IN THE SUPREME COURT OF THE STATE OF VERMONT

SUPREME COURT DOCKET NO. 2015-426

SARAH SINNOTT, Plaintiff-Appellant

v.

JENNIFER PECK, Defendant-Appellee

Appeal
from the
Chittenden Family Division
Docket No. 666-9-15Cndm

BRIEF OF THE APPELLANT

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ISSUE PRESENTED

Whether Vermont law permits a non-adoptive, non-marital parent to establish parental rights and responsibilities for minor children jointly raised by that parent and the minor children's adoptive parent after dissolution of the parents' relationship?

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Because the lower court declined to file this case, the facts to support it have yet to be fully developed. What follows is a description of the facts as alleged by Plaintiff-Appellant Sarah Sinnott that form the basis of the claim she seeks to prove if permitted to make her case. Because this case was declined for filing due to lack of jurisdiction, as set forth below, this Court should review the facts in the light most favorable to the appellant.

Sarah Sinnott was in a committed, loving, family relationship with Jennifer Peck beginning some time in 2003 that lasted for 7 years. (Printed Case ("P.C.") 12). For the duration of their relationship they lived together in Shelburne, Vermont. (P.C. 12). Together they shared meals, vacationed together, cared for aging friends and relatives, and raised two children. (P.C. 12-15). Initially, when the relationship began to erode, they negotiated ways to ensure that each could care for and sustain the loving relationships they had developed and fostered with the two children they had jointly raised and which Jenny had adopted. (P.C. 15). When it became clear to Sarah that her relationship with her children was at risk, she brought this action.

When Sarah and Jenny's domestic relationship began, Jenny was parenting a one year old child named G[redacted] (E[redacted] (P.C. 12). Jenny had adopted E[redacted] (born September 28, 2002) from [redacted] when E[redacted] was four months old. (P.C. 12). At Jenny's encouragement, E[redacted] referred to Sarah as "Mom" or "Mama." (P.C. 12).

When E[redacted] was two years old, Jenny and Sarah decided to adopt another child together. (P.C. 12). They spoke about the importance of E[redacted] having a sibling because

both Sarah and Jenny had been close to their siblings. (P.C. 12). Sarah and Jenny initially discussed whether to do an international or a domestic adoption. (P.C. 13). To ensure their children's shared heritage, they decided to adopt another child from [redacted] (P.C. 13). Initially, they took steps to work with an adoption agency that would work with them as domestic partners. (P.C. 13).

They soon thereafter decided to have Jenny complete the adoption with the same agency that she had worked with previously when adopting E[redacted] (P.C. 13). They made this choice because the agency that agreed to work with them as domestic partners would take longer to do the adoption and Sarah and Jenny were concerned that [redacted] would soon close its borders to international adoptions. (P.C. 13). [redacted] did close its adoption program soon after the adoption of the second daughter, M[redacted] (S[redacted]) (born September 2, 2005). (P.C. 13).

Sarah was actively involved both in parenting E[redacted] and in the preparations for S[redacted]'s adoption. (P.C. 13). On two occasions, Sarah, Jenny, and E[redacted] traveled to [redacted] to spend time with S[redacted]. (P.C. 13). S[redacted] began living with Sarah and Jenny from the time she arrived in Vermont in February, 2006. (P.C. 13). E[redacted] was nearly 3 ½ years old. S[redacted] was close to 6 months old.

Throughout the parties' relationship, both agreed that Sarah would be a full and equal parent to both children. Once S[redacted] joined their family, Sarah took maternity leave from her job to be the primary at-home caretaker of the children. (P.C. 13-14). Even when Sarah returned to work on a part-time basis, she brought S[redacted] with her. (P.C. 14). Sarah took care of the children's daily needs including bathing, clothing, and diapering.

(P.C. 14). She read them books before they went to sleep. (P.C. 14). The children called Sarah "Mom." (P.C. 12, 14).

Sarah was part of the medical decision making for the children. (P.C. 14). Sarah took S[redacted] to the doctor for well child check-ups and when she was sick. (AP Para. 10). Sarah was the parent who accompanied S[redacted] when she had dental surgery as a toddler and E[redacted] when she had her adenoids removed at age 2. (P.C. 14). She also cared for them during their recovery from medical procedures. (P.C. 14).

In part because of Jenny's responsibilities for caring for her aging father, and later for a family friend who was dying of cancer, and because Sarah had more flexibility in her work scheduling, Sarah was the primary caretaking parent of both children. (P.C. 14-15) for most of the years from the time the children arrived until Sarah and Jenny's relationship eroded. It was also because of these outside obligations and family disruptions that Jenny and Sarah never completed a joint adoption. (P.C. 14).

When Sarah and Jenny's relationship ended in 2010 when the girls were approximately 5 and 8, they agreed to a shared custody arrangement which provided for evenly divided parental rights and responsibilities. (P.C. 15). Although they never filed it in court, they did communicate the agreement to the children's school and acted in accordance with it for nearly 3 years. (P.C. 15). Beginning in 2013, when the girls were roughly 8 and 11, Jenny began disrupting the relationship between Sarah and the children causing Sarah to be concerned for their welfare. (P.C. 15-16).

Jenny told the children's school that the school was not permitted to speak with Sarah about the children. (P.C. 15). Jenny and Sarah would make plans for parent-child contact between the children and Sarah, which Jenny would cancel at the last minute.

(P.C. 15). Jenny would prevent the children from seeing Sarah for weeks at a time. (P.C.15). Sarah grew concerned both because of the disruption of the children's relationship with her and because of the harm to the children Jenny's erratic behavior was causing them. (P.C. 15-16).

Sarah made extensive efforts since then to retain a relationship with the children and to ensure their welfare. (P.C. 16) over the course of the next two years. Despite Jenny disrupting planned visits, Sarah worked to ensure she maintained strong connections with the children. (P.C. 16). She texted, spoke, and saw the children whenever Jenny would permit it. (P.C. 16). Communications including Mother's Day cards, texts, and emails from the children reflect the loving bond they continued to share with Sarah. (P.C. 18, 25-27, 33, 35-37). Unfortunately, Jenny's behavior began to be so erratic and disruptive that Sarah's concern for her children grew to an intolerable level. (P.C. 16). Sarah observed E[redacted] becoming seriously overweight and pre-diabetic. (P.C. 16). Both children appeared addicted to videos, withdrawn, and increasingly isolated from friends and family. (P.C. 16). Concerned for her children's wellbeing and frustrated by the insurmountable barrier Jenny had created to keep Sarah from them, Sarah filed a parentage claim.

Proceedings Below

On August 21, 2015, through counsel, Sarah filed her Petition to Establish Parentage with the Vermont Superior Court, Chittenden Family Division. On September 30, 2015, the Court issued an entry order declining Sarah's filing due to lack of jurisdiction. (P.C. 3-4). In its order, the Court acknowledged the legal remedy Sarah sought but declined jurisdiction based on its view that "the Supreme Court has strongly

suggested that it is not willing to open parentage actions" to parties in Sarah's position. (P.C. 4).

SUMMARY OF ARGUMENT

The Superior Court, Family Division erred in its refusal to file a parentage action brought by Plaintiff-Appellant Sarah Sinnott. Vermont law establishes jurisdiction in the Family Division to hear claims of parentage pursued under 15 V.S.A. §§ 301-308. Section 302 authorizes standing for a person who alleges herself to be the parent of a child subject to the parentage claim. Although the statute does not provide a definition of parent, this Court set forth a clear and specific test in the case of *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, Para. 56, 180 Vt. 441, 912 A.2d 951, for determining the facts upon which parentage can be determined. Sarah Sinnott properly filed a parentage action pursuant to Vermont law. As such, the Family Division had no basis for failing to even consider her claim.

ARGUMENT

I. SARAH IS ENTITLED TO PURSUE AN ACTION FOR PARENTAGE IN THE FAMILY DIVISION.

A. Standard of Review.

The Court's refusal to file is a dismissal of the action which is subject to *de novo* review. *Watson v. Vill. at Northshore I Assn., Inc.*, 2014 VT No. 2013-451, 2014 WL 3714662, at *2, citing *Jordan v. Agency of Transp.*, 166 Vt. 509, 511, 702 A.2d 58 (1997). To the extent the Superior Court dismissed the case for failure to state a claim, upon review this Court must accept as true all well-pleaded facts and resolve any doubts in favor of the complaint's sufficiency. *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, Para. 7, 186 Vt. 605, 987 A.2d 258. This Court should only affirm the dismissal of the

claim if it appears the plaintiff can prove no set of facts upon which relief can be granted. *Id.*

B. The Superior Court, Family Division Has Jurisdiction Over Parentage Claims.

Vermont's parentage act, 15 V.S.A. §§ 301-308, creates jurisdiction in the Superior Court, Family Division to adjudicate issues relating to parentage. As set forth in 15 V.S.A. § 303, "[t]he family division of the superior court has jurisdiction over actions brought under this subchapter to establish parentage." There can be no serious question about the court's *jurisdiction* to hear any claim of parentage filed by Sarah Sinnott. The statute clearly establishes jurisdiction in the family division to adjudicate claims of parentage. Accordingly, the question cannot be about whether the Court can hear Plaintiff's claim but rather must focus on whether the claim was properly brought under the relevant statute.

C. Sarah Has Standing as a Parent to Pursue Her Claim of Parentage.

In refusing to even allow Sarah to file her parentage claim, the Superior Court seemingly relied on its assessment that this Court "has strongly suggested that it is not willing to open parentage actions to third parties in Ms. Sinnott's position", (P.C. 4), i.e., "where there has been no adoption, marriage, or civil union." (P.C. 3). To reach its conclusion, the Superior Court surveyed three of this Court's relevant parentage cases – *Titchenal v. Dexter*, 166 Vt. 373, 693 A.2d 682 (1997), *Miller-Jenkins*, 2006 VT 78, 180 Vt. 441, 912 A.2d 951, and *Moreau v. Sylvester*, 2014 VT 31, 196 Vt. 183, 95 A.3d 416, – and determined that they point in different directions on matters of general principles as to legal parentage. (P.C. 3-4).

Based on its brief analysis, the lower court seemed to regard these cases, particularly *Miller-Jenkins* and *Moreau*, as contradictory notwithstanding their very different factual and legal contexts. In declining to even permit Sarah to file a parentage action, the Superior Court followed its understanding of *Moreau*, presumably as the most recent and thus controlling decision of this Court, applying it to the legal, statutory action here despite clear statements in the *Moreau* majority opinion narrowing its holding to cases brought in equity.[1] In so doing, the lower court ignored the teachings of the case most directly on point with this action, *Miller-Jenkins*, under which there can be no discernable basis for declining to accept Sarah's parentage filing in light of the allegations it sets forth.

