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2000 Survey of Rhode Island Law: Cases: Family Law

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Family Law. *Goodson v. Goodson,* 744 A.2d 828 (R.I. 2000). The Rhode Island Family Court is limited by federal law in its ability to freely divide military pensions as marital property pursuant to a divorce. The provisions of the Uniformed Services Former Spouses' Protection Act (USFSPA) preempt state law on the issue and provide that a state may divide only the retiree's "disposable retired pay," as defined in the statute, at the time the divorce decree is entered.

FACTS AND TRAVEL

On November 28, 1988, the plaintiff, Diana Goodson (plaintiff), and the defendant, George Osborn Goodson, Jr. (defendant), were granted a divorce by the Rhode Island Family Court.[1] Paragraph 13 of the final decree provided that fifty percent of defendant's "gross government monthly pension" was to be paid to plaintiff by way of a direct allotment.[2] The government began making the required payments to plaintiff in 1991.[3] The payments represented fifty percent of the defendant's monthly military retirement pay after a deduction for federal income taxes.[4] Therefore, the amount the plaintiff actually received was less than half of the defendant's gross monthly pension amount as provided for by the decree.[5]

In 1997, plaintiff filed a motion with the family court seeking a declaration that defendant was in contempt of court by failing to make the required payments as stated in the divorce decree.[6] On August 31, 1998, the family court declared defendant in contempt and ordered him to pay plaintiff the difference between fifty percent of his pre-tax monthly pension and the amount plaintiff actually received.[7] In its decision, the family court justice stated that

1. *See* Goodson v. Goodson, 744 A.2d 828, 828 (R.I. 2000).
2. *Id.* at 829.
3. *See id.* The divorce decree also provided that until the allotment payment could be effected, the defendant would personally pay the plaintiff the required amount. The defendant paid the plaintiff $1,274 from February, 1988, the required commencement date, through 1991, when the government began paying the plaintiff via direct allotment. The $1,274 paid by the defendant represented fifty percent of the gross monthly pension amount he received from the government each month.
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*

the language of the decree was clear and that the court had interpreted "gross income" in accordance with the accepted legal definition of the term when used in property settlement agreements.[8]

Defendant appealed the decision arguing that federal law, specifically the USFSPA,[9] restricts the manner in which the family court may divide military pensions and thus, asserting that the trial justice erred in applying its own definition of "gross income" rather than the one provided for by the federal statute.[10]

BACKGROUND

In 1981, the United States Supreme Court held that state courts were preempted from considering military retirement pensions as marital property for the purposes of division upon divorce.[11] Thereafter, Congress enacted the USFSPA to protect former military spouses from being denied a fair portion of marital property earned during the marriage.[12] The USFSPA authorizes state courts to divide military retirement pensions to the extent of the service member's "disposable retired or retainer pay."[13] The United States Supreme Court validated Congress's intent in 1981 in its decision in *Mansell v. Mansell*.[14] In *Mansell*, the court confirmed that the USFSPA empowered the states to divide military pensions incident to divorce.[15] However, the court expressly held that the states only have the power to divide the service member's "disposal retired or retainer pay" as defined under the act at the time the specific divorce decree was entered.[16]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court, citing *Mansell*, determined that the USFSPA limited the ability of the family court to divide defendant's pension to the extent of his disposable retired or re-

8. *See id.*
9. 10 U.S.C. § 1408 (1982).
10. *See Goodson*, 744 A.2d at 829.
11. *See* McCarty v. McCarty, 453 U.S. 210 (1981) (holding that under the Supremacy Clause of Article VI of the United States Constitution, states were powerless to divide federal military benefits).
12. *See Goodson*, 744 A.2d at 830.
13. *Id.* (quoting 10 U.S.C. § 1408(e)(1) (1982)).
14. 490 U.S. 581 (1989).
15. *See Goodson*, 744 A.2d at 831 (citing *Mansell*, 490 U.S. at 588-89).
16. *Id.* (quoting *Mansell*, 490 U.S. at 588-89).

