

## *V.C. v. M.J.B.*: The New Jersey Supreme Court Recognizes the Parental Role of a Nonbiological Lesbian “Mother” but Grants Her Only Visitation Rights

V.C. and M.J.B. are lesbians who met in 1992, began dating, and by 1995 had purchased a home together and then “married” each other in a commitment ceremony.<sup>1</sup> During this time, M.J.B. conceived twins through artificial insemination by a sperm donor.<sup>2</sup> V.C. assisted M.J.B. throughout the pregnancy, during the delivery, and in the raising of the children in the few years leading up to the dissolution of their relationship in 1996.<sup>3</sup> Shortly thereafter, M.J.B. refused to accept V.C.’s support money for the children and then decided to discontinue their contact with V.C.<sup>4</sup> Subsequently, V.C. sought joint legal custody and visitation with the children in the New Jersey Superior Court, Chancery Division, Family Part, Essex County.<sup>5</sup> The trial court denied V.C.’s applications for both joint legal custody and visitation, finding that she did not qualify as a parent to the children as to custody and that it was not in the best interests of the children to grant her visitation.<sup>6</sup> The court reasoned that because it was not proven that M.J.B. was an unfit parent, V.C.’s application for joint legal custody was without cause, and because of the animosity between M.J.B. and V.C., the court felt that it would be detrimental to the children’s emotional welfare to allow V.C. visitation.<sup>7</sup> On appeal, the Appellate Division affirmed the trial court’s judgment on the issue of joint legal custody, holding that although V.C. had established a parental relationship with the children, granting her joint legal custody was not in the best interests of the children.<sup>8</sup> On the issue of visitation, the appeals court reversed the lower court’s judgment, finding that M.J.B.’s animosity toward V.C. was insufficient to deny her contact with the children, which the court found to be in the children’s best interests and therefore remanded the proceedings to establish a visitation schedule.<sup>9</sup> M.J.B. appealed the decision challenging the courts’ subject matter jurisdiction, V.C.’s standing to bring the suit, and the

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1. See *V.C. v. M.J.B.*, 748 A.2d 539, 542-44 (N.J. 2000).

2. See *id.* at 542.

3. See *id.* at 542-44.

4. See *id.* at 544.

5. See *id.*

6. See *id.* at 545.

7. See *id.*

8. See *id.* at 545-46.

9. See *id.* at 546.

appellate court's judgments; her motion for a stay was denied.<sup>10</sup> *V.C.* also appealed the decision of the appellate court as to joint legal custody.<sup>11</sup> The New Jersey Supreme Court *held* that (1) it has subject matter jurisdiction even where a third party seeking custody is neither a biological nor an adoptive parent but has sufficiently proven that she has established *de facto* parental status under the circumstances and that (2) allowing such third party standing to intervene in the parent-child relationship does not unconstitutionally infringe on the legal parent's fundamental right to the care, custody, and nurturance of his or her child even where parental unfitness, abandonment, or gross misconduct of the legal parent have not been alleged. *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

In order for a court to hear a case, it must have both personal and subject matter jurisdiction, the latter of which can never be waived.<sup>12</sup> For a court to have subject matter jurisdiction, the party bringing the suit must have proper standing to present a case or controversy to the court.<sup>13</sup> The Constitution of the United States has been interpreted to protect the rights of a parent to the companionship and care of his or her child, and such rights are fundamental in that they may not be restricted without a showing that the parent presents a danger to the welfare or well-being of the child.<sup>14</sup> Under New Jersey statutory law, there is no explicit language addressing the rights or standing authority of an unmarried former domestic partner as to the custody of and visitation with her former partner's biological children.<sup>15</sup> In fact, New Jersey statutes relative to the care, custody, guardianship, and support of children identify only "parents" as appropriate parties to such suits, unless the parent is alleged to be unfit, has abandoned the child, or is dead.<sup>16</sup>

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10. *See id.*

11. *See id.*

12. *See, e.g., Petersen v. Falzarano*, 79 A.2d 50, 54 (N.J. 1951).

13. *See, e.g., Watkins v. Resorts Intern. Hotel & Casino, Inc.*, 591 A.2d 592, 602 (N.J. 1991).

14. *See Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that the Equal Protection Clause of the Fourteenth Amendment guarantees a parent's fundamental right in the care and custody of his or her child); *see also In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976) (holding that the First, Ninth, and Fourteenth Amendments of the Constitution of the United States protect a parent's rights in the care and companionship of her child, as long as it is in the child's best interests).