The plaintiff submits that the Superior Court erred in its reading of *Moreau* to the extent either that it relied on that case to determine the family division is without jurisdiction to hear her *statutory* claim for parentage or that it concluded *Moreau* limits who has standing to bring such claims. At the same time, Plaintiff acknowledges that the family division and litigants would benefit from clarification around the line of cases from *Titchenal* to *Miller-Jenkins* through *Columbia v. Lawton*[2] and, most recently, to *Moreau*.

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[1] *Moreau*, 2014 VT 31, Para. 20, 196 Vt. 183, 95 A.3d 416 ("defendant's claim is essentially an appeal to equity – particularly given his acknowledgment of the absence of any available remedy at law.").

[2] Plaintiff adds *Columbia v. Lawton* in this mix to the extent that it addresses statutory standing for parentage actions, 2013 VT 2, Para. 5, 193 Vt. 165, 71 A.3d 1218, but also because it is a recent affirmation of the *Miller-Jenkins* rule for determining parentage. *Id.* Para. 29, 193 Vt. 165, 71 A.3d 1218.

In particular, plaintiff requests that this Court reverse the Superior Court's entry order, order Sarah's filing to be accepted and in so doing clarify the scope and intent of the law including that *Moreau's* focus was on equitable, not statutory parentage claims. Sarah also seeks clarification that *Moreau* did not reverse or limit the *Miller-Jenkins* test for parentage and that Vermont statutes are not so narrow and out of step with modern families as to limit statutory claims of parentage to be brought only by individuals who allege a parentage relationship that derives from birth, marriage, or adoption.

Sarah seeks reversal of the order below in order to protect children-parent relationships formed and developed with and at the encouragement of the child's legal parent where the putative parent acts as a parent to that child, is held out to the world by the parent and child as having that familial relationship and without a legally sustained relationship with the putative parent leaves a child with no parent apart from the single, legally recognized one.

1. 15 V.S.A. § 302 Authorizes Standing to Bring A Parentage Action.

Vermont's standing provision for parentage provides: "An action to establish parentage . . . may be brought by . . . a person alleged or alleging himself or herself to be the natural parent of a child…." 15 V.S.A. § 302. This Court has explained that Section 302 provides "broad standing" given that the legislature did not "expressly or implicitly limit the class" of putative parents authorized to bring claims pursuant to it. *LeClair v. Reed*, 2007 VT 89, Para. 4, 182 Vt. 594, 939 A.2d 466.

As this Court has also explained, the standing provision is not intended to define who is a parent. "The parentage act does not include a definition of 'parent.'" *Miller-Jenkins*, 2006 VT 78, Para. 54, 180 Vt. 441, 912 A.2d 951. "In fact, the statute is

primarily procedural, leaving it *to the courts* to define who is a parent for purposes of a parentage adjudication." *Id*. (emphasis added). That responsibility was met by this Court in the rule announced by the *Miller-Jenkins* decision. In her filing, Sarah alleged herself to be the parent of the two children at issue in this case relying on the *Miller-Jenkins* factors as her guide.

2. The Multi-Factored Test This Court Articulated to Determine Who Is a Parent For Purposes of the Vermont Parentage Act Does Not Exclusively Turn on Marriage or Biology.

The Superior Court, Family Division declined Sarah's filing of her parentage action because it seemingly assumed the term "natural parent" in 15 V.S.A. § 302 is limited to persons who are in a marriage or civil union relationship with a birth or adoptive parent or who herself has a biological or adoptive relationship to a child. (P.C. 3).

The lower court's conclusion is contrary to this Court's precedent. In the *Miller-Jenkins* case, this Court rejected the position that parentage can only be established by marriage, biology, or adoption instead articulating a multi-factored test to be applied by family courts to resolve contested parentage claims. 2006 VT 78, Para. 56, 180 Vt. 441, 912 A.2d 951.

The determination of whether someone is a parent considers: (1) whether that individual was in a marriage or civil union relationship with the child's other parent; (2) the "expectation and intent" with regard to the individual's parentage; (3) the individual's participation in the decision to bring a child into the family; (4) the individual's active participation in bringing the child into the family; (5) the fact that both partners treated the child as a child of the individual alleging parentage; and (6) the absence of any other

claimant to the status of parent. *Miller-Jenkins*, 2006 VT 78, Para. 56, 180 Vt. 441, 912 A.2d 951. This Court recently affirmed the *Miller-Jenkins* test in *Columbia*, 2013 VT 2, Para. 29, 193 Vt. 165, 71 A.3d 1218.

In *Miller-Jenkins*, the appellee Lisa Miller-Jenkins challenged the Family Court's determination that Lisa's former civil union partner, Janet Miller-Jenkins, was a parent to the 3 year old child they had jointly raised. 2006 VT 78, Para. 1, 180 Vt. 441, 912 A.2d 951. The facts reflected that Lisa and Janet lived together for a time before they decided to have a child together. *Id*. Para. 3, 180 Vt. 441, 912 A.2d 951. They participated jointly in the decision to bring a child into their family, worked together to make that happen, welcomed the child jointly into their family, lived together with the child, and participated in the daily caretaking and support of their child. *Id*. Para. 56, 180 Vt. 441, 912 A.2d 951. Based on the "many factors," in the case, the Court affirmed the determination that Janet was a parent. *Id.*

This Court again considered the parentage statute in *Columbia*, in that case precluding a putative father from bringing a parentage action where parentage of a child had been determined in a prior action. 2013 VT 2, Para. 19, 193 Vt. 165, 71 A.3d. 1218. And while the focus of the case was not primarily on the meaning and definition of "parent" in the parentage statute, the outcome and key pieces of the discussion are highly relevant to it.

In the case, plaintiff Bradley Columbia filed a parentage action requesting the court to order genetic testing to determine whether he was the child's biological father. *Columbia*, 2013 VT 2, Para. 1, 193 Vt. 165, 71 A.3d 1218. The court required plaintiff to join Joshua Bacon, who had previously been adjudicated the father to the child, as a

party. *Id.* Para. 4, 193 Vt. 165, 71 A.3d 1218. After a hearing, the court denied the motion for genetic testing and dismissed plaintiff Bradley Columbia's case. *Id.* Para. 5, 193 Vt. 165, 71 A.3d 1218. This Court affirmed the court's dismissal concluding Mr. Bacon's prior adjudicated parentage status was controlling. *Id.* Para. 19, 193 Vt. 165, 71 A.3d 1218.

For purposes of this case, it is notable that the Court commented that the enforceable, prior parentage order identifying Mr. Bacon as the father was based *exclusively* on a stipulation of the mother and Mr. Bacon. *Columbia*, 2013 VT 2, Para. 2, 193 Vt. 165, 71 A.3d 1218. The record contained "no evidence of any genetic testing or findings to support the [parentage] order other than the parties' stipulation."[3] *Id.* Notwithstanding, this Court held that the earlier parentage order based solely on a stipulation between the parents was preclusive of any other where the mother and Mr. Bacon were "living together as an intact [f]amily." *Id*. The *Columbia* Court reaffirmed the *Miller-Jenkins* test for parentage. *Id.* Para. 29 n.2, 193 Vt. 165, 71 A.3d 1218. It also affirmed Mr. Bacon's parentage although there was no evidence in the record of either a biological relationship to the child or a marriage to the mother at the time the child was born. *Id.* Para. 27, 193 Vt. 165, 71 A.3d 1218.

[3] While not in the record, the Court mentioned that, "mother represented that Mr. Bacon had signed an acknowledgment of parentage at the hospital when J.B. was born," but declined to treat those facts as evidence. *Columbia*, 2013 VT 2, Para. 2 n.1, 193 Vt. 165, 71 A.3d 1218.

3. The Parentage Act Does Not Require Either A Marriage to the Other Parent or a Biological Relationship with the Child

By definition, a multi-factored test for determination of parentage does not require an alleged parent to plead one characteristic – whether marriage, biology, or adoption – in order to satisfy it.

Marriage to the other legal parent of a child either born to or adopted by the other parent is not essential to a determination of parentage. For starters, an interpretation of 15 V.S.A. § 302 that ties standing to marital status would set it on a collision course with 15 V.S.A. § 301, which states "that the legal rights, privileges, duties, and obligations of parents be established for the benefit of all children, regardless of whether the child is born during civil marriage or out of wedlock." Any question about the scope of § 302 must be resolved consistent with Vermont law and policy, which is that "courts adjudicate parental obligations in a consistent fashion so that children are not treated differently under the law solely because of the relationship between their parents." *Heffernan v. Harbeson*, 2004 VT 98, Para. 8, 177 Vt. 239, 861 A.2d 1149.

This Court in *Miller-Jenkins* had the opportunity to determine Janet Miller-Jenkins' parentage based solely on the marital/civil union presumption, but it declined to do so. Rather, after listing the numerous factors pointing towards Janet's parentage, it noted that there were "so many factors" present that it did not need to "address which factors may be dispositive on the issue in a closer case." 2006 VT 78, Para. 58, 180 Vt. 441, 912 A.2d 951. While acknowledging that the couple's legal union at the time of the child's birth was "extremely persuasive evidence of joint parentage," the Court did not elevate the marriage factor above all others nor did it hold that marriage is essential to

demonstrate "joint parentage" particularly where, as here, other evidence overwhelmingly demonstrates it. *Id.*

In fact, the Court pointed out that under *Paquette*, it could have affirmed the interim visitation order (or even ultimately custody) at issue on appeal because Janet was, at a minimum, a step-parent by virtue of the civil union she had with Lisa and the facts of the case satisfied the "extraordinary circumstances" requirement to give a step-parent visitation even over the objection of a fit parent. *Miller-Jenkins*, 2006 VT 78, Para. 47, 180 Vt. 441, 912 A.2d 951.

As *Miller-Jenkins* made clear, the relevance of the parties' marital or civil union status was that it provided strong evidence of the parties' intent to raise children together and thus provided a ready means of demonstrating the intention, commitment, and action otherwise measured by the articulated factors. The holding in *Miller-Jenkins* declined to make marriage essential to the parentage determination, despite its importance in that case. 2006 VT 78, Para. 56, 180 Vt. 441, 912 A.2d 951.

Neither is a biological connection "tantamount to parenthood," a factor not relevant here because of the adoptive status of the children. *See, e.g., Columbia*, 2013 VT 2, Para. 23, 193 Vt. 165, 71 A.3d 1218. Indeed, the parentage act sets forth several presumptions of parentage that anticipate a lack of a biological relationship to ensure protection of all parent-child relationships. 15 V.S.A. §§ 307-308. Those presumptions have "assumed even greater significance today, as alternative methods of conception unrelated to the 'biology' of the presumed parent have become more common." *Godin v. Godin*, 168 Vt. 514, 522, 725 A.2d 904, 910 (1998) citing *In re Adoption of B.L.V.B.*, 160 Vt. 368, 376, 628 A.2d 1271, 1276 (1993). In fact, it is often not appropriate or permitted

to even rebut a presumption of parentage "merely because of a parent's belated and self-serving concern over a child's biological origins." *Godin*, 168 Vt. at 522, 725 A.2d at 910. Rather, "as family structures become more fluid and the means of conception become ever more varied," *id.*, 168 Vt. at 525-526, 725 A.2d at 912, it becomes even more pressing that courts ensure the parentage act effectuates its core purposes of protecting families, *id.*, 168 Vt. at 522, 725 A.2d at 909 (parentage act goals include "[p]rotecting innocent children from the social burdens of illegitimacy, ensuring their financial and emotional security, and ultimately preserving the stability of the family unit").