tainer pay.[17] The court stated that the version of USFSPA in effect at the time the divorce decree was entered in the present case defined "disposable retired or retainer pay" as total monthly retired or retainer pay to which a member is entitled less amounts which are properly withheld for federal, state or local income tax purposes.[18] Thus, regardless of the language in the divorce decree, plaintiff was entitled to receive only one-half of defendant's monthly pension, less any federal, state or local income taxes withheld on that amount.[19]

The supreme court conceded that plaintiff was thus, in effect, double-taxed on the pension amount,[20] but stated that the court was obliged to follow *Mansell* and its interpretation of the statutory language in USFSPA.[21] Thus, the decision of the trial justice was reversed.[22]

CONCLUSION

In *Goodson v. Goodson*, the Rhode Island Supreme Court determined that the Rhode Island Family Court is limited in its authority to divide military pension benefits between spouses pursuant to a divorce. Following the United States Supreme Court guidance in *Mansell v. Mansell*, the Rhode Island Supreme Court held that states are bound by the federal provisions in USFSPA and can only divide the pension benefits to the extent of the retiree's "disposable retired or retainer pay" as defined in the statute.

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17. *See id.* (citing *Mansell*, 490 U.S. at 588-89).

18. *Id.*

19. *See id.*

20. *See id.* The court discussed how the recipient of military pension benefits may be subject to double taxation on the amount received due to USFSPA provisions. The government deducts federal income tax from the pension amount prior to the disbursement to the recipient. The recipient of this post-tax amount must also pay personal federal income tax on the amount received.

21. *See id.*

22. *See id.*

Family Law. *Gormly v. Gormly*, 760 A.2d 1241 (R.I. 2000). When receipt of a settlement was not conducted in a timely fashion, a former wife was entitled to increase in value her share of her former husband's 401(k) plan prior to receipt of settlement.

In *Gormly v. Gormly*,[1] the Rhode Island Supreme Court held that a trial justice has broad discretion in dividing marital assets.[2] Accordingly, the trial judge did not abuse his discretion when he gave the former wife the increased value of her proportionate share of a 401(k) plan pursuant to a Qualified Domestic Relations Order (QDRO) from the date of division of the plan to the actual receipt of the settlement agreement.[3]

FACTS AND TRAVEL

John F. Gormly, Jr. (plaintiff) and Linda R. Gormly (defendant) were divorced in June 1995.[4] The trial judge entered a QDRO as an order of the court in September 1995.[5] The judge divided the plaintiff's retirement benefits, a 401(k) plan, pursuant to the final judgment of divorce.[6] The QDRO contained several provisions. The first was that the defendant was entitled to half of the plaintiff's vested retirement benefit plan.[7] Another provided that the defendant would not share in the increase or decrease of contributions made after October 1994.[8] Also, the order provided that the defendant would not share in investment gains or losses under the plan after October 1994.[9] Further, the family court retained jurisdiction to amend the order only for purposes of establishing or maintaining its qualification as a QDRO.[10] Finally, the order provided that no amendment of the order would require the plan to provide any type or form of benefit or option not otherwise provided for by the plan.[11]

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1. 760 A.2d 1241 (R.I. 2000).
2. *See id.* at 1243.
3. *See id.*
4. *See id.* at 1241.
5. *See id.* at 1241-42.
6. *See id.* at 1241.
7. *See id.* at 1242.
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*

In January 1996, a motion was filed by the defendant seeking to modify the QDRO as it pertained to her interests and/or dividends after October 1994.[12] She argued that she was entitled to increased earnings because the value of the plan had increased during the delay in effectuating the QDRO.[13] The defendant did not receive her QDRO settlement until March 1996, approximately seventeen months after the date designated for the division of the plan.[14]

The motion was heard in February 1997.[15] The plaintiff countered the defendant's arguments with the plain language of the QDRO.[16] The plaintiff argued that the language clearly meant that the defendant was not entitled to increased benefits after October 1994.[17] The defendant argued that the plaintiff had received the benefit of the use of the money.[18] The trial justice reasoned that since the money had not been distributed until March 1996, the defendant was entitled to the increase in the value of the plan, excluding contributions made after October 1994.[19]

