IN THE SUPREME COURT
OF THE
STATE OF VERMONT

SUPREME COURT DOCKET NO. 2009-473

Lisa Miller,

Appellant,

v.

Janet Jenkins,

Appellee.

APPEALED FROM:

Rutland Family Court

Docket No. 454-11-03 Rddm

INITIAL BRIEF OF APPELLANT

Norman C. Smith, Esq.
76 Lincoln Street
Essex Junction, VT 05452
Telephone 802-288-9088
Facsimile 802-879-9640
Attorney for Appellant

Mathew D. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
2n[d] Floor
Maitland, FL 32751
Telephone 800-671-1776
Facsimile 407-875-0770
Attorney for Appellant

Stephen M. Crampton
Rena M. Lindevaldsen
LIBERTY COUNSEL
100 Mountain View Road
Suite 2775
Lynchburg, VA 24502
Telephone 434-592-7000
Facsimile 434-592-7700
Attorneys for Appellant

STATEMENT OF THE ISSUES

1. Whether a parental rights and responsibilities order, issued over the objections of the fit, biological parent, awarding sole legal and physical custody to a woman with no biological or adoptive relationship to the child, infringes the fundamental parental rights of the biological parent.

2. Whether a court can escape the minimum constitutional analysis and parental rights presumption required by *Troxel v. Granville*, 530 U.S. 57 (2000), before awarding sole legal and physical custody of a child, over the objections of the child's fit, biological parent, to a person with no biological or adoptive relationship to the child.

3. Whether the trial court erred in awarding sole legal and physical custody to Ms. Jenkins.

TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

Page

TABLE OF AUTHORITIES

CASES **Page**

STATE STATUTES

STATEMENT OF THE CASE

Lisa Miller met Janet Jenkins in 1997 while both women were living in Virginia. A few months later, Miller moved in with Jenkins. While Virginia residents, in December 2000, they traveled to Vermont to enter into a civil union, immediately returning to their home in Virginia. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 3, 180 Vt. at 445, 912 A.2d at 956. A few months later, Miller expressed her desire to have a baby. In August 2001, Miller became pregnant through artificial insemination in Virginia. *Id.* Miller gave birth to Isabella in Virginia in April 2002. *Id.* Around August 2002, Miller and Jenkins moved to Vermont. *Id.* Approximately one year later, the couple separated, with Miller returning to Virginia with her daughter. *Id.*

In November 2003, Miller filed standard court forms in Vermont to dissolve the civil union.[1] *Id.* ¶ 4, 180 Vt. at 446, 912 A.2d at 956. She filed them *pro se*, by mail from Virginia, without the advice or representation of counsel. (P.C. 97, 102).[2] Miller did, however, receive some assistance from a court clerk in Vermont, who instructed Miller to complete the *entire* form, checking a box for each question. (P.C. 98, 103). Miller checked the boxes to indicate that she should be awarded legal and physical rights and responsibilities over IMJ and that Jenkins should be awarded *supervised* parent-child contact. (P.C. 104). The form did not then, and still does not, provide the option of checking a box to indicate that no visitation should be awarded to

[1] At the time, because Virginia did not legally recognize same-sex relationships, Vermont was the only state in which Miller could file to dissolve the civil union. *See* VA. CODE ANN. § 20-45.2 (2008) ("A marriage between persons of the same sex is prohibited."); *see also Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002) (affirming trial court's ruling that it lacks subject matter jurisdiction to dissolve Vermont same-sex civil union); *Lane v. Albanese*, No. FA044002128S, 2005 WL 896129, at *4 (Conn. Super. Ct. Mar. 18, 2005) (finding court lacks subject matter jurisdiction to dissolve Massachusetts same-sex marriage).

[2] "P.C." refers to the printed case.

the other party. In addition, when the form asked her to list the "biological or adoptive children" of the civil union, Miller identified IMJ because IMJ was born during the civil union. (P.C. 100).

In response to the complaint, Jenkins retained counsel and asserted a counterclaim seeking an award of physical and legal custody, with an award of parent-child contact to Miller. The answer and counterclaim did not contain any allegation that Miller was an unfit parent or that Jenkins had adopted the child—because she had not—but simply alleged she was a parent and desired custody.

Prior to the court's first hearing concerning a temporary order for parental rights and responsibilities, Miller's first attorney intended to object to the court's treating Jenkins as a second parent to Isabella. Soon after, Miller retained a new lawyer, Ms. Deborah Lashman, who did not meet with her until the first day of hearings on March 15, 2004. (P.C. 47-49). Without consultation with Miller, Lashman purported to waive Miller's right to challenge the court's treatment of Jenkins as a parent. (P.C. 49-54, 60, 69-71). Despite the efforts of Miller's third attorney, Ms. Judy Barone, to revoke the waiver at the next day of hearings, the court refused to directly address the waiver issue. (P.C. 93).