15. *See V.C.*, 748 A.2d at 547.

16. *See* N.J. STAT. ANN. § 9:2-1 (West 1993). These statutes mention only "parents" as relevant parties to the proceedings discussed therein, except, for example, N.J. STAT. ANN. § 9:2-9 (West 1993), which states that where a parent is grossly immoral or unfit, neglects the child, presents a danger to the child's welfare, or is dead, "any person interested in the welfare of [the] child" may bring an action on behalf of the child and for further relief.

Accordingly, for purposes of these statutes, “[t]he word ‘parent,’ when not otherwise described by the context, means a natural parent or parent by previous adoption.”<sup>17</sup> Thus, a person must fit him or herself into this definition for purposes of childcare, custody, guardianship, and support in order to have appropriate standing to bring a cause of action and afford the court subject matter jurisdiction.<sup>18</sup> Other jurisdictions, however, grant explicit statutory standing to third parties seeking custody or visitation rights despite the lack of biological or adoptive relation.<sup>19</sup>

Although the New Jersey statutes facially limit standing to natural and adoptive parents, relevant case law suggests that the aforementioned statutes in fact do not limit standing for custody and visitation cases to biological and adoptive parents, but that third parties who qualify as parents under the circumstances may have standing if they can establish a significant relationship with the child.<sup>20</sup> This expansive interpretation of the statutes involves a rather complex process through which the court must determine the significance of the relationship alleged to have

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17. N.J. STAT. ANN. § 9:2-13(f) (West 1993).

18. Effectively, a person who is neither a biological nor adoptive parent lacks standing and therefore cannot seek custody of or visitation with another person’s children because he or she does not meet the definitional requirement of a parent, such that under *Stanley* and *In re J.S. & C.*, discussed *supra* note 14, a parent’s constitutionally protected liberty interest in her child would arguably bar a third party from seeking judicial intervention in the care, custody, and companionship pertinent to the parent-child relationship where the parent does not pose a harm to the welfare of the child or is otherwise unfit. See *Stanley v. Illinois* 405 U.S. 645 (1972), *In re J.S. & C.*, 324 A.2d 90 (N.J. Super. Ct. Ch. Div. 1974), *supra* note 14.

19. See, e.g., HAW. REV. STAT. ANN. § 571-46(2), (7) (Michie 1999) (stating that custody may be awarded to any third party other than the father or mother “whenever the award serves the best interest of the child” and that reasonable visitation rights may be awarded to “any person interested in the welfare of the child”); MASS. ANN. LAWS. ch. 208, § 28 (Law. Co-op. 1994) (affording the court authority to award custody to a third party “if it seems expedient or for the benefit of the children”); N.H. REV. STAT. ANN. § 458:17-d (Supp. 2000) (granting grandparents standing to petition for visitation); OR. REV. STAT. § 109.119(1) (1997) (giving “any person who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child” standing as to custody, placement, guardianship or wardship of that child); VA. CODE ANN. § 16.1-241(A)(6) (Michie Supp. 2000) (granting standing to “any party with a legitimate interest” in the custody, visitation, support, control or disposition of a child such that the juvenile court shall have jurisdiction).

20. See, e.g., *Hoy v. Willis*, 398 A.2d 109 (N.J. Super. App. Div. 1978) (holding that there can be a psychological parent-child relationship between a child and someone other than the biological parents); see also *Sorentino v. Family & Children’s Soc’y of Elizabeth*, 367 A.2d 1168 (N.J. 1976) (recognizing that foster parents may have developed a significant relationship with the child such that separation from them might result in psychological harm); *In re Adoption of a Child by P.S.*, 716 A.2d 1171 (N.J. Super. Ct. App. Div. 1998) (holding that foster parents must prove that they have formed a bonded psychological relationship with the child in order to assert custody rights over the child’s natural parent); *In re Guardianship of J.T.*, 634 A.2d 1361, 1370-71 (N.J. Super. Ct. App. Div. 1993) (stating that foster mother had served as child’s psychological parent and that therefore transfer to natural mother was barred because it would result in psychological harm to child).

developed between the third party and the child.<sup>21</sup> First, as a means of asserting jurisdiction, the court may invoke the “exceptional circumstances” doctrine in the absence of an allegation of unfitness, abandonment, or gross misconduct.<sup>22</sup> Under this doctrine, the court may utilize its *parens patriae* power to protect a child from serious psychological harm and allow a third party, whose forced absence would arguably cause the child psychological trauma, to seek custody and visitation of another person’s child where the court otherwise might not have cause for intervention.<sup>23</sup>