Of course, following several conflicting orders, both parties objected to the offers proffered by the other side.[20] In October 1997, the trial judge entered another order providing that the figure for the income produced from the plan from February 1996, to the date of distribution would be added to the defendant's share; such distribution was to be made in October 1997.[21] The plaintiff appealed this order, and three others, in November 1997.[22] Thereafter, the supreme court proceeded to decide the case on the merits.[23]

ANALYSIS AND HOLDING

The plaintiff argued that the trial judge abused his discretion by overstepping his jurisdiction and ignoring the plain language of

12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.* at 1243.
23. *See id.*

the QDRO.[24] By law, the family court has jurisdiction over property issues relating to divorce.[25] Further, any assignment of property by the family court is final, subject only to any right of appeal.[26] Also, the original September 1995, QDRO provided that the family court retained jurisdiction to amend the QDRO only for the purposes of establishing or maintaining the qualification of the QDRO as such.[27] The court noted that no appeal was ever taken from the initial QDRO, nor was there ever an attempt to amend the QDRO for purposes of amending or maintaining the qualification of the QDRO.[28]

The court began by noting the well-established rule that allowing or disallowing amendments in a divorce action is at the trial judge's discretion.[29] In addition, the court noted a trial judge's wide discretion in dividing marital property justly and fairly between the parties.[30] Unless it is shown that a trial judge either improperly exercised or abused his discretion, the Rhode Island Supreme Court will not disturb the findings.[31]

The court decided there was no abuse of discretion.[32] The court noted that the trial judge's decision was based on the fact that the distribution of the plan was not conducted in a timely fashion.[33] In fact, seventeen months had passed between the original date designated for division and the defendant's actual receipt of the QDRO settlement.[34] During that interval, the plaintiff enjoyed the benefit of the use of the defendant's money.[35] In essence, the court opined, this action was neither a change nor an amendment to the September 1995 QDRO; the trial justice merely compensated the defendant for the plaintiff's use of her money.[36] For

24. *See id.*
25. *See id.* (citing R.I. Gen. Laws § 8-10-3(a) (1956) (1994 Reenactment)).
26. *See id.* (citing R.I. Gen. Laws § 15-5-16.1(c) (1956) (2000 Reenactment)).
27. *See id.*
28. *See id.*
29. *See id.* (citing Whited v. Whited, 478 A.2d 567, 571 (R.I. 1984)).
30. *See id.* (citing Stevenson v. Stevenson, 511 A.2d 961, 964 (R.I. 1986)).
31. *See id.* (citing Poirier v. Poirier, 267 A.2d 390, 394 (R.I. 1970)).
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*

those reasons, the Rhode Island Supreme Court affirmed the trial justice's decision.[37]

CONCLUSION

In *Gormly v. Gormly*, the Rhode Island Supreme Court addressed the right to the share of an increase in value of a retirement plan in a divorce settlement action from the division date and actual receipt of a QDRO settlement. The court held that the trial judge did not abuse his discretion, nor did he amend or change the plain language of the QDRO, when he gave the proportionate share of the increase of investment gains of a 401(k) plan to an ex-spouse when the ex-spouse's share was not distributed in a timely fashion.

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37. *See id.*

Family Law. *In re Matthew A.*, 743 A.2d 553 (R.I. 2000). In a juvenile delinquency adjudication, prior to the change in the admission form, failure to inform a juvenile that admitting to the commission of a sexual offense in a plea agreement will result in mandatory participation in the sexual offender registry is grounds to vacate the delinquency determination.

In *In re Matthew A.*,[1] the Rhode Island Supreme Court determined whether a justice of the family court erred in granting a motion to vacate the delinquency determination of a juvenile based on the fact that the juvenile's admission was made without knowledge that his admission would subject him to mandatory participation in the sexual offender registry.[2]

FACTS AND TRAVEL

Matthew, who was charged with sexual assault, was fifteen years old when he entered an admission in court.[3] Prior to entering his admission, he was informed that he must have some involvement with the sex offender program but was never advised about the sexual offender registration requirement.[4] Based on his admission, Matthew was adjudicated as a delinquent.[5] Two years later, after learning that he was required to register with the sex offender registry, Matthew filed a motion to vacate the adjudication of delinquency based on the premise that, due to his lack of knowledge about the sexual offender registration requirement, his admission was involuntary.[6] Between the time that Matthew made his admission and the motion to vacate, the family court altered its admission form.[7] The form sets forth the consequences of entering a guilty plea, and now includes the sexual offender registration requirement.[8]