Contrary to the trial court's ruling in this case, neither *Titchenal* nor *Moreau* speak to the question of statutory construction of the parentage act. In both cases, this Court rejected equitable claims to establish parentage. *Titchenal*, 166 Vt. 373, 377, 693 A.2d 682, 684 (1997); *Moreau*, 2014 VT 31, Para. 21, 196 Vt. 183, 95 A.3d 416. In neither case nor in any prior or subsequent precedent has this Court held that family courts lack jurisdiction to consider a statutory claim of parentage when brought by a non-adoptive, non-biological, non-marital parent.

As the Court noted in *Moreau* and a point upon which both sides in the opinion were in agreement, "[t]he precise issue addressed in *Titchenal* was whether equity provided an avenue for the civil court to adjudicate visitation claims within the then-exclusive jurisdiction of the family court." *Moreau*, 2014 VT 31, Para. 13, 196 Vt. 183, 95 A.3d 416; *see also id.* Para. 45, 196 Vt. 183, 95 A.3d 416 (Robinson, J. dissenting) ("The core holding in *Titchenal* was that, in the absence of a statutory basis for doing so, the superior court, which did not even have statutory authority to decide ordinary cases

concerning custody and visitation at the time *Titchenal* was decided, could not invoke its general equitable powers to assign a nonparent parent-like rights.").

Indeed, a review of the Appellant's brief filed with this Court in the *Moreau* appeal reveals that the appellant did not once cite to the Vermont parentage statutes, 15 V.S.A. §§ 301-308. (See addendum). As the Court explained, the basis for the claim was that "equity provides a jurisdictional basis for de facto parents to petition the family court for custody, parentage and visitation *in the absence of* a statutory right to do so." *Moreau*, 2014 VT 31, Para. 19, 196 Vt. 183, 95 A.3d 416 (emphasis added).

To the extent that *Moreau* has any bearing on this case, it supports the petitioner's claim. Contrary to the lower court's reading of it, *Moreau* affirmed the *Miller-Jenkins* set of factors as determinative of parentage in appropriate cases. 2014 VT 31, Para. 17, 196 Vt. 183, 95 A.3d 416. Also importantly, *Moreau* identified the intentionality of bringing the child into the family unit as a critical distinguishing factor between the cases. *Id.* Para. 18, 196 Vt. 183, 95 A.3d 416 ("Unlike the child in *Miller-Jenkins*, the children in this case [*Moreau*] are not the product of mutually-agreed-upon artificial insemination.").

As a result, *Miller-Jenkins* remains the guiding precedent for adjudicating statutory parentage cases with *Moreau* and *Titchenal* standing as corollary reminders that Vermont equity law provides no alternative remedy.

4. Sarah Alleged Herself To Be A Parent.

In applying the *Miller-Jenkins* factors, Sarah's parentage petition alleges all of the hallmarks for her to be able to state a claim for parentage of the two children she is jointly raising with Jenny. The relevant factors include: (1) demonstration of a committed relationship with the children's other parent; (2) "expectation and intent[ion]"

with regard to jointly parenting the children; (3) participation in bringing the children into the family relationship; (4) active participation in raising the children; (5) treatment and regard by both parents of the alleged parent as parent to the children; and (6) the absence of any other claimant to the status of parent. *Miller-Jenkins*, 2006 VT 78, Para. 56, 180 Vt. 441, 912 A.2d 951.

The complaint, accompanying affidavit of parentage, and attached exhibits, detail facts relating to Sarah's parentage role including the nurture and care provided throughout the children's lives and her involvement, discussions and concrete steps taken to bring a second child into the family she had created with Jenny and their first daughter, E[redacted] Jenny and Sarah sustained a committed relationship for 7 years – the duration of time their second child was in their family and nearly their first child's whole life – and continued to jointly parent for several years following the dissolution of their intimate partnership.

Jenny and Sarah jointly planned for and actively worked together to adopt their second child. (P.C. 12-13). Both children considered both women their parents. (P.C. 12, 14, 16). The children called Sarah "Mom." (P.C. 12, 14, 16). Jenny referred to Sarah as the children's mother to friends, teachers, doctors, family and acquaintances. (P.C. 12, 14). Sarah was an essential caregiver to the children – bathing, diapering, clothing them; taking them to the doctor; reading to them at night; accompanying them for surgeries. (P.C. 14). The children sent her Mother's Day cards, letters, and texts, always referring to Sarah as mom and mother. (P.C. 14, 16, 25-27, 33, 35-37).

Viewed in light of the *Miller-Jenkins* factors, Sarah's parentage complaint and supporting affidavit clearly reflect her allegation that she is a committed, loving parent to

the two children at issue in this case. Sarah alleged that she lived with her partner, Jenny, in a home in which they both nurtured the child Jenny had adopted shortly before getting involved with Sarah. (P.C. 12). That family unit thrived for that time, so much so that Jenny and Sarah jointly decided they wanted their daughter to have a sibling. (P.C. 12). Together they took steps to plan for and bring their second child into their family. (P.C. 12-13). Sarah and Jenny welcomed that second child into the family. Sarah was the daily and often primary caretaker of her from the time she joined their family until the relationship between Sarah and Jenny dissolved. (P.C. 13-14). At the same time, she served as well as a caretaker, often the primary caretaker, of their older daughter. (P.C. 13-14). The children, like the child of Janet and Lisa Miller-Jenkins, regarded both Sarah and Jenny as "mom" and developed a parental-child relationship with both of them. (P.C. 12, 14, 16). Both children were adopted shortly after their births. (P.C. 12-13). If Sarah is not adjudicated their other parent, they have no other parent. No other individual can stake a claim of parentage with regard to them. As this Court has said, "the term 'parent' is specific to the context of the family involved." *Miller-Jenkins*, 2006 VT 78, Para. 55, 180 Vt. 441, 912 A.2d 951. In the context of the family created by Sarah and Jenny both are parents.

Of course, this Court is not being asked to make a parentage determination. Those facts must yet be proven. But "[o]ne need look no further than [this Court's] recent decision in *Miller-Jenkins v. Miller-Jenkins* to appreciate the importance of a well-developed factual record in making parentage determinations." *LeClair v. Reed*, 2007 VT 89, Para. 13, 182 Vt. 594, 939 A.2d 466. This Court's reversal of the judgment below would allow development of that factual record.

5. The Facts of the Previous Adoptions Do Not Preclude a Determination that Sarah is a Parent.

As explained above, the trial court has jurisdiction to hear the parentage claim and Sarah alleged sufficient facts to demonstrate that she can meet the *Miller-Jenkins* factors. No other statutory provision bars her claim. For completeness, Plaintiff-appellant addresses the only other potentially related but ultimately irrelevant statutory language. Section 302(a) of Chapter 15 (emphasis added) permits "[a]n action to establish parentage *in cases where parentage has not been previously determined* either by an action under this subchapter or *by adoption*".

The plain language of a statute is key to its meaning and to the intent of the legislature in its passage. *Wesco, Inc. v. Sorrell*, 2004 VT 102, Para. 17, 177 Vt. 287, 865 A.2d 350. While there were prior adoptions of the two minor children by Jenny, they were not "cases where parentage [was] *determined* . . . by adoption"" meaning that while they *created* parentage in one parent, they were not parentage *determinations* because the adoptions were not preclusive of other parentage relationships. *See, e.g.*, *L.M. v. M.G.*, 208 Cal. App. 4th 133, 146 (Cal. App. 4th Dist. 2012) (adoption decree "served only to vest parent status in M.G. and cut off the legal rights of the Child's birth parents," but did not adjudicate the issue of whether the child may have a second parent). *See also Chatterjee v. King*, 2012-NMSC-019, Para. 35, 280 P.3d 283 (adoption was not a preclusive determination of parentage). The prior adoptions were actions that terminated legal rights in the children's birth parents and created legal parentage in Jenny. They did not address anything with regard to Sarah and assuredly were not parentage determinations for purposes of 15 V.S.A. § 302(a).

To the extent that there is any question with regard to how Section 302(a) might apply in a case where there was a prior adoption, the statute should be read to preclude a parentage action brought by an individual whose parental rights were extinguished by the adoption, for example, E[redacted]'s or S[redacted]'s birth parent – assuredly a different case than the one at bar. That interpretation is the only one consistent with the language of Section 302(a) and this Court's most recent interpretation of it.

Columbia v. Lawton identified the twin goals behind 15 V.S.A. § 302(a) to be: (1) finality as it relates to the protection of "established parent-child relationships," and (2) avoidance of risks of "conflicting parentage orders." *Columbia,* 2013 VT 2, Para. 11-12, 193 Vt. 165, 71 A.3d 1218. Neither of these concerns is implicated in this case.

Sarah does not contest Jenny's parentage. Her parentage claim does nothing to threaten the finality of the parent-child relationship created in Jenny and established by her adoption of the children. Nor would a parentage action in this case ever result in an order that conflicts with the prior adoption to the extent that its effect was to create parentage in Jenny. To the contrary, Sarah's parentage action seeks to preserve one of the only two established parent relationships created with these children who happen to be adopted.

This Court should be especially cautious about excluding Sarah's parentage petition where rather than creating a risk of conflicting parentage orders doing so would "essentially leave the child[ren] without the benefit of a [parental] relationship, and the economic and emotional well-being that accompanies it." *Godin,* 168 Vt. 514, 524, 725 A.2d 904. Sarah is the only other person with a claim to be these children's second parent; if Sarah is not their second parent, they have none.

II. VERMONT LAW AND THE FEDERAL CONSTITUTION REQUIRE THE PARENTAGE ACT TO BE INTERPRETED TO ALLOW THE NON-MARITAL PARTNER OF AN ADOPTIVE PARENT TO SEEK PARENTAL RIGHTS AND RESPONSIBILITIES.

The children in this parentage case should not be disadvantaged because they were raised by non-marital parents or because they are adopted. To do so would violate established Vermont law and implicate constitutional concerns under both Vermont's Common Benefits Clause and the Equal Protection Clause of the United States Constitution.

A. Vermont Law Prohibits Treating These Children Differently Because of Their Parents' Marital Status.

Prohibiting Sarah from bringing a parentage claim denies these children the right to a continued relationship with one of their parents due to the circumstances of the children's birth. Vermont law sets forth as manifest state policy "that the legal rights, privileges, duties, and obligations of parents be established for the benefit of *all children*, regardless of whether the child is born during civil marriage or out of wedlock." 15 V.S.A. § 301 (emphasis added). This Court has confirmed Vermont law and policy is that "courts adjudicate parental obligations in a consistent fashion so that children are not treated differently under the law solely because of the relationship between their parents at the time of their birth." *Heffernan*, 2004 VT 98, Para. 8, 177 Vt. 239, 861 A.2d 1149.