Without deciding whether Miller had waived her parental rights, on June 17, 2004 the court issued a temporary order (the "Temporary Custody Order") granting Jenkins, over Miller's objections, "parent-child contact" and awarding Miller "legal and physical responsibility" over Isabella. *Miller-Jenkins*, 2006 VT 78, ¶ 4, 180 Vt. at 445–46, 912 A.2d at 956. The order directed Miller to give Jenkins liberal unsupervised visitation with then two-year-old IMJ beginning in August 2004. *Id.*

Five months after it granted Jenkins parent-child contact in the Temporary Custody Order, the trial court declared Jenkins a parent to IMJ. *Id.* ¶ 8, 180 Vt. at 446, 912 A.2d at 957.

In that November 17, 2004 order (the "Parentage Order"), the court addressed Miller's arguments that (1) she be permitted to rebut any presumption of parentage in favor of Jenkins by submitting evidence that Jenkins had no genetic link to Isabella, and (2) Lashman's waiver of Miller's parental rights was without her consent. With respect to the paternity presumption, Miller argued that to the extent a husband or wife is able to rebut a paternity presumption through submission of genetic tests demonstrating that the husband is not the father, Miller should also be able to rebut any presumption that Jenkins is a parent to IMJ with genetic proof that Jenkins is not biologically related to IMJ. (P.C. 90); *see also* VT. STAT. ANN. tit. 15, § 308 (2002) ("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 (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test . . . ."). Although the court applied the paternity presumption to the case to find that Jenkins was IMJ's parent, it refused to permit Miller to use the statutory genetic exception to rebut the presumption. *Miller-Jenkins*, 2006 VT 78, ¶ 54, 180 Vt. at 464, 912 A.2d at 969.

After explaining that Vermont had not previously "been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination," the court created a new test for Vermont. (P.C. 91-92). The test provides that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." *Id.* The court then retroactively applied this new test to determine parentage of IMJ who was born two years earlier in another state. (P.C. 94). Pursuant to the new test, the court declared Jenkins to be IMJ's second mother

because Jenkins and Miller were in a civil union relationship when Miller and Jenkins planned for Miller to have a child. *See id.* at 11; *see also Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 180 Vt. at 465, 912 A.2d at 970.The trial court did not address Miller's constitutional parental rights argument.

In August 2006, this Court affirmed. As to the parental rights question, this Court stated that "Janet was awarded visitation because she is a parent of IMJ. Lisa's parental rights are not exclusive."[3] *Id.* ¶ 59, 180 Vt. at 467, 912 A.2d at 971. This Court did not ask whether elevating Jenkins to the status of a parent infringed Miller's fundamental constitutional rights as IMJ's sole biological parent. *Id.* ¶¶ 62–63, 180 Vt. at 469, 912 A.2d at 972–73.On June 15, 2007, the trial court issued a final order, granting Miller legal and physical custody with regular visitation to Jenkins. (P.C. 131-32). Several subsequent orders were issued over the next two years concerning visitation and make-up visitation. On November 20, 2009, the trial court switched custody to Jenkins, giving her legal and physical custody of IMJ (the "Order"). The Order did not provide visitation to Miller but instead gave Jenkins ninety days to propose a visitation schedule. The trial court's primary basis for switching custody was because Miller had not complied with visitation orders. (P.C. 19). That Order is the subject of this appeal.

Specific Claims of Error

In making its best interest of the child determination, the court committed reversible error with respect to the following findings: (i) that Ms. Jenkins demonstrated an ability to foster a good relationship between Ms. Miller and Ms. Miller's biological child (P.C. 10, 16); (ii) that

[3] As stated in Miller's Motion for Reargument, this Court erred in its conclusion that Miller had failed to adequately raise the constitutional argument below. In the Motion, Miller explained that the argument had been directly raised in an October 8, 2004 Supplemental Memorandum filed, with court permission, in connection with the hearing that led to the November 2004 order declaring Jenkins a parent.

Ms. Jenkins demonstrated an ability to foster a good relationship between Ms. Miller and Ms. Jenkins (P.C. 3-4, 6); (iii) that Ms. Jenkins indicated a willingness to respect Ms. Miller's religious and moral instructions of IMJ (P.C. 3, 10); (iv) that there was no evidence of abuse by Ms. Jenkins toward IMJ (P.C. 11, 19); (v) that Ms. Miller had no justification for denying parent-child contact to Ms. Jenkins (P.C. 9); and (vi) Ms. Miller testified under oath that she would comply with future Vermont orders (P.C. 3).

In issuing an order switching custody to Jenkins, the trial court failed to address Miller's argument that a switch of custody to a woman who is not the child's biological or adoptive parent over the objections of the fit, biological parent, violates the mother's fundamental parental rights. Miller specifically argued below that although this Court had previously found that Miller's parental rights were not violated in awarding visitation to Jenkins, a switch of custody implicates her parental rights in a way that visitation does not. Separately, the trial court order's failure to perform even the minimum constitutional analysis required by *Troxel* is itself a violation of the Fourteenth Amendment due process guarantee. (P.C. 1-21).