The family court granted Matthew's motion to vacate and the state filed a petition for certiorari claiming that the family court justice erred.[9] The state asserted that the sexual offender registra-

1. 743 A.2d 553 (R.I. 2000).
2. *See id.* at 553.
3. *See id.*
4. *See id.* at 554.
5. *See id.* at 553.
6. *See id.* at 554.
7. *See id.*
8. *See id.* at 555.
9. *See id.* at 554.

tion requirement is a collateral consequence.[10] Therefore, Matthew did not need to be informed about it for his admission to be valid.[11] In response, Matthew argued that the issue is moot due to the fact that the information is now supplied on the admission form.[12]

BACKGROUND

Rhode Island law requires offender registration and community notification upon a convicted sexual offender's release from prison, probation or parole.[13]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that, due to the policy involved with fully informing a juvenile of the consequences of a guilty plea, Matthew should be given the same information that all future sexual offenders will receive.[14] Therefore, the family court did not err in vacating the delinquency adjudication.[15] The court declined to evaluate the parties' arguments and said that the court's ruling is based solely on the change in the admission form.[16] This change will alert all future sexual offenders to the registration requirement.[17] In fact, the court refused to extend its holding to a situation where a juvenile was not informed and there had been no change in the admission form.[18] The state's petition for certiorari was denied and the writ previously issued was quashed.[19]

CONCLUSION

In re Matthew A. provides a very narrow holding. The effect of this decision is to invalidate, upon motion, a juvenile's delinquency adjudication based on a guilty plea to a sexual assault charge, if that juvenile was not informed of the sexual offender registration

10. *See id.*
11. *See id.*
12. *See id.* at 555.
13. *See* R.I. Gen. Laws § 11-37.1-5 (1956) (1996 Reenactment).
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*

requirement and the plea was made prior to the change in the admission form providing this information.

Dena M. Castricone

Family Law. *Logan v. Logan*, 763 A.2d 587 (R.I. 2000). The Rhode Island Supreme Court upheld a denial of a husband's motion to modify a previous child custody award despite the husband's contention that his former wife's living with her fiancé warranted modification of a child custody decree.

FACTS AND TRAVEL

On August 4, 1997, Jeffrey S. Logan (Mr. Logan) and Anita B. Logan (Mrs. Logan) were divorced.[1] By an order of the family court, both parties were awarded joint custody of their daughter, Samantha Grace Logan (Samantha).[2] Samantha was four and a half years old at the time of the divorce.[3] While physical possession of Samantha was given to Mrs. Logan, Samantha stayed with Mr. Logan three nights per week.[4] One year after the divorce, Mr. Logan filed a motion to modify the child custody agreement.[5] Mr. Logan argued that because his wife was living with her fiancé, Samantha's "'sense of values and her understanding of what's right and wrong' were being adversely affected by the wife's behavior."[6] On November 8, 1998, the family court denied Mr. Logan's motion.[7] On appeal, Mr. Logan argued that the trial justice erred as a matter of law.[8]

ANALYSIS AND HOLDING

The family court has jurisdiction over child custody determinations pursuant to the Uniform Child Custody Jurisdiction Act.[9] In *Pettinato v. Pettinato*,[10] the Rhode Island Supreme Court held that child custody awards must be made in the best interest of the child[11] and further held that the best interest of the child is to be left within the sole discretion of the trial judge.[12] Therefore, the

1. *See* Logan v. Logan, 763 A.2d 587, 588 (R.I. 2000).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. *Id.* at 589.
7. *See id.*
8. *See id.*
9. *See id.*; R.I. Gen. Laws § 15-14-4 (1956) (2000 Reenactment).
10. 582 A.2d 909 (R.I. 1990).
11. *See Logan*, 763 A.2d at 589 (quoting *Pettinato*, 582 A.2d at 913).
12. *See id.* (citing *Pettinato*, 582 A.2d at 913).