In *Heffernan*, this Court faced the legislative reality that the parentage statutes "provided no standards to guide the courts in making determinations concerning 'obligations of parentage'" in cases involving non-marital parents. 2004 VT 98, Para. 3, 177 Vt. 239, 861 A.2d 1149, quoting 15 V.S.A. § 306. Eschewing the argument that children might end up with different custodial relationships with their parents simply

because their parents were unmarried at the time the child was born, this Court read into the parentage statute the substantive terms of 15 V.S.A. § 665 (setting the standard for parental rights and responsibilities for marital children). *Id.* Para. 5-6, 177 Vt. 239, 861 A.2d 1149. It did so to avoid an unjust result and one which the Court determined was not consistent with the equality commitment to equivalent treatment of non-marital children as set forth in 15 V.S.A. § 301. *Id*.

This Court's approach in *Heffernan* is consistent with that in both *Miller-Jenkins* and *In re B.L.V.B. Miller-Jenkins,* 2006 VT 78, 180 Vt. 441, 912 A.2d 951; *In re B.L.V.B.* 160 Vt. 368, 376, 628 A.2d 1271, 1276 (1993). As in *Heffernan*, this Court in *Miller-Jenkins* looked to the reality of families and to the child's life experiences and relationships to establish a contemporary but exacting definition of who is a parent. 2006 VT 78, Para. 56, 180 Vt. 441, 912 A.2d 951. So, too, in the case of *In re B.L.V.B.* this Court interpreted statutory language to ensure the well-being of children and allow protection for the parent-child relationship forged in modern, non-marital family settings equivalent to those step-parent families forged by a marital tie. 160 Vt. 368, 370-71, 628 A.2d 1271 (1993).

The legislature could not have intended for the equality commitment set forth in 15 V.S.A. § 301 to be undermined by a contrary reading of the standing statute that immediately follows it. In its case law, legislation, and policy, Vermont recognizes the importance of creating parental obligations for a parent who consents to bringing a child into a family, works with the other parent to make that happen, and raises that child as her own along with the other parent. Doing so recognizes that when two people bring a child into a family, the law must hold them both accountable as the child's legal parents

just as it would if the parents were married. Regardless of the parent's marital status, the child is in the family unit as a result of the couple's actions and has the same need for parental protection, guidance, and support. It would be irrational and contrary to the well-being of children to protect parent-child relationships pursuant to 15 V.S.A. § 302 exclusively based on the marital status of the parents and particularly perverse in light of the policy statement in 15 V.S.A. § 301 that precedes it.

If Sarah and Jenny had married, it is beyond cavil that Sarah would be able to bring this parentage action and have the opportunity to prove a set of facts to which the family division could apply the *Miller-Jenkins* rule. Such is the case given that the only other obvious distinction between this case and *Miller-Jenkins* was the way in which the children were brought into the family – adoption as opposed to through alternative reproduction. That the children's relationship with Sarah would be protected had Sarah and Jenny married is no less true where the children were adopted.[4]

At a bare minimum, and without conceding that Sarah has alleged anything other than full parentage, a marriage to Jenny would give Sarah at least step-parent status providing her a claim not just to visitation, but potentially custody as well. *See Paquette*

[4] Vermont adoption statutes anticipate joint parentage of adopted children. *See, e.g.,* 15A V.S.A. § 3-301(b) ("[t]he spouse of a petitioner shall consent to the petition unless judicially declared incompetent."); 15A V.S.A. § 3-401(a)(5) (notice of a proceeding for adoption of a minor "shall be served . . . upon the spouse of the petitioner if the spouse has not joined in the petition" unless waived). These provisions bring into legal equivalence children adopted by married couples with those born into marital relationships. *See, e.g.,* 15 V.S.A. § 308(4) ("A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if . . . the child is born while the alleged parents are legally married to each other."). Vermont's adoption law similarly ensures protections for adopted children of married and unmarried persons and couples. *See* 15A V.S.A. § 1-112 (providing jurisdiction in the family division of the superior court to dispose of issues pertaining to parental rights and responsibilities in cases involving family dissolution for "two unmarried persons").

v. Paquette, 146 Vt. 83, 92, 499 A.2d 23 (1985). The point being not that Sarah is anything other than a full parent but rather that if Sarah cannot pursue her parentage action, these children brought into a family and raised by parents who are not married to one another are left more vulnerable than children who were raised similarly but in a marital household based solely on their parent's legal status. This directly violates express Vermont law and policy.

B. This Court Should Construe 15 V.S.A. § 302 to Avoid an Unconstitutional and Unjust Result.

In addition to being consistent with this Court's prior decisions and with the language and purpose of the parentage statutes, this Court should also interpret 15 V.S.A. § 302 as inclusive of non-marital parents in order to avoid an unconstitutional and unjust result. This Court should construe statutes so as to avoid constitutional infirmities if reasonable principles of interpretation permit it. *See, e.g., State v. Hurley*, 2015 VT 46, Para. 16, 117 A.3d 433; *In re G.T.*, 170 Vt. 507, 517, 758 A.2d 301 (2000).

The United States Supreme Court has consistently struck down statutes that have disadvantaged children in circumstances where a statutory protection turns on the parent's marital status. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 165 (1972) (Louisiana statute denying worker's compensation to non-marital children violated the Equal Protection Clause). *See also Trimble v. Gordon*, 430 U.S. 762, 763 (1977) (provision of an Illinois statute allowing non-marital children to inherit only through their mother while marital children could inherit through their mother or father violated equal protection); *Jimenez v. Weinberger*, 417 U.S. 628, 629 (1974) (differential treatment of non-marital children under Illinois dependency law impermissible); *N.J. Welfare Rights*

Org. v. Cahill, 411 U.S. 619, 621 (1973) (same under New Jersey benefits law); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (same under Louisiana wrongful death law).

The United States Supreme Court has clearly held that laws discriminating between children with married and unmarried parents are unconstitutional unless the distinction is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Sec. of Comm. v. City Clerk of Lowell*, 366 N.E.2d. 717, 723 (1977) (recognizing *Trimble*, 430 U.S. 762). This well-settled law is based on the recognition that it is "illogical and unjust" to disadvantage some merely because of the marital status of their parents. *Weber*, 406 U.S. at 175-76.

The Common Benefits Clause of the Vermont Constitution provides related equality guarantees though not identical protections for children of non-marital couples. Vt. Const. ch. I, art. 7. Although this Court has rejected "the rigid, multi-tiered analysis of the federal Equal Protection Clause analysis in favor of 'a relatively uniform standard, reflective of the inclusionary principle at [the Common Benefits Clause's] core'", *Badgley v. Walton*, 2010 VT 68, Para. 21, 188 Vt. 367, 10 A.3d 469, citing *Baker v. State*, 170 Vt. 194, 212, 744 A.2d 864 (1999), its scrutiny of laws limiting benefits or protections to non-marital children is no less exacting. *See, e.g., In re Estate of Murcury*, 2004 VT 118, Para. 11, 177 Vt. 606, 868 A.2d 680 (following reasoning of federal Equal Protection analysis in challenge brought by non-marital child seeking inheritance from putative parent). In evaluating the constitutionality of a statute under Article 7, this Court looks at the part of the community disadvantaged by the law; the government's purpose in drawing a classification that includes some members and excludes others; and whether the classification is reasonably necessary to accomplish the State's claimed objectives.

Badgley, 2010 VT 68, Para. 21, 188 Vt. 367, 10 A.3d 469, citing *Baker*, 170 Vt. at 212-14, 744 A.2d 864. The Court must "ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose." *Id*.

Limiting parentage protections only to adopted children of married parents would violate the equal protection and common benefits guarantees of children with unmarried parents by treating similarly-situated children differently with no valid governmental purpose.

Adopted children raised by married and unmarried parents are not different – all of these children were intentionally brought into their families, indeed brought into their families in precisely the same way, by their parents. And, more fundamentally, they love and depend upon their unmarried parents in the same way as marital children love and depend upon their parents. From the point of view of children who are adopted and raised by both parents, and who have deep parent-child bonds with both parents, whether their parents are married has no bearing on the children's need for a protected legal relationship with both parents.

There is no permissible governmental reason for denying these protections and benefits to children adopted by unmarried parents – particularly in light of the equality commitment expressed in 15 V.S.A. § 301 -- let alone an important one. To the extent the asserted interest is administrative ease, it does not meet the requisite threshold of being an important reason nor is the marital limit sufficiently related to the justification even if it were. In *Stanley v. Illinois*, the United States Supreme Court rejected efficient procedures as a sufficiently important state interest because "the Constitution recognizes

higher values than speed and efficiency." 405 U.S. 645, 656 (1972) (holding unconstitutional a statutory presumption of parental unfitness applicable to non-marital father's upon the death of the non-marital mother). The Court held a procedure designed for administrative ease cannot stand when it "disdains present realities in deference to past formalities" and "risks running roughshod over the important interests of both parent and child." *Id.* at 657. *See also Craig v. Boren*, 429 U.S. 190, 198 (1976) (rejecting administrative ease and convenience as a sufficiently important objective for a gender-based alcohol regulation); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (invalidating an Idaho statute that gave preference to males to administer estates, finding "the objective of reducing the workload on probate courts by eliminating one class of contests" was arbitrary and in violation of equal protection).

Nor could a government purpose to encourage couples to either marry or jointly adopt withstand scrutiny or justify denying children of unmarried parents the protections of parentage recognition. *See Weber*, 406 U.S. at 175-76 (disadvantaging children in order to induce their parents to marry is "ineffectual" as well as "unjust" and is therefore unconstitutional). Creating this unnecessary distinction that serves only to disadvantage children with unmarried parents is precisely the type of discrimination that the United States Supreme Court recognized must be eradicated. And while allowing only married parents who adopt children to be recognized as parents creates a bright line, it is not a line that even eases the administration of the family division. The family division already has to make individualized assessments, for example, as to whether someone meets a threshold demonstration of standing (e.g. if someone has sufficiently alleged a basis for

even getting an order for genetic testing under 15 V.S.A. § 304) or whether parent-child contact is appropriate (under 15 V.S.A. § 665).

Regardless of the level of scrutiny this Court might apply, under any standard of review, an interpretation of the parentage statute that denies these children the opportunity to maintain a parental relationship with Sarah based on their parents' marital status would be unconstitutional. It is irrational to recognize as a legal parent – (1) a man who stipulates to being a parent but with no genetic relationship to the children or legal relationship to the mother (*Columbia*);[5] (2) a married man with no genetic relationship to a child (*Godin*);[6] and (3) a same-sex partner with no genetic tie to the child she jointly raised with her partner brought into the family through the use of assisted reproduction (*Miller-Jenkins*)[7] – but not even give an opportunity to establish legal parentage to a woman who raised two adopted children with her former partner with the intention and reputation of being a family.