ARGUMENT

I. THE ORDER TRANSFERRING CUSTODY OF ISABELLA TO JANET JENKINS VIOLATES LISA MILLER'S CONSTITUTIONAL RIGHTS.

The trial court order violates Miller's fundamental parental rights and her guarantee of procedural due process. It bears emphasis at the outset that the constitutional arguments raised here are different than those raised in connection with this Court's August 2006 opinion. In that opinion, the Court addressed the parental rights argument in the context of a visitation order. None of the cases cited by this Court in support of its 2006 decision involved an award of *custody* (as compared to *visitation*) to the third-party that's been declared a parent. The Order presently on appeal, which involves a switch of custody away from the fit biological parent,

rather than a visitation order, implicates Miller's fundamental parental rights in a way that visitation does not.[4] *See Egan v. Fridlund-Horne*, 211 P.3d 1213, 1225 (AZ. Ct. App. 2009) ("The legislature intended that courts treat custody and visitation petitions in a different manner, presumably because 'granting visitation is a far lesser intrusion, or assertion of control, than is an award of custody, and thus not nearly as invasive of parents' rights.'"); *Koshko v. Haining*, 921 A.2d 171, 186 (Md. 2007) ("There is no dispute that the grant or modification of visitation involves a lesser *degree* of intrusion on the fundamental right to parent than the assignment of custody."); *In re Kosek*, 871 A.2d 1, 4-5 (NH 2005) ("we do see a meaningful difference between awards of custody and awards of visitation. . . . granting visitation is a far lesser intrusion, or assertion of control, than is an award of custody").

Miller's procedural due process argument is based on the trial court's failure to (i) even address Miller's parental rights argument and (ii) afford at least "some special weight" to Miller's preference. The trial court utterly failed to even discuss Miller's constitutional rights in issuing its order to switch custody. The failure to do so before stripping a fit, biological parent of custody is itself a procedural due process violation.

A. Miller, Not Jenkins, is Endowed With the Fundamental, Unalienable Right to Direct IMJ's Upbringing.

For nearly 100 years, the United States Supreme Court has protected a parent's fundamental, inalienable right to make decisions concerning her child's upbringing. A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000).The Supreme Court has explained that because "[t]he child is not the mere creature of the State," "[i]t is cardinal . . . that the custody, care and nurture

[4] Miller maintains that an award of visitation also violates the fundamental parental rights of a fit biological or adoptive parent.

of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925). Those obligations "include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).The Court has emphasized that a state can override a parent's decision only where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 233–34.

The importance placed upon the relationship between the child and a legal parent also has been emphasized by the higher standard of proof required before the state can substantially interfere with the parent's constitutional rights. *See Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982) (suggesting that a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); *Garcia v. Rubio*, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) ("[A] court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child." (quoting *Stuhr v. Stuhr*, 481 N.W.2d 212, 217 (Neb. 1992))). "[T]he interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)) (dealing with rights of an unwed father). "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the

Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citations omitted) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).The State's interest in caring for the child of a natural or adoptive parent is *de minimis* if that parent is shown to be a fit parent. *Stanley*, 405 U.S. at 657–58.

The Supreme Court's decision in *Troxel v. Granville*, as the most recent parental rights case, demonstrates that fit parents have rights superior to third parties, including close biological grandparents. In *Troxel*, the Court declared Washington's third-party visitation statute unconstitutional because it failed to "accord at least some special weight to the parent's own determination" concerning visitation. *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion). Specifically, the Washington order granting visitation to the grandparents over the objection of the sole biological parent "failed to provide any protection [to the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at 69–70. Explaining that the liberty interest "of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized" by the Court, the Court held that the Washington statute unconstitutionally infringed Granville's "fundamental parental right." *Id.* at 65, 67.

The Washington statute infringed Granville's constitutional parental rights because the statute gave a court the discretion to "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision file[d] a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67.The statute contained no requirement that a court accord the parent's decision any presumption of validity whatsoever: if a judge disagreed with the parent's view of the child's best interest, the judge's view necessarily prevailed. *Id.*

The Court explained that the failure of the statute to give any weight to the parent's determination ignored the presumption that parents act in the best interest of their children. *Id.* at 69 (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

> [S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68-69. The Court explained that while "[i]n an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren . . . whether such an intergenerational relationship would be beneficial in any specific case is for the parent[, not the court,] to make in the first instance." *Id.* at 70. "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73. As a result, the Washington Superior Court failed to provide any procedural protection to the biological mother's "fundamental constitutional right to make decisions concerning the rearing of her own daughters." *Id.* at 69-70.

In his concurring opinion, Justice Souter articulated a solid description of parental rights that gives parents the exclusive right to determine with whom their children associate. *See id.* at 75–80 (Souter, J., concurring). He explained that although the Court's cases "have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child," the fundamental parental "right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision.'" *Id.* at 78.

> The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but

> may indoctrinate children, and a choice about a child's social [companions] is not essentially different from the designation of the adults who will influence the child in school. . . . It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent. To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.

Id. at 78–79 (footnote omitted). Justice Souter noted that the Supreme Court of Washington invalidated the statute on similar reasoning:

> Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas.

Id.

