolved on remand. This Court cannot be expected to refrain from correcting legal errors in proceedings involving the custody of children on the theory that changing any existing placement is necessarily harmful to a child.

3. There Is No Conflict with this Court's Precedent. The Petition argues that rehearing should be granted because of a conflict between the Division's opinion and *Davis v. Jurney*, 145 A.2d 846, 849 (D.C. 1958), or *In re H.R.*, 581 A.2d 1141, 1143 (D.C. 1990). In *Davis*, the biological parents gave custody to another couple in a formal written agreement prepared by counsel. Several years later, the biological mother sued for custody. The trial court denied the mother's custody petition, but this Court reversed and remanded, requiring a determination of the mother's fitness. *Davis* does not support either the court's jurisdiction over a custody complaint by a non-parent, or the denial of custody to a fit parent. There is nothing in *Davis* that is inconsistent with the Division's decision.

In re H.R. was an adoption case. It has nothing to do with whether non-parents can sue parents for custody in a private domestic relations proceeding. Consequently, it cannot be "controlling authorit[y] on that issue," as the Petition contends. Pet. 1. Neither is *In re Baby Boy*

C., 630 A.2d 670, the appeal after remand in *H.R.*, or *In re N.M.S.*, 347 A.2d 924 (D.C. 1975), a neglect case.

4. Adoption, Not a Judicially Created Custody Action, Is the Right Way for Non-Parents to Obtain Permanent Parental Rights. Appellees seek permanent parental rights over a child. District of Columbia law allows them to obtain such relief, even against the biological parents' wishes, through adoption or permanent guardianship. Adoption, like permanent guardianship, requires consideration of the factors relevant to termination of the biological parents' rights in proceedings in which the parents have counsel. *See* D.C. Code § 16-304(e) (authorizing adoption without parents' consent if determined to be in the child's best interests); *In re P.S.*, 797 A.2d 1219, 1223 (D.C. 2001) (termination standard applies to unconsented adoption); *In re J.L.*, 884 A.2d 10702, 1076-77 (D.C. 2005) (same); D.C. Code § 16-2383 (grounds for establishment of permanent guardianship); *In re A.G.*, 900 A.2d 677, 678 (D.C. 2006) (preponderance of the evidence standard for permanent guardianship). The Division properly denied appellees a shortcut around those important procedural protections.

Legal Aid's long experience in the Superior Court has shown the need for additional procedural safeguards to protect poor people in child custody proceedings. Perhaps the most important safeguard, because it is instrumental in triggering many others, is the provision of counsel. Although in this case the parents were represented by counsel because of the overlap between the custody and neglect proceedings,[7] in cases in which non-parents sue for custody without any neglect case, indigent parents do not have a statutory right to counsel, and there are few legal services or *pro bono* lawyers available to represent them. The lack of representation, combined with imbalances in levels of education, experience with the legal system, and facility

[7] Slip op. 6 (purpose of consolidation was to provide free legal services for the parents in the custody case).

with written and spoken English, may dramatically skew the custody court's assessment of the child's best interests to the parents' disadvantage. Because, as this case well illustrates, the award of custody over a very young child may effectively sever the parent-child relationship, the parental liberty interests in such a custody proceeding are no different from those in a termination of parental rights proceeding. *See Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27 (1981). Appellees cannot insist that they alone should exercise parental rights and simultaneously deny appellants the benefit of the legal standards and procedures required in adoption and permanent guardianship cases to determine whether the biological parents' constitutionally protected rights should give way.[8]

If a legislature enacted a law allowing non-parents to obtain parental rights through custody actions without satisfying the legal standards applicable to adoption, the law would almost certainly be unconstitutional under the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). The common ground of the six opinions in *Troxel* was that a state law would be unconstitutional if it allowed "any person" to demand court-ordered visitation without a fit parent's consent and without giving the fit parent's views presumptive weight. Whether or not the District of Columbia Council could craft a narrowly tailored statute that could satisfy *Troxel* for a limited category of cases, it has not done so. The courts should not create a right of action that would surely fail under *Troxel*.

[8] K.T.'s interests should, of course, also be protected on remand. It seems doubtful, however, that any liberty interest that K.T. may have is properly asserted by appellees.

CONCLUSION

The petition for rehearing or rehearing en banc should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2006, I caused a true and correct copy of the foregoing Brief *Amicus Curiae* of The Legal Aid Society in Opposition to the Petition for Rehearing or Rehearing *En Banc* to be sent by first-class mail, postage prepaid, to:

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