III. THE ABILITY OF NON-MARITAL COUPLES TO JOINTLY ADOPT SHOULD NOT PRECLUDE THE NON-ADOPTIVE PARENT FROM ESTABLISHING PARENTAGE THROUGH THE PARENTAGE STATUTE.

This case shows why the availability of second parent adoption does not eliminate the need to allow parents like Sarah the ability to pursue parental rights and

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[5] The *Columbia* Court acknowledged that the original and controlling parentage order was "based on a stipulation of the parties; the record contains no evidence of any genetic testing or findings to support the order other than the parties' stipulation." 2013 VT 2, Para. 2, 193 Vt. 165, 71 A.3d 1218.

[6] *Godin v. Godin*, 168 Vt. 514, 523-24, 725 A.2d 904 (1998) (refusing to revisit a parentage determination despite doubts about plaintiff's genetic relation to the child, finding it was the "parent-child relationship" and not genetic testing, that must control).

[7] *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, Para. 56-58, 180 Vt. 441, 465, 912 A.2d 951, 970.

responsibilities where a parent-child bond has been forged with the consent and encouragement of the other parent. For a variety of different reasons, numerous children throughout Vermont are raised by parents on whom they rely for their daily emotional, psychological, and financial support and caretaking needs but who are not formally adopted by both of those parents. Especially where Vermont has not created a formal definition of parent within the parentage statute but has left it up to courts to determine who meets the status, children like E[redacted] and S[redacted] should not suffer because their parents did not take the formal steps to complete a joint adoption.

The *Miller-Jenkins* decision suggests that this Court agrees with the many states who offer second-parent adoption but who also recognize parentage in a person with whom a child has forged a parent-child bond. 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (recognizing parentage despite Plaintiff not having done a second parent adoption). *See also Chatterjee v. King*, 2012-NMSC-019, 280 P.3d 283; *A.B. v. S.B.*, 837 N.E.2d 965 (Ind. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *T.B. v. L.R.M*, 786 A.2d 913 (Pa. 2001); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999); *In the Interest of E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004); *Laspina-Williams v. Laspina-Williams*, 742 A.2d 840 (Conn. Super. Ct. 1999); *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014).

Parents do not go through joint adoptions for a number of different reasons. In this case, Sarah seeks to prove that she and Jenny jointly agreed not to proceed with a joint adoption of their second child so the international adoption could happen quickly enough to ensure the siblings they raised would share a bond relating to their country of birth. She also seeks to demonstrate that facts relating to the couple's commitment to

care for ailing extended family members, sick friends in need of care, and finances kept them from jointly adopting the children they were raising. Some couples cannot afford a second-parent adoption or are unaware of it whatever the reason. Children should not be denied a parental relationship because of the parent's lack of legal sophistication, financial capacity, or foresight.

"Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice." *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the Superior Court, Family Division's order declining the filing of her parentage petition.

Dated: January 22, 2016

Respectfully submitted,

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15 V.S.A. § 306

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN. DOMESTIC RELATIONS*** **>** ***CHAPTER 5. DESERTION AND SUPPORT*** **>** ***SUBCHAPTER 3A. PARENTAGE PROCEEDINGS***

§ 306. Judgment or order

In an action under this subchapter, the court may determine parentage and may include in its order provisions relating to the obligations of parentage, including future child support, visitation and custody.

History

Added 1983, No. 231 (Adj. Sess.), § 1, eff. May 14, 1984.

15 V.S.A. § 307

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN. DOMESTIC RELATIONS*** **>** ***CHAPTER 5. DESERTION AND SUPPORT*** **>** ***SUBCHAPTER 3A. PARENTAGE PROCEEDINGS***

§ 307. Voluntary acknowledgment of parentage

(a) In any case in which the parents of a child are not married, parents of the child may acknowledge parentage by filling out and signing a Voluntary Acknowledgment of Parentage form prescribed and made available by the department of health and by filing the form with the department of health. The Voluntary Acknowledgment of Parentage form shall be confidential and shall include the parents' mailing addresses and Social Security numbers, instructions for filing the form with the department of health, information concerning the legal implications of completing the form, including the procedure for establishing parentage, parental rights and responsibilities and child support obligations.

(b) The department of health shall make Voluntary Acknowledgment of Parentage forms generally available to the public through hospitals, medical offices, schools and the courts. Upon adoption of the uniform national Voluntary Acknowledgment Form by the U.S. Department of Health and Human Services, it shall be adopted by the department of health. The form shall contain language emphasizing the gravity of the effects of acknowledging parentage and the rights and responsibilities which attach. The form shall also contain the following statement: "Parentage creates specific legal obligations. This signed form may be used in court in support of a parentage claim. You should seek legal advice before signing this form if you have any questions or if you are confused about your rights and responsibilities."

(c) The department of health shall only make the completed Voluntary Acknowledgment of Parentage form available to the parties who signed it and the office of child support. The office of child support shall not have access to the form except for the purpose of initiating a parentage or support proceeding on behalf of a dependent child as defined in *section 3901(4) of Title 33*, in which case the department of health shall make available to the office of child support upon explicit request, the appropriate information.

(d) A witnessed Voluntary Acknowledgment of Parentage form signed by both biological parents under this section shall be a presumptive legal determination of parentage upon filing with the department of health provided no court has previously adjudicated parentage or no legal presumption of legitimacy otherwise applies.

(e) In an action brought under this chapter, documents on file with the court that contain the Social Security number of the parties shall be released only to the parties or the state if it is involved in the matter.

(f) A person who has signed a Voluntary Acknowledgment of Parentage form may rescind the acknowledgment within 60 days after signing the form or prior to a judicial determination of parentage, whichever occurs first. The rescission shall be in writing and shall be filed with the department of health. If a Voluntary Acknowledgment of Parentage form is not timely rescinded as provided for in this subsection, the determination of parentage may be challenged only pursuant to Rule 60 of the Vermont Rules of Civil Procedure. During the pendency of such a challenge, the legal responsibilities, including child support obligations, of any signatory arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

History

Added *1989, No. 220* (Adj. Sess.), § 30; amended *1993, No. 105*, § 4; *1993, No. 228* (Adj. Sess.), § 12; *1997, No. 63*, § 5, eff. Sept. 1, 1997.

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15 V.S.A. § 308

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN. DOMESTIC RELATIONS*** **>** ***CHAPTER 5. DESERTION AND SUPPORT*** **>** ***SUBCHAPTER 3A. PARENTAGE PROCEEDINGS***

§ 308. Presumption of parentage

A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if:

(1) the alleged parent fails to submit without good cause to genetic testing as ordered; or

(2) the alleged parents have voluntarily acknowledged parentage under the laws of this State or any other state, by filling out and signing a Voluntary Acknowledgement of Parentage form and filing the completed and witnessed form with the Department of Health; or

(3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test; or

(4) the child is born while the alleged parents are legally married to each other.

History

Added *1989, No. 220* (Adj. Sess.), § 31; amended *1993, No. 228* (Adj. Sess.), § 13; *2013, No. 183* (Adj. Sess.), § 3.

15 V.S.A. § 665

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN. DOMESTIC RELATIONS*** **>** ***CHAPTER 11. ANNULMENT AND DIVORCE*** **>** ***SUBCHAPTER 3A. CHILD CUSTODY AND SUPPORT***

§ 665. Rights and responsibilities order; best interests of the child

(a) In an action under this chapter, the Court shall make an order concerning parental rights and responsibilities of any minor child of the parties. The Court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. When the parents cannot agree to divide or share parental rights and responsibilities, the Court shall award parental rights and responsibilities primarily or solely to one parent.

(b) In making an order under this section, the Court shall be guided by the best interests of the child, and shall consider at least the following factors:

(a) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection, and guidance;

(b) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs, and a safe environment;

(c) the ability and disposition of each parent to meet the child's present and future developmental needs;

(d) the quality of the child's adjustment to the child's present housing, school, and community and the potential effect of any change;

(e) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;

(f) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;

(g) the relationship of the child with any other person who may significantly affect the child;

(h) the ability and disposition of the parents to communicate, cooperate with each other, and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided; and

(i) evidence of abuse, as defined in section 1101 of this title, and the impact of the abuse on the child and on the relationship between the child and the abusing parent.

(c) The Court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent.

(d) The Court may order a parent who is awarded responsibility for a certain matter involving a child's welfare to inform the other parent when a major change in that matter occurs.

(e) The jurisdiction granted by this section shall be limited by the Uniform Child Custody Jurisdiction and Enforcement Act, if another state has jurisdiction as provided in that act. For the purposes of interpreting that act and any other provision of law which refers to a custodial parent, including *13 V.S.A. § 2451*, the parent with physical responsibility shall be considered the custodial parent.

(f) The State has a compelling interest in not forcing a victim of sexual assault or sexual exploitation to continue an ongoing relationship with the perpetrator of the abuse. Such continued interaction can have traumatic psychological effects on the victim, making recovery more difficult, and negatively affect the victim's ability to parent and to provide for the best interests of the child. Additionally, the State recognizes that a perpetrator may use the threat of pursuing parental rights and responsibilities to coerce a victim into not reporting or

assisting in the prosecution of the perpetrator for the sexual assault or sexual exploitation, or to harass, intimidate, or manipulate the victim.

(a) The Court may enter an order awarding sole parental rights and responsibilities to a parent and denying all parent-child contact with the other parent if the Court finds by clear and convincing evidence that the nonmoving parent was convicted of sexually assaulting the moving parent and the child was conceived as a result of the sexual assault. As used in this subdivision, sexual assault shall include sexual assault as provided in *13 V.S.A. § 3252(a)*, (b), (d), and (e), aggravated sexual assault as provided in *13 V.S.A. § 3253*, and aggravated sexual assault of a child as provided in *13 V.S.A. § 3253a*, lewd and lascivious conduct with a child as provided in *13 V.S.A. § 2602*, and similar offenses in other jurisdictions.

(1) An order issued in accordance with this subdivision (f)(1) shall be permanent and shall not be subject to modification.

(2) Upon issuance of a rights and responsibilities order pursuant to this subdivision (f)(1), the Court shall not issue a parent-child contact order and shall terminate any existing parent-child contact order concerning the child and the nonmoving parent.

(b) The Court may enter an order awarding sole parental rights and responsibilities to one parent and denying all parent-child contact between the other parent and a child if the Court finds by clear and convincing evidence that the child was conceived as a result of the nonmoving parent sexually assaulting or sexually exploiting the moving parent and the Court finds by a preponderance of the evidence that such an order is in the best interest of the child. A conviction is not required under this subdivision and the Court may consider other evidence of sexual assault or sexual exploitation in making its determination.