1. Miller did not knowingly and intelligently waive her fundamental parental rights.

Concluding, as some courts have done, that the biological parent somehow implicitly waives her parental rights by involving a third party in the child's rearing alongside the parent does not adequately protect the parent's rights. The Utah Supreme Court explained the inherent deficiencies in a factual determination of implicit waiver:

> [A]dopting a *de facto* parent doctrine fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases. A *de facto* parent rule for standing, which rests upon ambiguous and fact-intensive inquiries into the surrogate parent's relationship with a child and the natural parent's intent in allowing or fostering such a relationship, does not fulfill the traditional gate-keeping function of rules of standing. Under such a doctrine, a party could try the merits of her case under the guise of an inquiry into standing, unduly burdening legal parents with litigation.

Jones v. Barlow, 154 P.3d 808, 816 (Utah 2007) (italics added). Not only are there proof problems inherent in an implicit waiver standard, but it is inconsistent with United States Supreme Court precedent concerning waiver of fundamental rights. "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and "'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882)). Additionally, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* In the context of waiving the right to assistance of counsel, the Supreme Court has explained:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution.

Id. at 465.

As a result, an accused retains the right to counsel unless he knowingly waives that right. Embodied within the "knowingly" requirement is not just that he knows that he executed a waiver but that he appreciates the legal consequence of that waiver. As courts have stated, "'[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *Travis v. Finley*, 548 S.E.2d 906, 911 (Va. Ct. App. 2001) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)); *see also State v. Merrill*, 584 A.2d 1129, 1131 (Vt. 1990) (explaining that in order to find a knowing waiver of right to counsel, the "defendant may need to be advised of the available options to protect his rights to counsel, the full nature of the charges against him, the range of allowable punishment, and the consequences of proceeding without the aid of an

attorney" (citing *State v. Quintin*, 460 A.2d 458, 460–61 (Vt. 1983); State v. Ahearn, 403 A.2d 696, 702 (Vt. 1979))).

In addition, since the constitutional right belongs to the individual, the right can only be waived by the individual—not by her attorney. *See Travis*, 548 S.E.2d at 911 (concluding that a letter from counsel indicating that discovery answers would be forthcoming cannot constitute a waiver of the client's privilege against self-incrimination).A similar standard is used concerning the right to confront an adverse witness, the Sixth Amendment right to a jury trial, the Miranda warnings, and, as stated above, the Sixth Amendment right to counsel. *See Patterson v. Illinois*, 487 U.S. 285, 292 (1988); *Moran v. Burbine*, 475 U.S. 412, 421 (1986); *McCarthy v. United States*, 394 U.S. 459, 466 (1969); *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966).

Waiving one's constitutional parental rights to have exclusive authority to make decisions concerning who visits with or has custody over one's child is, at a minimum, of similar weight to these other rights so as to require a similar waiver standard. For example, the *de facto* parenthood test adopted by many courts asks whether the biological parent consented to and fostered a relationship between the third party and the child. *See, e.g., Holtzman v. Knott*, 533 N.W.2d 419, 421 (Wis. 1995). If so, then the third party can be declared a parent over the objections of the parent. This is similar to the factors relied on by this Court in its 2006 opinion – that the two were in a civil union at the time of IMJ's birth, that the parties expected Jenkins to co-parent IMJ, and that both parties treated IMJ as their own for the first seventeen months of IMJ's life. 2006 VT 78, ¶ 56, 180 Vt. at 465, 912 A.2d at 970. Whether the parent consented to the third party's establishing a relationship with the child, however, is *not* the relevant constitutional inquiry. While that question focuses on whether the biological parent permitted a third party to become involved in the life of the parent's child, it does not provide any insight

into the relevant legal inquiry of whether the biological parent was fully aware of her fundamental parental rights and knowingly intended to relinquish those rights to a third party. Stated differently, although the parent consented to her child forming a relationship with a third party a court cannot necessarily infer that she knowingly, and irrevocably, waived her constitutional right to (1) be treated as the child's sole parent, or (2) make exclusive determinations concerning custody and visitation concerning her child. *See, e.g., Stadter v. Siperko*, 661 S.E.2d 494, 500 (Va. Ct. App. 2008) (rejecting argument that the biological mother partially relinquished her parental rights to permit the court to grant third-party visitation over parental objection). That is particularly true, as here, where the court below has now stripped Miller of custody of her child.

2. Miller's parental rights are not lessened because she is a single parent.

Nor does the fact that the biological parent is a single parent justify deprivation of the biological mother's constitutional rights. This Court mentioned in its August 2006 decision the fact that unless the court treats the third party as a parent the child will be left with only one parent, suggesting that single parents have less constitutional rights to parent their children. *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 180 Vt. 441,465, 912 A.2d 951, 970 ("[T]here is no other claimant to the status of parent, and, as a result, a negative decision would leave [Isabella] with only one parent."). One Wisconsin Supreme Court judge highlighted the problem with this argument:

> Contrary to the majority opinion, the child here does not need the "protection of the courts." His mother is the one who should have had the courts protecting her right to raise her own child and to determine what is in her child's best interests . . . . But, this child is in no "societal drift," Dickensian or otherwise. This child is no "Oliver Twist"—he is not an orphan, he has a mother. Thousands and thousands of single parents, widows and widowers from time immemorial have raised children and made the choices parents have always had to make that are part of raising, supporting and nurturing their children, including deciding with whom

> their child shall associate. And, they have done so without government interference. This mother has a constitutional right to do the same.