supreme court must use an abuse of discretion standard when reviewing a family court's denial of a motion to modify a prior custody award.[13]

In determining whether an abuse of discretion has occurred, the supreme court must determine whether the trial justice has "properly considered what custody arrangements are in the best interest of the children."[14] However, before a final child custody decree may be modified, the moving party must establish by a fair preponderance of the evidence that the conditions or circumstances existing at the time the decree was entered have so changed that it should be modified in the interest of the children's welfare.[15] The family court has no discretion to amend a final child custody decree if the moving party fails to meet this burden.[16]

In this case, the supreme court found that Mr. Logan failed to produce any evidence that would indicate that a sufficient change in circumstances now existed since the initial child custody decree was granted.[17] The supreme court found that neither the child's increased age, nor Mrs. Logan's living with her fiancé were sufficient reasons to require a modification of the child custody award.[18] The court also found that Mrs. Logan's living with her fiancé was not causing Samantha any psychological trauma.

CONCLUSION

In *Logan v. Logan*, the Rhode Island Supreme Court upheld a family court's denial of a husband's motion to modify a previous child custody award simply because his ex-wife began living with her fiancé. The supreme court found that the husband failed to present any evidence that would indicate that his ex-wife's residing with her fiancé had any detrimental effect on the child's psychological welfare.

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13. *See id.* (citing Suddes v. Spinelli, 703 A.2d 605 (R.I. 1997)).
14. *Id.* (quoting *Suddes*, 703 A.2d at 607).
15. *See id.*
16. *See id.*
17. *See id.* at 590.
18. *See id.*

Family Law. *Poisson v. Bergeron*, 743 A.2d 1037 (R.I. 2000). Appeals of all matters relating to contempt in the family court may only be sought by a petition for certiorari pursuant to section 14-1-52(b)[1] of the Rhode Island General Laws.

FACTS AND TRAVEL

Louise G. Bergeron (Bergeron) brought a motion in family court to adjudge her former husband, Lionel A. Poisson (Poisson), in contempt for failure to pay child support.[2] The family court denied Bergeron's motion[3] and she appealed the decision to the Rhode Island Supreme Court.[4] The court ordered both parties to show cause why the appeal should not be summarily decided and to discuss the appropriateness of raising the family court's denial of a contempt motion on direct appeal.[5] The court heard oral arguments on December 7, 1999, and decided that cause had not been shown.[6] The appeal was denied and dismissed.[7]

BACKGROUND

In *Bonney v. Bonney,*[8] the court dismissed a direct appeal regarding an affirmative finding of contempt and held that appeal of an affirmative finding of contempt must be sought by writ of certiorari.[9] The court stated that the "statute clearly delineates [that] the sole method of securing appellate review" is through petition for writ of certiorari.[10]

In *Armentrout v. Armentrout*,[11] the court issued a writ of certiorari to review the family court's denial of a motion to adjudicate a party in contempt, but did not address whether the procedure was required.[12] In *McKenna v. Guglietto*,[13] the court heard an appeal

1. *See* R.I. Gen. Laws § 14-1-52 (1956) (2000 Reenactment).
2. *See* Poisson v. Bergeron, 743 A.2d 1037, 1037 (R.I. 2000).
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.* at 1038.
8. 695 A.2d 508 (R.I. 1997).
9. *See Poisson,* 743 A.2d at 1038 (citing *Bonney*, 695 A.2d at 510).
10. *Id.* (quoting *Bonney*, 695 A.2d at 510).
11. 691 A.2d 559 (R.I. 1997).
12. *See Poisson,* 743 A.2d at 1038 (citing *Armentrout*, 691 A.2d at 560).
13. 683 A.2d 369 (R.I. 1996).

of a family court order that granted a motion to modify child support, but noted that the proper means of obtaining review was through petition for writ of certiorari and that "only in the rarest of circumstances will we allow any deviation from the required procedure."[14]