(1) For purposes of this subdivision (f)(2):

(a) sexual assault shall include sexual assault as provided in *13 V.S.A. § 3252*, aggravated sexual assault as provided in *13 V.S.A. § 3253*, aggravated sexual assault of a child as provided in *13 V.S.A. § 3253a*, lewd and lascivious conduct with a child as provided in *13 V.S.A. § 2602*, and similar offenses in other jurisdictions; and

(b) sexual exploitation shall include sexual exploitation of an inmate as provided in *13 V.S.A. § 3257*, sexual exploitation of a minor as provided in *13 V.S.A. § 3258*, sexual abuse of a vulnerable adult as provided in *13 V.S.A. § 1379*, and similar offenses in other jurisdictions.

(2) Except as provided in subdivision (f)(2)(C), the Court shall not issue a parent-child contact order in a case in which a parental rights and responsibilities order has been issued pursuant to this subdivision (f)(2) and any existing parent-child contact order concerning the child and the nonmoving parent shall be terminated.

(3) A party may file a motion for modification of the order only upon a showing of extraordinary, real, substantial, and unanticipated change of circumstances.

(c) Issuance of an order pursuant to this subsection shall not affect the right of the custodial parent to seek child support from the noncustodial parent.

History

Added 1985, No. 181 (Adj. Sess.), § 3; amended *1993, No. 228* (Adj. Sess.), § 6; *2011, No. 29*, § 3; *2013, No. 197* (Adj. Sess.), § 1.

15A V.S.A. § 1-112

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN A. ADOPTION ACT*** **>** ***ARTICLE 1. GENERAL PROVISIONS***

§ 1-112. Family division of the superior court jurisdiction

The family division of the superior court shall have jurisdiction to hear and dispose of issues pertaining to parental rights and responsibilities, parent-child contact and child support in accordance with the provisions of chapter 11 of Title 15 under the following circumstances:

(a) If two unmarried persons, who have adopted a minor child, terminate their domestic relationship; or

(b) If two unmarried persons, one of whom has adopted a minor child of the other, terminate their domestic relationship.

History

Added *1995, No. 161* (Adj. Sess.), § 1; amended *2009, No. 154*, § 238.

15A V.S.A. § 3-301

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN A. ADOPTION ACT*** **>** ***ARTICLE 3. GENERAL PROCEDURE FOR ADOPTION*** **>** ***PART 3. PETITION FOR ADOPTION OF MINOR***

§ 3-301. Standing to petition to adopt

(g) Except as otherwise provided in subsection (c) of this section, the only persons who have standing to petition to adopt a minor under this article are:

(j) a person with whom a minor has been placed for adoption or who has been selected as a prospective adoptive parent by a person authorized under this title to place the minor for adoption; or

(k) a person with whom a minor has not been placed for adoption or who has not been selected or rejected as a prospective adoptive parent pursuant to Article 2, Part 1 and Part 2 of this title, but who has had physical custody of the minor for at least six months immediately before seeking to file a petition for adoption and is allowed to file the petition by the court for good cause shown.

(h) The spouse of a petitioner shall consent to the petition unless judicially declared incompetent.

(i) A petition for adoption of a minor stepchild by a stepparent may be filed under Article 4 of this title and a petition for adoption of an emancipated minor may be filed under Article 5 of this title.

History

Added *1995, No. 161* (Adj. Sess.), § 1.

15A V.S.A. § 3-401

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Statutes Annotated **>** ***TITLE FIFTEEN A. ADOPTION ACT*** **>** ***ARTICLE 3. GENERAL PROCEDURE FOR ADOPTION*** **>** ***PART 4. NOTICE OF PENDENCY OF PROCEEDING***

§ 3-401. Service of notice

(j) Unless notice has been waived, notice of a proceeding for adoption of a minor shall be served, within 30 days after a petition for adoption is filed, upon:

(l) a person whose consent to the adoption is required under section 2-401 of this title, but notice need not be served upon a person whose parental relationship to the minor or whose status as a guardian has been terminated;

(m) an agency whose consent to the adoption is required under section 2-401;

(n) a person whom the petitioner knows is claiming to be or who is named as the father or possible father of the minor adoptee and whose paternity of the minor has not been judicially determined, but notice need not be served upon a man who has executed a verified statement, as described in subdivision 2-402(a)(3) of this title, denying paternity or disclaiming any interest in the minor;

(o) a person other than the petitioner who has legal or physical custody of the minor adoptee or who has a right of communication or visitation with the minor under an existing court order issued by a court in this or another state;

(p) the spouse of the petitioner if the spouse has not joined in the petition; and

(q) a grandparent of a minor adoptee if the grandparent's child is a deceased parent of the minor and, before death, the deceased parent had not executed a consent or relinquishment or the deceased parent's parental relationship to the minor had not been terminated.

(k) The court shall require notice of a proceeding for adoption of a minor to be served upon any person the court finds, at any time during the proceeding, is:

(d) a person described in subsection (a) of this section who has not been given notice;

(e) a person who has revoked a consent or relinquishment pursuant to subsection 2-408(a) or 2-409(a) of this title or is attempting to have a consent or relinquishment set aside pursuant to subsection 2-408(b) or 2-409(b) of this title; or

(f) a person who, on the basis of a previous relationship with the minor adoptee, a parent, an alleged parent, or the petitioner, can provide information that is relevant to the proposed adoption and that the court in its discretion wants to hear.

(l) If, at any time in the proceeding, it appears to the court that there is an alleged father of the adoptee who has not been given notice, the court shall require notice of the proceeding to be given to him.

(m) The court shall send a duplicate copy of the petition to the department. The department shall determine whether or not the petitioners have been the subject of a substantiated complaint filed with the department, and shall report its findings to the court within 14 days of receiving the petition. If a substantiated complaint has been filed with the department, the department shall include a copy of the investigative report that relates to the complaint with the findings it files with the court.

History

Added *1995, No. 161* (Adj. Sess.), § 1.

End of Document

Vt. Const. Ch. I, Art. 7

STATUTES CURRENT THROUGH THE 2015 REGULAR SESSION

Vermont Constitution **>** ***CONSTITUTION OF THE STATE OF VERMONT*** **>** ***CHAPTER I. A DECLARATION OF THE RIGHTS OF THE INHABITANTS OF THE STATE OF VERMONT*** **>** ***ARTICLE 7. [GOVERNMENT FOR THE PEOPLE; THEY MAY CHANGE IT]***

Vt. Const. Ch. I, Art. 7

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

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2012 WL 2936093 (Vt.) (Appellate Brief)
Supreme Court of Vermont.

Christopher MOREAU, Appellant,
v.
Noel SYLVESTER, Appellee.

Nos. 2012-152, 2012-154.
June 29, 2012.

Appeal from the Washington Family Court, Washington County, Vermont
Docket No.: 115-3-12 Wndm
Appeal from the Caledonia Family Court, Caledonia County, Vermont
Docket No.: 43-3-12 Cafa

Appellant's Brief

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***1** *STATEMENT OF ISSUES*

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***7** *STATEMENT OF THE CASE*

Facts

Mr. Moreau and Ms. Sylvester were involved in a relationship for approximately six years, and although Mr. Moreau is not the biological father, he has been the “de facto” father since one child was born and since the other child was six month's old. For their entire lives, there has been no other “father” on the scene. Over the course of this relationship, the two girls have lived in Mr. Moreau's home approximately 90% of the time, often for extended periods without their mother. Mr. Moreau assumed the role of a parent for all aspects of child rearing, and supported the children as his own, both emotionally and financially.

Recently, Ms. Sylvester became involved with another man and has denied the children all access to their “de facto” father unless he agreed to re-employ her, which he declined to do because she had previously stolen from his business. In retaliation, she kept the children from their “father” when he came to see if they were safe.

Procedural History

Noel Sylvester v. Christopher Moreau, Docket No. 43-3-12 Cafa

On March 6, 2012, Mr. Moreau drove to Danville, Vermont to check in on the two minor children. Mr. Moreau felt that the best time to see the child was when he knew a potentially combative male (the then current boyfriend of Appellee) would not be with them. That same day, Ms. Sylvester filed a Complaint for Relief from Abuse. PC at 36. A Temporary Order for Relief from Abuse was signed by Judge Manley that same day and the Relief from Abuse hearing was set for March 20, 2012. PC at 39. On April 3, 2012, a Final Order for Relief from Abuse was signed by Judge DiMauro. PC at 44. In ***8** part, Mr. Moreau was denied all contact with the children because "Defendant is not their biological father." PC at 46. A timely appeal followed.

Christopher Moreau v. Noel Sylvester, Docket No. 115-3-12 Wndm

On March 20, 2012, Mr. Moreau, through his attorney, filed an Emergency Petition for Child Custody in Washington County Superior Court. PC at 1. On March 21, 2012, Judge Zonay issued an Entry Order indicating that it appeared that the Complaint should be dismissed for lack of jurisdiction and gave Mr. Moreau ten days to supplement his file with a Memorandum. PC at 15. Memorandums were submitted on April 12, 2012 and April 19, 2012 and Judge Zonay dismissed the action on April 24, 2012. PC at 29. This case was also appealed in a timely manner.

STANDARD OF REVIEW

Mr. Moreau seeks to have both cases remanded for evidentiary findings of whether or not he is a "de facto" parent and if it is in the best interest of the children to order some visitation between him and the children. Whether or not Vermont recognizes the rights of a "de facto" parent is a legal question and should be reviewed by this Court *de novo* without deference to the trial courts' opinions. *Doe v. Vt. Office of Health Access*, 2012 Vt 15A, p.12 (Vt. 2012).

Mr. Moreau does not seek a review of the factual allegations of his claim as those will properly be dealt with at the Trial Court level. His appeal is focused on what Vermont Courts recognize and what the current state of the law is or should be.

***9** *SUMMARY OF THE ARGUMENT*

In 1997, this Court had its first opportunity to evaluate psychological and *de facto* parent rights in *Titchenal v. Dexter* 166 Vt. 373 (Vt., 1997).[1] Since *Titchenal*, Vermont has become a leader in the national trend recognizing same sex couples' rights to marry and their legal status as civil union partners. While some of the issues presented in *Titchenal* have been remedied by these new laws and judicial mandates, others remain unresolved.

There is still no legal remedy for those people who welcome non-biological children into their lives. While the majority in *Titchenal* opined that the Legislature was better equipped to deal with third party custody issues, that has not occurred. There is an inherent tension between the statutory mandate to award custody and visitation that is in the best interests of the child and the restrictions in the *Titchenal* case; this contradiction is exacerbated by contemporary realities and changing demographics. Trial courts do not feel empowered to even consider what is best for the children when the parent is non-biological. Mr. Moreau finds himself in this position and now simply seeks a chance to present his case for why he can make "his" childrens' lives better. He has not had this opportunity and others like him, and their children, continue to suffer silently.