Holtzman v. Knott, 533 N.W.2d 419, 441 (Wis. 1995) (Day, J., concurring and dissenting); *see also Troxel*, 530 U.S. at 100–01 (Kennedy, J., dissenting). A state's preference that a child be raised in a two-parent home is not sufficiently strong to deprive a parent of her constitutional rights, especially where the state has ordered the child turned over to a woman who is not related to the child by adoption or biology.

B. The Trial Court's Decision to Transfer Custody to Ms. Jenkins Should be Reversed.

The trial court's legal conclusions are reviewed de novo. *See Borden v. Hofman*, 2009 VT 30, ¶ 9, 974 A.2d 1249, 1252; VRCP 52(a)(2). In this case, the trial court ordered a transfer of custody without even addressing the constitutional arguments squarely raised by Miller thereby violating Miller's fundamental parental rights and procedural due process guarantees. The decision to transfer custody from the fit, biological parent (who the trial court found to be fit and capable of providing for IMJ's material needs, present and future development needs, and providing her a safe environment) to a woman who is not related by biology or adoption is unprecedented. While courts in approximately sixteen states have afforded parental-like rights to third parties for purposes of visitation,[5] courts in approximately twelve states have refused to do

[5] *See, e.g., Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004) (without mentioning *Troxel*, allowing one standing *in loco parentis* to obtain visitation over objections of fit, biological parent); *Robinson v. Ford-Robinson*, 208 S.W.3d 140 (Ark. 2005) (stepparent granted visitation as standing *in loco parentis*); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (parental rights and responsibilities granted to former partner in lesbian relationship with biological mother); *In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (granting former same-sex partner joint parenting time and decision-making authority over objection of fit, biological mother); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005) (woman entitled to some rights of visitation to her former same-sex partner's biological child); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (finding that once a court determines the nonparent in a same-sex relationship to be a *de facto*

so.[6] None of those cases, however, put the third party (including former same-sex partners) on precisely the same constitutional footing as the fit biological parent for purposes of switching custody.

Regardless of the parentage label attached to Jenkins' status by this Court or the trial court, the fact is that Jenkins is not the biological or adoptive parent to IMJ. Miller is IMJ's only biological parent and as such, has fundamental parental rights conferred on her that are not

---

parent, court is free to award parental rights over objections of biological parent); *S.F. v. M.D.*, 751 A.2d 9 (Md. Ct. App. 2000) (granting *de facto* status to former same-sex partner over fit, biological parent's objection); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (best interest analysis applies when determining custody between biological parent and *de facto* parent); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent stands in parity with biological parent); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (coparenting agreement between lesbian couple enforceable); *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. Ct. 2005) (rights of persons standing *in loco parentis* are the same as that of biological parent); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (a *de facto* parent has parental rights regardless of *Troxel*); *In re Custody of H.S.H.K.*, 533 N.W.2d 419 (Wis. 1995) (four factor *de facto* parenthood test); *Clifford K. v. Paula S.*, 619 S.E.2d 138 (W. Va. 2005) (adopting Wisconsin's *de facto* parent test).

[6] *See, e.g., Kazmierazak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (nonparent in same-sex relationship sought parental rights); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001) (fit biological parent may not lose custody to a nonparent unless nonparent proves by clear and convincing evidence that the biological parent is unfit or that the parental custody would cause physical or significant, long term emotional harm to the child); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. 2005) (refusing to recognize a psychological parent right even when the nonparent was called "daddy" by the children and he had co-parented the children since their birth); *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999) (former same-sex partner was not entitled to visitation); Petition of Ash, 507 N.W.2d 400 (Iowa 1993) (former boyfriend not entitled to visitation with biological mother's child); *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (mother's same-sex partner not entitled to visitation or custodial rights over objection of biological father after biological mother died); *In re Nelson,* 825 A.2d 501 (N.H. 2003) (rejecting claim by nonparent to parental rights over objection of fit, biological parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (rejecting claim to visitation by former same-sex partner over objection of fit, biological parent); *Brewer v. Brewer*, 533 S.E.2d 541 (N.C. Ct. App. 2000) (rejecting claim to de facto parent status over objection of fit, biological parent); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (rejecting claim to parental rights over objection of fit, biological parent); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (biological mother's former partner in a same-sex relationship had no claim to visitation); *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. Ct. App. 2003) (rejecting claim by same-sex partner for visitation, explaining that the *in loco parentis* status is temporary, ending when the child is no longer under the *in loco parentis* person's care); *Jones v. Barlow*, 154 P.3d 808, 2007 UT 20 (Utah 2007); *Surles v. Mayer*, 628 S.E.2d 563 (Va. Ct. App. 2006).

afforded to third parties, regardless of who they are or what label is attached to them. No court (or legislature, or executive) in the United States has the authority to strip a fit, biological parent of her fundamental rights without affording her the constitutionally required due process.