ANALYSIS AND HOLDING

In *Poisson v. Bergeron*, the issue addressed by the court was whether the appeal was properly before the Rhode Island Supreme Court.[15] Section 14-1-52(b) of the Rhode Island General Laws provides, in pertinent part:

> [e]very person aggrieved by any decree . . . of the family court relating to modification of alimony or of child support, or a finding of contempt for failure to pay alimony or child support, may, within twenty (20) days . . . seek review of questions of law in the supreme court by petition for writ of certiorari . . . .[16]

Bergeron argued that because the family court did not affirmatively find contempt, but only *refused* to find contempt, the provisions in section 14-1-52(b) regarding appeal by writ of certiorari did not apply to this case.[17] She asserted that the appropriate means to obtain review was through a timely appeal.[18] Poisson argued that the only means of obtaining review was to petition the court for a writ of certiorari.[19] He contended that a refusal by the family court to find contempt is still "relating to" a finding of contempt, and thus, the writ of certiorari requirements in section 14-1-52(b) had been triggered.[20]

The court found that *McKenna* did not bear directly on the issue because section 14-1-52(b) "expressly provides" that decrees (which are by their very nature, affirmative) relating to modification of child support may only be reviewed by petition for writ of certiorari.[21] The court acknowledged that the statute does not di-

14. *Poisson*, 743 A.2d at 1038 (quoting *McKenna*, 683 A.2d at 369).
15. *See id.* at 1037.
16. R.I. Gen. Laws § 14-1-52 (1956) (2000 Reenactment).
17. *See Poisson*, 743 A.2d at 1038.
18. *See id.*
19. *See id.*
20. *See id.* at 1037.
21. *See id.* at 1038.

rectly speak to a denial of a contempt motion.[22] However, the court construed the words "relating to" as modifying the words "finding of contempt," regardless of whether the family court affirmatively found contempt.[23] Therefore, because of this construction of the statute, and because of prior holdings *requiring* appeal by petition for writ of certiorari once a situation falls within section 14-1-52(b),[24] the court held that review by the Rhode Island Supreme Court of matters relating to contempt in the family court, including the denial of a motion to find contempt in the family court, may be sought only by a petition for writ of certiorari.[25]

CONCLUSION

In *Poisson v. Bergeron*, the Rhode Island Supreme Court clarified prior law relating to the means of appealing family court contempt motions. The court held that regardless of whether the family court granted or denied a motion to adjudge contempt, the proper and sole method of obtaining review is through petition for writ of certiorari.

Tanya J. Zorabedian

22. *See id.*
23. *See id.*
24. *See id.*
25. *See id.*

Family Law. *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000). A former same sex partner and non-biological de facto parent may seek visitation of her former partner's biological child in family court. It is up to the family court to determine whether visitation is in the best interest of the child.

FACTS AND TRAVEL

In *Rubano v. DiCenzo*, Maureen Rubano (Rubano) and Concetta DiCenzo (DiCenzo) were involved in a committed relationship for three years when they decided to raise a child together.[1] Using an anonymous donor, DiCenzo was artificially inseminated and gave birth to a baby boy in 1992.[2] DiCenzo listed the child's last name as Rubano-DiCenzo on his birth and baptismal certificates and sent out birth announcements identifying both parties as parents.[3] The three lived together for four years in Massachusetts and Rubano and DiCenzo raised the boy as their son.[4] In 1996, the couple separated and DiCenzo moved to Rhode Island with the boy.[5] A visitation schedule was worked out by the parties, but when that agreement failed, Rubano petitioned the family court to establish her de facto parental status and obtain visitation.[6] Again, the parties came to an agreement, and entered a consent order providing Rubano visitation with the child in exchange for her release of her right to pursue any further action.[7] The family court entered this agreement as an order of the court.[8] Once again, DiCenzo reneged on the agreement, thwarting Rubano's efforts to visit the boy.[9] Rubano returned to the family court seeking enforcement of the court-recognized agreement.[10] DiCenzo responded that the family court lacked jurisdiction to enforce the consent order.[11] The Chief Justice of the Rhode Island Family