In 2003, Chris Moreau began his relationship with Noel Sylvester. Ms. Sylvester had one child, Lexi Montgomery, who was six months old at the time. The parties broke up for three months in 2005 and reconnected while Ms. Sylvester was pregnant with ***10** Maquedya. Though neither of the children are biologically his, Mr. Moreau accepted the children as his own. The girls' father, Joseph Montgomery, has been incarcerated in Vermont for drug convictions and has never even met Maquedya. In fact,

as soon as he learned that Ms. Sylvester was pregnant, he walked away. Chris Moreau was "Dad" since Maquedya was born and before Lexi's first birthday. He experienced first words, first steps, and a first lost tooth. He changed diapers in the middle of the night, helped with schooling, and enrolled the girls in ballet classes. For approximately 90% of the time, the children and their mother lived in his home in Barre. Throughout the parties' occasionally rocky relationship, Mr. Moreau remained a constant in the girls' lives and they lived with him without their mother for some months after the Spring flooding of 2011.

Ms. Sylvester faced significant prison time after being charged with felony forgery and petit larceny in 2009 and admitted to the crimes in exchange for deferred and suspended sentences. PC at 52. When not living with Mr. Moreau, Ms. Sylvester went through a series of transient relationships marked by dysfunction. Meanwhile, Mr. Moreau operated his own successful business, at one point even employing Ms. Sylvester until he had to fire her when she stole from him. But when she took the girls out of his house in March of 2012 and threatened to not let him see them unless he re-hired her, Mr. Moreau went to Court seeking parent-child contact. Without any evaluation of the childrens' best interests, a Washington County Court, relying on *Titchenal,* dismissed Mr. Moreau's petition for parentage because he was not biologically related to the girls. When he tried to see "his" girls at a time when Ms. ***11** Sylvester's aggressive new boyfriend was not at home, he was hit with a restraining order by a Caledonia Court Judge, which denied visitation because he is not the father.

Family structures in Vermont continue to change. From 2000 to 2010, the number of unmarried partners living together rose 26%. *U.S. Census Bureau Table (DP-1) Vermont, Profile of General Population Housing Characteristics: 2010;* and *U.S. Census Bureau Table (DP-1) Vermont, Profile of General Demographic Characteristics: 2000.* [2] Despite an overall population increase, the number of households with two spouses decreased. *Id.* Perforce, the percentage of households with one non-biological parent is also increasing. Based on national data from 2010, "[t]wenty percent of children living with single fathers and 10 percent of children living with single mothers also lived with their parent's cohabiting partner." *Family Structure and Children's Living Arrangements, http://www.childstats.gov/americaschildren/famsoc1.asp.* There is no reason to expect these trends to reverse.

Although other States have begun to deal with *de facto* parent's rights and third party visitation issues through their courts and legislatures, there are inconsistent decisions and opposite conclusions being reached. *See In re Parentage of L.B.*, 155 Wn.2d 679, 704 (Wash. 2005)(citing court decisions from Maine, Ohio, Pennsylvania, New Jersey, Rhode Island, Indiana, Colorado and New Mexico recognizing *de facto* parent's common law rights and contrary decisions from New Hampshire, Tennessee, Michigan, and New York). [3] Connecticut, Montana, Nevada, Oregon, Virginia and ***12** Washington statutorily allow for non-biological parents to have visitation. Conn. Gen. Stat. § 46b-59 ("[T]he Superior Court may grant the right of visitation with respect to any minor child or children to any person ... [and] the court shall be guided by the best interest of the child"); Mont. Code Anno., §§ 40-4-211(4)(b) & 40-4-228 ("[A] parenting plan proceeding is commenced in the district court: ... by a person other than a parent if the person has established a child-parent relationship with the child"); Nev. Rev. Stat. Ann. § 125C.050(2)("If the child has resided with a person with whom the child has established a meaningful relationship, the district court in the county in which the child resides also may grant to that person a reasonable right to visit the child during the child's minority, regardless of whether the person is related to the child."); ORS § 109.119(3)(a)("The court shall grant custody, guardianship, right of visitation or other right to the person having the child-parent relationship, if to do so is in the best interest of the child."); Va. Code Ann. § 16.1-278.15 ("[T]he court may award custody upon petition to any party with a legitimate interest therein ... 'legitimate interest' shall be broadly construed to accommodate the best interest of the child"); and Rev. Code Wash. (ARCW) § 26.10.160(3)("[A]ny person may petition the court for visitation rights at any time ... [and] [t]he court may order visitation rights for any person when visitation may serve the best interest of the child").

***13** Adding more mud to the waters are a U.S. Supreme Court without a majority opinion or clear direction, state supreme court cases which have ruled that some of the statutes above are unconstitutional, and subsequent state cases which then alter those earlier decisions. *See Troxel v. Granville,* 530 U.S. 57 (U.S. 2000)(currently cited in over 1500 law review articles e.g. Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v Granville,* 2000 SUP. CT. REV. 279 (2000), Sally F. Goldfarb, *Visitation for Nonparents After Troxel v. Granville: Where Should States Draw the Line?,* 32 RUTGERS L.J. 783 (2001); *In re Parentage of L.B.,* at 712 (finding the visitation statute unconstitutional but recognizing *de facto* parents); *Roth v. Weston,* 259 Conn. 202 (Conn. 2002)(holding Conn. Gen. Stat. § 46b-59 unconstitutional); and *Fish v. Fish,* 285 Conn. 24, 55-61 (Conn. 2008)(limiting the *Roth* decision and discussing differences between custody and visitation).

The Vermont Constitution, decisions by this Court, and Vermont Statutes all support Mr. Moreau's position that non-biological parents have rights to parent-child contact. In this appeal, he asks the Court to re-examine *Titchenal* and to resolve its clash with 15 V.S.A. § 665.

ARGUMENT

There is a conflict between 15 V.S.A. § 665 and precedent case law. The "best interests of the child" law directs courts to foster visitation and contact with parents but *Titchenal v. Dexter* restricts who has standing to pursue custody and visitation.

1. Vermont statutes concerning the best interest of a child should be used to create enforceable visitation between children and *de facto* parents.

***14** The undisputed policy in Vermont is that "after parents have separated or dissolved their civil marriage, it is in the best interest of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents." 15 V.S.A. § 650. While families change, and unwed parties reside with one another more often, the word "parent" cannot be limited solely to those with a biological connection. "The term 'parents' is specific to the context of the family involved." *Miller Jenkins vs. Miller Jenkins,* 2006 Vt. 78, ¶55 (Vt. 2006). "Family" in Vermont is moving away from a 1950's advertisement with two heterosexual parents, their son, daughter and white terrier. "When social mores change, governing statutes must be interpreted to allow for changes in a matter that does not frustrate the purposes behind their enactment." *Id.* at ¶50(quoting *In re B.L.V.B.,* 160 Vt. 368, 375 (Vt. 1993)).

[O]ur paramount concern should be with the effect of our laws on the reality of children's lives. It is not the courts that have engendered the diverse composition of today's families. It is the advancement of reproductive technologies and society's recognition of alternative lifestyles that have produced families in which a biological, and therefore a legal, connection is no longer the sole organizing principle. But it is the courts that are required to define, declare and protect the rights of children raised in these families, usually upon their dissolution. At that point, courts are left to vindicate the public interest in the children's financial support and emotional well-being by developing theories of parenthood, so that "legal strangers" who are *de facto* parents may be awarded custody or visitation or reached for support. Case law and commentary on the subject detail the years of litigation spent in settling these difficult issues while the children remain in ***15** limbo, sometimes denied the affection of a "parent" who has been with them from birth.

In re B.L.V.B., at 376.

The Court went on to say that it was "inconsistent with the children's best interest" to deny a *de facto* parent's legal rights concerning the children. *Id.* at 376.

In an ideal world, Mr. Moreau would have had a full working knowledge of Court precedent, foreseen the dissolution of his relationship with Ms. Sylvester and promptly contacted his State representative to sponsor a bill which would have secured him a legal opportunity to present his case for visitation. [4] He did not have such knowledge. Unfortunately, the Dissenters in *Titchenal* were correct in recognizing that most Vermonters have an incomplete understanding of Vermont law and refused to impute complete legal knowledge onto civil parties. By reaffirming the majority decision in *Titchenal*, this Court would deny a trial judge the opportunity to learn the facts of Lexi and Maquedya's lives in order to determine what is truly in their best interest. "While it would be appropriate for the Legislature to address the issues raised by this case, these children cannot wait. It is the function of the Courts to address these interstitial areas where no statute literally controls." *V.C. v. M.J.B.*, 319 N.J. Super. 103, 129 (App.Div.1999) (dissenting opinion).

II. The changing demographics in Vermont necessitate a modernized interpretation of the law and another look at the *Titchenal* reasoning.

A. The *Titchenal* decision.

***16** In 1997 this Court ruled that after a domestic relationship ended, the partner who failed to adopt a child had no legal standing to petition the courts for visitation. The 3/2 decision "declined to ... create a right of unrelated third-party visitation" despite its recognition "of the disintegrating nuclear family" and "public-policy considerations that favor allowing third parties .. court compelled parent-child contact." *Titchenal* at 385-386. The Appellant urged the Court to recognize the rights of *de facto* parents who helped raise and support a child and who had developed strong emotional bonds. Two key reasons why the Court refused to accept the Appellant's proposals were because biological parents could be subjected to a whole new class of litigation by those seeking visitation with the children and because such a large modification of visitation statutes was presumptively better handled by the Legislature. The two Justice dissent would have used equitable adoption theories to serve the Appellant and those similarly situated. The Dissent's approach was less expansive than recognizing the rights of *de facto* parents and would have limited claims to those parties who failed to adopt their non-biological children within a certain time frame.

B. There have been several developments in Vermont law since *Titchenal.*

Three years later, Vermont became the first state to enact a civil union law which provided same sex couples legal rights that follow a marriage. H.847 *An Act Relating to Civil Unions* 2000 and 15 V.S.A. Chapter 23. Nine years after that, and over Governor Douglas' veto, Vermont was the fourth state to legalize gay marriage. Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES (April 7, 2009) *available at: http:// www.nytimes.com/2009/04/08/us/08vermont.html*. Backed with support from national advocacy groups, gay couples in Vermont can now avoid ***17** some of the pitfalls that were present when *Titchenal* was decided by entering into a civil union or marriage and establishing legal custody rights over the children. Unfortunately, organizations with lobbying power for *de facto* parents are far less prevalent and no laws in Vermont have been passed to protect the parents' interests.

C. The American family has changed.

Across the country, family dynamics and structure are changing dramatically. More than 40% of all American babies are born to unwed mothers and Vermont is close behind the national average with 39.2%. *U.S. Census Bureau, Statistical Abstract of the United States: 2012*, Table 1335 and *National Center for Health Statistics, Vermont Birth Data 2010, Vermont Fact Sheet.* Marriages are also declining steadily while unmarried couples live together without taking steps to formalize their relationship. While these trends started more than fifty years ago, they have steeply increased in the last ten years and are more prevalent among an older population. *See National Center for Health Statistics*, Stephanie J. Ventura, *Changing Patterns of Nonmarital*

Childbearing in the United States Data Brief (May, 2009)(showing trends since 1940 and steady increases in unwed births to mothers aged 25-34 compared to more stagnant rates with mothers 15-17 years old). Since *Titchenal*, there have been "attitudinal changes ... [and] societal disapproval that unmarried mothers faced at one time has diminished sharply." *Id.* at 6. In some respects, Vermont law has kept pace with these societal changes by passing laws on civil unions and gay marriage, but trial courts have fallen behind by continuing to adhere to the *Titchenal* reasoning when confronted with a psychological parent who had failed to adopt the children.