The Declaration of Independence proclaims that

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The purpose of government, then, is to protect the unalienable rights of its citizens to life and liberty, not to destroy them. In fact, the Declaration goes on to proclaim that there comes a time when government abuses require the people to throw off abusive government. With terms so clear concerning the duty of government to *protect* the people's rights and the duty of the people to rein in government that is abusive of the people's rights, there can be no argument that government has authority to strip a fit, biological parent of her unalienable right to parent her child.

The Fourteenth Amendment due process guarantee is a constitutional guarantee that government will not improperly deprive people of their unalienable rights. The due process guarantee requires that certain *procedure* be afforded before unalienable rights be infringed. Although neither Congress nor the United States Supreme Court has articulated what process is due before a fit, biological parent can be stripped of *custody* in a dispute with a third party who was declared to be a parent, the Supreme Court has articulated the minimum due when a third party seeks visitation over the objections of the fit, biological parent. In those circumstances, the

minimum is that "some special weight" must be afforded to the parent's preference. The Court has also articulated the minimum required in a parental rights termination case. The point is that some process is guaranteed to Miller, as the fit biological parent, and none has been afforded her. As a result, the Order violates the procedural due process guarantee as well as Miller's fundamental parental rights.

II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN TRANSFERING CUSTODY TO JANET JENKINS

The trial court committed reversible error with respect to six of its findings of fact. The applicable standard of review by this court as to factual errors is clearly erroneous. *See Borden v. Hofman*, 2009 VT 30, ¶ 9, 974 A.2d 1249, 1252; VRCP 52(a)(2). Findings are clearly erroneous if the "trial court's interpretation of the facts is implausible, illogical, or internally inconsistent." *Id.* at ¶ 11.

A. Six of the Trial Court's Factual Findings Should Be Reversed.

1. It is clearly erroneous to find that Jenkins will foster a good relationship between Miller and IMJ (Findings of Fact 12, 20, 74).

This finding is clearly erroneous insofar as Ms. Jenkins testified that she considers Miller's beliefs concerning homosexuality to be bigoted and hateful, that she believes Miller to be a liar (e.g., Miller has made up all the allegations concerning IMJ's negative reactions to visits with Jenkins), and she doesn't believe Miller is a good mother. (Aug. 21, 2009 Tr. at 42, 68-69, 72, 77, 104) ("they teach, you know, hatred and bigotry as far as if you're different from them or the Bible readings") . Although Jenkins denied it, Miller has submitted sworn statements to the court indicating that on the few occasions that Jenkins had visitation with IMJ, Miller was not able to reach IMJ on IMJ's cell phone, Jenkins' cell phone, or Jenkins' home phone. (P.C. 152). Miller also submitted sworn statement indicating that Jenkins created a hostile environment

during drop off and pick up times, refusing to speak directly to Miller and requiring drop off in Vermont to be in a public park rather than Jenkins' home. (P.C. 152). Jenkins did not deny these facts but instead insisted that Miller's conduct required Jenkins to act that way. (Tr. at 84-85). Miller told the court that Jenkins behavior caused IMJ stress. (P.C. 138-39). No direct testimony was offered to rebut this fact. Given these facts and the testimony of Jenkins herself, it is implausible and illogical for the court to have concluded that Jenkins will foster a good relationship between Miller and IMJ.

2. ***It is clearly erroneous to find that Jenkins has demonstrated an ability to communicate and cooperate with Miller (Findings of Fact 18, 67).***

This finding is clearly erroneous insofar as Ms. Jenkins testified that she believes Miller has defamed her, lied to her, and is bigoted and hateful for believing that Jenkins is a sinner. (Tr. at 68, 77, 84-85). Jenkins also admitted that she declined Miller's invitation to open a line of communication. (Tr. at 74, 76-77). Miller also submitted sworn testimony to the court explaining that Jenkins refused to speak with Miller about visitation issues. (P.C. at 151-52). Given these facts and testimony, it is implausible and illogical for the court to have concluded that Jenkins has demonstrated an ability to communicate and cooperate with Miller.

3. ***It is clearly erroneous to find that that Jenkins indicated a willingness to respect Miller's religious and moral instructions of IMJ (Findings of Fact 18, 68, 69).***

Jenkins' own testimony belies the court's finding on this factor. Although Jenkins testified that Miller would be able to take IMJ to church when she had visitation with IMJ and that Jenkins would take IMJ to her church when she had her, the testimony also makes clear that Jenkins would not permit IMJ to attend a conservative, Bible-believing church such as IMJ attended in Virginia and that Jenkins doesn't even attend church (Tr. at 112). While Jenkins testified initially that IMJ could attend a Baptist Church if she preferred that church (Tr. at 44) to

the Unitarian Universalist church (which Ms. Jenkins described as all-inclusive toward views on homosexuality), she later testified that she believes that the church Miller and IMJ attend teaches "hatred and bigotry" and that she wouldn't allow IMJ to attend a church that taught that homosexuality is a sin. In fact, Jenkins testified that what IMJ believes about homosexuality is hateful and bigoted.