1. *See* Rubano v. DiCenzo, 759 A.2d 959, 961 (2000).
2. *See id.* Rubano paid for part of the insemination procedure.
3. *See id.*
4. *See id.*
5. *See id.*
6. *See id.* at 961-62.
7. *See id.*
8. *See id.*
9. *See id.* at 963.
10. *See id.*
11. *See id.*

Court, uncertain as to his authority, certified the following three questions to the Rhode Island Supreme Court:[12]

> Question I: Does a child, biological mother, and same sex partner, who have been involved in a committed relationship constitute a 'family relationship' within the meaning of G.L. § 8-10-3, such that the Family Court has jurisdiction to entertain a miscellaneous petition for visitation by the former same sex partner when the same sex partner is no longer engaged in the committed relationship?[13]
>
> Question II: If the answer to the above question is in the negative, does such a conclusion violate Article I, section 5 of the Rhode Island Constitution?[14]
>
> Question III: If the answer to question 1 is in the affirmative, then does a non-biological partner, who has been a same sex partner with a biological mother have standing to petition the Rhode Island Family Court for visitation pursuant to G.L. 15-5-1 et al.[15]

BACKGROUND

In addition to the child's biological parents, the Rhode Island General Laws provide visitation rights for a child's grandparents[16] and siblings.[17] The laws of this state make no other provisions regarding who may petition for visitation.

ANALYSIS AND HOLDING

All five justices answered Question I in the negative regarding the portion of section 8-10-3(a) which grants the family court the power to hear "such other equitable matters arising out of the family relationship, wherein jurisdiction is acquired by the court by the filing of petitions for divorce, bed and board and separate maintenance."[18] The court held that the limiting language subsequent to "other equitable matters arising out of the family relation-

12. *See id.* at 963.
13. *Id.*
14. *Id.* at 965.
15. *Id.* at 976-77.
16. *See* R.I. Gen Laws §§ 15-5-24.1-24.3 (1956) (2000 Reenactment).
17. R.I. Gen. Laws §§ 15-5-24.3-24.4 (2000 Reenactment).
18. R.I. Gen. Laws § 8-10-3(a) (1956) (2000 Reenactment).

ship" clearly limits the application of this section to divorce, bed and board and separate maintenance matters.[19]

As to Question II, all five justices agreed that the Question I conclusion does not violate article I, section 5 of the state constitution.[20] However, under its Question II analysis, the majority unearthed two independent, alternative grounds for the family court to exercise jurisdiction over this matter.[21] The first ground for jurisdiction was uncovered in section 15-8-26 of the Rhode Island Uniform Law on Paternity and the second was found in section 8-10-3(a) only a few semicolons away from the portion declared inapplicable in Question I.[22]

Section 15-8-26 says "[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship."[23] According to the court, a de facto parent is an interested party.[24] In order to qualify as a de facto parent, a party must prove the existence of (1) a parent-like relationship and (2) an agreement to co-parent the child.[25]

Rubano satisfies the first prong of de facto parent test because of her parental bond with the child that was formed over a number of years and both fostered and encouraged by DiCenzo.[26] Rubano lived with the child since birth and, although it is not necessary for the de facto parent determination, helped to plan the child's birth.[27] DiCenzo caused the child's last name to appear as Rubano-DiCenzo on his birth and baptismal records and sent out birth announcements naming Rubano as a parent.[28] Furthermore, the three lived together as a family unit sharing all responsibilities for a period of four years.[29] DiCenzo held Rubano out to be a par-

19. *Rubano*, 759 A.2d at 964-65.

20. *See id.* at 966. "Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which may be received in one's person, property, or character." R.I. Const. art. I, § 5.

21. *See Rubano*, 759 A.2d at 966.

22. *See id.*

23. R.I. Gen. Laws § 15-8-26 (1956) (1996 Reenactment).

24. *See Rubano*,759 A.2d at 966-67 and 975.

25. *See id.*

26. *See id.* at 969.

27. *See id.*

28. *See id.* at 961.

29. *See id.*

ent and Rubano accepted this designation and the responsibilities that came with it.[30]

DiCenzo's voluntary acts of holding Rubano out to be the child's parent and fostering the growth and development of that relationship over a number of years satisfies the second prong of the de facto parent test regarding the agreement.[31] The substance of that agreement requires that the parties intend that the third party be considered a parent regardless of biological relation.[32] The court found such intention evidenced in many of the above-mentioned acts.