III. The Vermont Supreme Court has interpreted existing statutes and the Vermont Constitution to expand custody laws and marriage laws.

***18** Prior to Vermont's civil union laws being enacted, this Court heard *Baker v. State* 170 Vt. 194 (Vt. 1999). In *Baker*, this Court relied on the Vermont Constitution to secure legal rights for same sex couples. While acknowledging that the Vermont Legislature "undoubtedly [did] not even consider same sex unions when [marriage laws were] enacted in 1945," the Court felt its interpretation was consistent with the spirt and general intent of the laws. *Id.* at 200. It is similarly doubtful that the drafters of Vermont's Constitution considered same sex couples' rights when drafting the "Common Benefits" clause. This Court was able to use existing law to allow same sex couples legal rights without any prior legislative action. The Court then retained jurisdiction over the matter while permitting the Legislature to "enact legislation consistent with the constitutional mandate" the Court described. *Id.* at 29.

Apart from civil unions, visitation laws have been created by the Legislature after the Vermont Supreme Court has acknowledged their potentiality. In 1983, a grandparent visitation law was passed and secured rights under 15 V.S.A. Chapter 18. In those statutes, the Legislature directed courts to award grandparents visitation rights if the court found "that to do so was in the best interests of the child." 15 V.S.A. § 1011(a). The statutory scheme also outlines when and how the grandparents can seek visitation rights and how to enforce those rights after they are granted.

Twenty three years before the grandparent visitation laws, a Court case arose in which a grandmother had been the primary parent. *Miles v. Farnsworth*, 121 Vt. 491 (1960). The Court affirmed a trial court's decision to award custody to a mother when the father's mother was the primary caretaker of the child. The Court stated that "in [the] case of an active, healthy boy of 10 years, who will need constant active ***19** supervision during his formative years, an inability to furnish such supervision because of the infirmatives of advanced age, is a substantial circumstance for the Court to consider in the matter of custody." *Id.* at 494-95. The Court weighed the grandmother's ability to raise the child even though she was a third party and no grandparent visitation statute existed at that time. By analyzing which caretaker would be better for the child, the *Miles* case contemplates giving custody to a third party even in the absence of statutory authority to do so. In this appeal, Mr. Moreau seeks the opportunity to present his case, which to date, he has not been allowed to do.

Vermont law allows for third parties to take custody of children in certain instances and permits consideration of third parties when making determinations of what is best for the child. *See* 15 V.S.A. § 209 (the court may enter such order or judgment relating to the disposition, care and maintenance of such child, ... by committing the child ... to some person); 15 V.S.A. § 293 (the court "may determine with which of the parents the children, or any of them, shall remain"); and 15 V.S.A. § 665. Specifically, 15 V.S.A. § 665(4) and (6) deal with primary care providers and children changing homes and schools without using the word "parent." These sections focus on the child and her life as opposed to the biological parents and their connections to the child. Section (7) goes on to consider the child's relationship with other people. While the statute is used to determine parental rights, the analysis can be heavily influenced by third parties, evidencing the Legislature's position that relationships with third parties should be maintained if it is in the child's best interest.

In *Paquette v. Paquette*, 146 Vt. 83, 91 (Vt. 1985), the Court noted that "extraordinary circumstances may exist that would justify an award of custody to a ***20** nonparent." Mr. Paquette's case for custody of his step-child was remanded and the Court did not restrict its rationale only to step-parents by acknowledging the implication in previous cases. *Id.* at 91 (citing *Miles v. Farnsworth*). The holding in *Paquette* was confined to step-parents standing *in loco parentis*, but reiterated that the courts should be guided by what is best for the child. *Id. passim.*

In one case, the Court has not allowed a *de facto* parent to gain visitation with the children, but in another it has enforced child support obligations against a non-biological parent. In *O'Connell-Starkey v. Starkey*, 2007 Vt 128, ¶21 (Vt. 2007) the Vermont Supreme Court, consistent with other states, enforced a child support agreement after DNA evidence showed that the child and father were not biologically related. An inequitable inconsistency arises when the State forces an unrelated individual to financially support a child but then fails to allow another unrelated person to have visitation or even make a showing of why such visitation would be in the best interests of the child. Under *Titchenal* and *Starkey*, it would possible for an unmarried man to assume responsibility for a child, thinking it was his, help raise the child, agree to child support after the parties' separation but then be forced to pay child support and lose standing to petition for custody if it was later determined that he was not related. This is not Mr. Moreau's exact scenario; he never believed the children were biologically his, but illustrates the void in Vermont law that would be properly filled by a decision that allows him to present evidence that he is the psychological father of Lexi and Maquedya.

IV. Article 7 of the Vermont Constitution support rights for unmarried couples and the non-biological children of their relationships.

Chapter 1, Article 7 of the Vermont Constitution states that:

> ***21** That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community ...

The "Common Benefits" clause has been interpreted to protect the rights of adopted children, same-sex couples, widows of work related accidents, and grocery store owners. *Maccallum v. Seymour*, 165 Vt. 452 (Vt. 1996); *Baker; Lorrain v. Ryan*, 160 Vt. 202 (Vt. 1993); and *State v. Ludlow Supermarkets*, 141 Vt. 261 (Vt. 1982). Its purpose is to ensure that state protections benefit the whole community and not just a smaller part of the community. *USGen New Eng., Inc. v. Town of Rockingham*, 2003 VT 102, 28 (Vt. 2003)(citing *Baker*).

The Common Benefits clause is implicated in this case when viewed from the children's perspective. Children born to unwed mothers and raised by loving, *de facto* fathers are never given the benefit of Vermont's "best interest of the child" standards. While legal adoption was an option for Chris Moreau, it is an expensive and cumbersome process that entails locating the absentee biological father and terminating his residual parental rights. 15A V.S.A. § 1-105 and *U.S. Department of Health and Human Services, Costs of Adoption*, 2 (Feb. 201 1) (range of adoption costs without a public agency are $5,000 -- $40,000*). Marriage in the United States is at an all time low and the institution is close to achieving minority status. *See* PAUL TAYLOR ET AL., *Barely Half of U.S. Are Married -- A Record Low*, The Pew Research Center Social and Demographic Trends (Dec. 4, 201 1)(comparing marriage rate in 1960, 72%, to the modern rate of 51%).

These facts, the infrequency of legal adoptions and the increasing prevalence of unmarried couples, have created an expanding subset of "parents," one of whom is ***22** biologically unrelated to the child. This is in stark contrast to the analysis the Court would undertake if an incarcerated, absentee biological father sought visitation rights. [5] Unlike Chris Moreau, that absent father would be accorded a full opportunity to seek parent-child contact.

When considering Article 7 challenges, the Court "must first define the part of the community disadvantaged by the law by examining 'the statutory basis that distinguishes those protected by the law from those excluded from the state's protection.' " *State v. Rooney*, 2011 VT 14, P28 (Vt. 2011) (quoting *Baker* at 212-13). Here, *de facto* children are disadvantaged, and their best interests not considered, because there mothers and fathers are never given the chance to show how they can make the children's lives better. Children are penalized for both their parent's choices, religious or philosophical, and by the State's failure to keep pace with societal changes and norms.

A subsequent part of the Court's analysis is "ascertain[ing] whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose." *Baker* at 214. It is unknown why the government affords protection to one class of children but not another, but it is clear that constitutionally, a natural parent has a protected right to raise and rear their own child. *Troxel* at 56. Factoring into the Court's determination is the under inclusive flaw that exists because these children's interest are not being taken into account. *Baker* at 214. A parent's wishes regarding visitation do not always control as Vermont courts rule inconsistently with at least one parent's desires in every custody ***23** case which evaluates the parties under the "best interests" standard and awards custody to one parent.

CONCLUSION

Chris Moreau is "daddy." He was in the hospital when Maquedya was born and lived with the two girls for most of their lives. Two Vermont courts have ruled that he has no right to see the children but neither made any inquiry into what is best for the children. Judge Zonay dismissed the case in Washington County on jurisdictional grounds based on 15 year-old precedent and Judge DiMauro checked a box that denied Mr. Moreau any parent child contact because he "is not their biological father." PC at 46. The *Titchenal* case is at odds with 15 V.S.A. § 665 and the Vermont Constitution because it fails to consider the children's interests and denies them the benefits other Vermont children have when their parents separate. As Vermont families evolve, so too should the laws that protect them. As illustrated in *Baker*, the Court has the duty to interpret the current laws through contemporary standards even when those standards were never considered when the laws were enacted. Mandating that *de facto* parents seek Legislative changes is inconsistent with how the Court handled grandparent visitation and gay marriage rights, which were both initially considered judicially.

Appellant Chris Moreau seeks a remand on these consolidated appeals with instructions to the trial courts to consider his role in the girls' lives when determining the best interests of the children.

Footnotes

1 For the purposes of this brief, and in much of the literature, "psychological parent" and "*de facto* parent" are used interchangeably.

2 Available at *http:// factfinder2.census.gov/faces/tableservices/jsf/pages/*productview.xhtml?src=bkmk and *www.census.gov/ prod/2002pubs/c2kprof00-vt.pdf.*

3 *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004); *In re Bonfield*, 97 Ohio St. 3d 387 (Ohio 2002); *T.B. v. L.R.M.*, 567 Pa. 222 (Pa. 2001); *V.C. v. M.J.B.*, 163 N.J. 200, 227 (N.J. 2000); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000); *King v. S.B. (In re A.B.)*, 818 N.E.2d 126 (Ind. Ct. App. 2004)(superseded and remanded by *A.B. v. S.B.*, 837 N.E.2d 965 (Ind. 2005); *In the Interest of E.L.M.C.*, 100 P.3d 546, 558 (Colo. Ct. App. 2004); *A.C. v. C.B.*, 113 N.M. 581 (N.M. Ct. App. 1992); *In re Nelson*, 149 N.H. 545 (N.H. 2003); *White v. Thompson (In re Thompson)*, 11 S.W.3d 913 (Tenn. Ct. App. 1999); *McGuffin v. Overton*, 214 Mich. App. 95 (Mich. Ct. App. 1995); and *Karin T. v. Michael T.*, 484 N.Y.S.2d 780, 784 (N.Y. Fam. Ct. 1985).

4 Or perhaps Mr. Moreau would have more zealously pursued adoptions when he and Appellee met with a family law attorney in Barre for that purpose.

5 As noted above, the girls' biological father was incarcerated during the children's early years and has never met Maquedya.

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