Jenkins: I'm a Unitarian Universalist. It's all-inclusive. It basically teaches love and all-inclusiveness.

The Court: What I – I don't understand what that means. I'm sorry.

A: Unitarian Universalist or the all-inclusive? Meaning that because I'm gay, they're – they're not going to segregate me out and not – I mean, some churches, they – they teach, you know, hatred and bigotry as far as if you're different from them or the Bible readings and their interpretation thereof.

* * *

The Court: And --- and – and forgive me on this – on – on this question as well, but the – the – how does that – do those – do those just teachings compare with the religious teachings that Isabella is getting now?

* * *

A: Well, I know that they're saying that my being gay is a sin, and that's why I shouldn't have my daughter, is because I'm gay. It's all based on that.

The Court: "Who's 'they'?"

A: The Baptist Church and Lisa Miller.

* * *

Q: [Y]ou also in – in your expressions of religious tolerance indicated that if a church teaches that homosexuality is a sin – which is an orthodox Biblical belief . . . . that it is teaching hatred and bigotry. Is that what you said?

A: Yes.

Q: Okay. So in other words, if – if we followed you correctly, when you suggest that you'd be happy to go with Isabella anywhere she wants to go, Baptist, Universalist Unitarian, pick a religion, that only goes so far, as long as they don't teach 'hatred and bigotry,' right?

A: Absolutely. That is my view.

Q: So –

A: Yes.

Q: -- as long as they don't teach what Isabella already believes, right?

A: Right. I won't . . . will not be bringing her to . . . that type of establishment.

(Tr. at 42-43, 68-69). Ms. Jenkins also called those who believe that teaching seven year old IMJ that homosexuality is a sin are "radical." (Tr. at 119) . Even more troubling on this factor is that IMJ has already made a personal decision to accept Christ as her Savior, reads the Bible daily, and knows from reading the Bible what is right and wrong. (P.C. at 146). Jenkins will directly undermine those beliefs. The court's conclusion that Ms. Jenkins indicated a willingness to respect Ms. Miller's religious and moral instructions of IMJ is clearly erroneous.

4. It is clearly erroneous to find that there was no evidence of abuse by Ms. Jenkins toward IMJ (Findings of Fact 79).

The court's conclusion that there was *no* evidence of abuse is clearly erroneous insofar as Ms. Miller and third parties testified to abnormal behavior by IMJ after her visits with Ms.

Jenkins. One teacher became so concerned about IMJ's behavior, particularly in response to a discussion she had with IMJ about "good touch" and "bad touch" that she reported the incident to Child Protective Services. (P.C. at 136-37). Ms. Miller had also testified in the past about IMJ's disturbing behaviors after visits with Ms. Jenkins. (P.C. at 151-52). The court never addressed the allegations, instead simply finding that there was *no* evidence of abuse. It is beyond dispute that Miller introduced much evidence of abuse. The court's failure even to address it constitutes clear error. (Tr. at 77).

5. *It is clearly erroneous to find that Ms. Miller testified under oath and she would comply with future Vermont orders (Findings of Fact 39).*

This finding is clearly erroneous as it has no support in the record. Neither the court nor Jenkins has ever cited to testimony in the record to support this finding, and counsel for Miller knows of none. In fact, Miller was at all times careful not to offer any blanket assurance of compliance because she was not certain whether visits with Jenkins might harm her child. As a result, she carefully declined to make promises she could not keep. For example, when IMJ began attending school full time, the court held a hearing on modification of the prior visitation schedule. The order reflects that Miller would not stipulate to terms of visitation, again because she would not promise to give visitation without knowing how it would impact her daughter. (*See* December 31, 2007 Order Modifying Visitation; *see also* P.C. 158).

6. *It is clearly erroneous to find that Ms. Miller had no justification for denying parent-child contact to Ms. Jenkins (Findings of Fact 60).*

This finding is clearly erroneous for two reasons. First, the court disregarded the testimony of third parties, and Miller, concerning the frightening behavior or IMJ after her visits with Ms. Jenkins. (P.C. at 134-37). Surely, concern over the safety of her child is not tantamount to "no justification." Second, it was clearly erroneous to conclude that Miller had "no

justification" for denying parent-child contact when Jenkins admits that she believes IMJ's and Miller's religious beliefs are hateful and bigoted (and therefore would directly undermine IMJ's religious beliefs), and that Jenkins is still involved in the homosexual lifestyle, which is documented to be emotionally, psychologically, and physically unhealthy. (Tr. at 42; P.C. at 152-56 & exhibits thereto). The court failed to even acknowledge the testimony. Instead, the court refused even to permit Jenkins' expert to be cross-examined on the issue of whether children exposed to the homosexual lifestyle may be at increased risk for emotional, mental, and even physical harm. (Tr. at 170). It was clearly erroneous for the court to find that Miller had *no* justification for denying parent-child contact.