Once Rubano was deemed to be a de facto parent, and ultimately an "interested party," the court explained that DiCenzo would be equitably estopped from asserting that Rubano was not a de facto parent to the child to prevent her from seeking visitation.[33] After de facto status was established, the family court will determine if such visitation is in the best interest of the child.[34]

The second independent ground for jurisdiction is under section 8-10-3(a).[35] Pursuant to this statutory section, the family court has jurisdiction over matters "relating to adults who shall be involved with the paternity of children born out of wedlock."[36] Because Rubano and DiCenzo were never married, the child was born out of wedlock.[37] Furthermore, Rubano was involved with the paternity of the child through her joint decision with DiCenzo to have the child via artificial insemination and through her financial responsibility for the procedure.[38] In addition, both decided that the child's last name would be Rubano-DiCenzo, that Rubano's name would appear on the baptismal certificate, that the birth announcements would identify both as parents, and that Rubano would help raise and nurture the child while living together as a family.[39] The court found these factors sufficient to meet the "in-

30. *See id.*
31. *See id.* at 975.
32. *See id.*
33. *See id.* at 968 (citing Pettinato v. Pettinato, 582 A.2d 909 (R.I. 1990)).
34. *See id.*
35. *See* R.I. Gen. Laws § 8-10-3(a) (1956) (2000 Reenactment).
36. *Id.*
37. *See Rubano*, 759 A.2d at 971.
38. *See id.*
39. *See id.*

volved with paternity" requirement.[40] After Rubano was determined to be involved with the paternity and jurisdiction was granted, DiCenzo was again equitably estopped from claiming that Rubano did not have a parent-like relationship with the child.[41]

In essence, the court held that DiCenzo, through her conduct in consenting to and fostering the relationship between Rubano and the child, and through her actions in signing the order granting permanent visitation, rendered her own parental rights less exclusive, presumably surrendering some of her parental rights to Rubano.[42] As the biological parent, DiCenzo still has the parental constitutional rights and the benefit of the presumption that a fit parent makes decisions in the child's best interest. However, those rights DiCenzo are now subject to the child's best interest in maintaining his or her relationship with the other parent.[43] Any diminution in DiCenzo's rights was a direct result of her own actions.[44]

The court did not address Question III because it answered Question I in the negative.[45]

The Concurrence and Dissent

Justice Bourcier filed a concurring and dissenting opinion, with whom Chief Justice Weisberger joined.[46] Justice Bourcier concurred with the majority on the answer to Question I.[47] However, in Question II, he disagreed with the majority's grant of jurisdiction under sections 15-8-26 and 8-10-31(a) asserting that neither statute was enacted for such application.[48] Justice Bourcier also stated that he would answer certified Question III in the negative, arguing that if the Legislature had intended to include former same sex couples it would have done so explicitly.[49] Furthermore, the family court, being a court of special jurisdiction,

40. *See id.*
41. *See id.*
42. *See id.* at 976.
43. *See id.* at 969. In family court, Rubano must prove, by clear and convincing evidence, that the visitation is in the best interest of the child and defeat the constitutional presumption that fit parents make decisions in their child's best interest. *See id.*
44. *See id.*
45. *See id.* at 976-77.
46. *See id.* at 977.
47. *See id.* at 979.
48. *See id.* at 981.
49. *See id.* at 988.

would only have the authority to hear matters over which the Legislature has specifically given jurisdiction.[50]

CONCLUSION

This landmark decision grants the family court jurisdiction over visitation actions brought by non-biological, de facto parents. The court has deliberately crafted a difficult threshold to cross to get into family court. The facts of each case will be carefully scrutinized and the right to seek visitation will only be granted in limited situations like this one. Furthermore, crossing this threshold only gets the de facto parent in the door of the family court; it does not guarantee visitation with the child. That determination is up to the family court. Practically applied, this decision allows one who has functioned as and has been clearly designated a parent by the biological parent the right to seek visitation of the child in family court.

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50. *See id.*