B. The Trial Court Erred in Awarding Sole Legal and Physical Custody to Ms. Jenkins.

Applying the statutory factors set forth in 15 V.S.A. § 665, the trial court erred in awarding sole legal and physical custody to Ms. Jenkins. This Court will reverse the best interest determination if not supported by the findings. *Cloutier v. Blowers*, 172 Vt. 450, 452, 783 A.2d 961, 963 (2001). As discussed above, the trial court erred in its analysis of several of the factors. First, the trial court erred in concluding that IMJ has a good relationship with Jenkins. It based that conclusion on Jenkins' relationship with IMJ from the time of IMJ's birth until age seventeen months, at which time Miller and Jenkins separated and lived in two different states. At the time of the court's order, November 2009, IMJ was 7 ½ years old. The psychological expert who testified on behalf of Jenkins had never met IMJ or observed any interaction between IMJ and Jenkins. As a result, she could not testify to the relationship between IMJ and Jenkins now and certainly could not testify to what, if any, bonding had taken place between IMJ and Jenkins before IMJ moved to Virginia at age seventeen months. All that the expert testified to

was generalities about child bonding. (Tr. at 137). Any grandparent who lives apart from their grandchildren can tell you that a grandchild who last saw the grandparent at seventeen months old is not likely to remember the grandparent several years later. The finding of parent-child bonding between IMJ and Jenkins is pure speculation.

The court attempted to bolster its conclusion to transfer custody by stating that Miller's refusal to comply with prior court orders "bears adversely on the fitness on the custodial parent." Order at 15. The court, however, has never found Miller to be unfit. Rather, it has specifically found Miller to be fit in prior orders and, in the current order, concluded that Miller is capable of providing a safe environment with proper food, clothing, and medical care, and that she is able to meet IMJ's present and future developmental needs. (P.C. 15-16, 128). The court's conclusion on this factor is not supported by the findings.

The trial court also erred in concluding that the abuse factor does not weigh against either Miller or Jenkins. Section 665(b)(9) states that the court should consider evidence of abuse as defined in § 1101 of Title 15. Section 1101 incorporates the definition of abuse contained in 33 V.S.A. § 4912. That section defines an abused or neglected child as "a child whose physical health, psychological growth, and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare." The trial court has repeatedly been presented with evidence that IMJ has suffered psychologically after her visits with Ms. Jenkins. (PC at 134-40). Nevertheless, the court has refused to directly address the allegations, instead simply dismissing the allegations. The court has apparently credited Jenkins' testimony even though she testified at the August 2009 hearing that she clearly believes everyone lies except her. (Tr. at 77). In the face of allegations

suggesting abuse, the finding that the abuse factor did not weigh in favor of either party is in error.

CONCLUSION

The trial court's decision to switch custody away from IMJ's fit, biological parent is unprecedented. The fact that the court made its decision without affording Miller a constitutionally guaranteed minimum due process or, for that matter, even discussing Miller's constitutional rights, requires that it be reversed. Separately, the court's decision should be reversed because it made clearly erroneous findings of facts and made a best interest determination that is not supported by the findings. We therefore ask this Court to reverse the order switching custody to Jenkins.

Mathew D. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
2n[d] Floor
Maitland, FL 32751
Telephone 800-671-1776
Facsimile 407-875-0770
Attorney for Appellant

Stephen M. Crampton
Rena M. Lindevaldsen
LIBERTY COUNSEL
100 Mountain View Road
Suite 2775
Lynchburg, VA 24502
Telephone 434-592-7000
Facsimile 434-592-7700

Attorneys for Appellant

Norman C. Smith, Esq.
76 Lincoln Street
Essex Junction, VT 05452
Telephone 802-288-9088
Facsimile 802-879-9640
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Counsel for Appellant certify that based on the word count of the Microsoft Word, the number of words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and certificate of compliance is 8,145.

STATUTORY ADDENDUM

15 V.S.A. § 665. Rights and responsibilities order; best interests of the child

§ 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:

(1) 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;

(2) 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;

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

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

(5) 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;

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

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

(8) 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

(9) 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 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 but not limited to section 2451 of Title 13, the parent with physical responsibility shall be considered the custodial parent. (Added 1985, No. 181 (Adj. Sess.), § 3; amended 1993, No. 228 (Adj. Sess.), § 6.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of INITIAL BRIEF OF APPELLANT has been furnished by regular U.S. Mail delivery this 5th day of March, 2010, to the following:

Jennifer Levi, Esq.
Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 2108
Attorney for Defendant-Appellee

Michelle A. Kenny, Esq.
Kenlan Schwiebert Facey & Goss, P.C.
PO Box 578
Rutland, VT 05702
Facsimile: 802-775-1581
Attorney for the minor child

Tara J. Devine, Esq.
Lorentz Lorentz & Harnett
26 Court Street
Rutland VT 05701
Facsimile: 802-775-9896
Guardian ad Litem

Rena M. Lindevaldsen