The court in *Hoy v. Willis* recognized that the parent-child relationship, protected under the U.S. Constitution, may develop between the child and an individual other than the biological (or adoptive) parent such that biology (or adoption) is not a limiting factor as to the extension of such protection to relationships with certain persons other than the legal parent(s).<sup>24</sup> This relationship, which is often referred to as a “psychological parent-child relationship,” develops where “a third party has stepped in to assume the role of the legal parent who has been unable or unwilling to undertake the obligations of parenthood,” or where the legal parent voluntarily allows and/or encourages the development of a parent-like relationship between the child and the third party.<sup>25</sup> Thus, the role of a psychological parent, which is inherently assumed by a present

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21. See, e.g., *Hoy*, 398 A.2d at 112-15.

22. See *Watkins v. Nelson*, 748 A.2d 558 (N.J. 2000). In *Watkins*, the Court explained that the “extraordinary circumstances” doctrine can be invoked to rebut the presumption in favor of a natural parent where such circumstances exist that may affect the welfare of the child and where there is proof of serious physical or psychological harm or a substantial probability of such harm. *Id.* at 564-65.

23. See *id.* The *parens patriae* power of the state is reflected “in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1137 (7th ed. 1999); see also 24A AM. JUR. 2D *Divorce and Separation* § 946 (1998) (defining “*parens patriae*” as “the power of the state to watch over the interests of those incapable of protecting themselves”). Thus, when the court is acting as *parens patriae* it may limit the freedom and authority of natural parents as to their children’s welfare. See 59 AM. JUR. 2D *Parent and Child* § 11 (1987 & Supp. 2000).

24. See 398 A.2d 109, 112 (N.J. 1978).

25. *V.C.*, 748 A.2d at 549-51. The term “psychological parent” is also referred to as de facto parent or functional parent. *Id.* at 546 n.3. The psychological parent is to be distinguished from a person *in loco parentis*, which is a person who “puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption.” 59 AM. JUR. 2D *Parent and Child* § 75 (1987 & Supp. 2000). The key distinguishing factor is that “the status of being *in loco parentis* is temporary; it may be abrogated at will either by the surrogate parent or by the child.” *Id.* The psychological parent, on the other hand, reflects more of an emotional and psychological connection between parent and child such that the relationship is arguably not abrogable at will, which is the main reason such a relationship is to be protected.

and active biological or adoptive parent, can also be fulfilled “by any other caring adult.”<sup>26</sup>

Consequently, a third party, who is neither a biological nor adoptive parent of a child, arguably may fall within the definition of a parent if he or she is able to establish this psychological parent-child relationship, despite the fact that under New Jersey statutory law there is no explicit provision for such person or relationship.

In order to qualify as a psychological parent to a child, and hence establish the relationship, much will depend on the “day-to-day interaction, companionship, and shared experiences” as between the third party and the child.<sup>27</sup> Courts may consider a variety of factors that go to the heart of such a relationship when making a determination as to whether an individual has established the requisite ties to a child that constitute psychological parentage.<sup>28</sup> Different jurisdictions have approached this process of determination in myriad, albeit essentially similar, ways. In *E.N.O. v. L.M.M.*, for example, the Massachusetts Supreme Court explained that a psychological or de facto parent “has participated in the child’s life as a member of the child’s family . . . resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent . . . The de facto parent shapes the child’s daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide,” for reasons primarily other than financial return.<sup>29</sup>

The Alaska Supreme Court, in *Carter v. Brodrick*, held that in order to establish psychological parentage, a third party must establish that he or she, “on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological need for an adult.”<sup>30</sup> Further, the individual must show that he or she has become an essential focus of the child’s life such that the physical, emotional, and psychological needs of the child are fulfilled in his or her capacity as a

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26. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973) (explaining the different compositions of and forms that a family may take and the influences parents have on the development and well-being of their children in these different circumstances).

27. *Id.*

28. See, e.g., *V.C.*, 748 A.2d at 550-51 (explaining that many other states have enacted statutes that factor out the fundamental elements of psychological parentage, such as the substantial nature of the relationship between the third party and the child, whether the third party and the child actually lived together, and whether the third party provided financial support for the child).

29. 711 N.E.2d 886, 891 (Mass. 1999) (finding that a de facto parent has standing to petition for visitation with the biological child of her former same-sex partner).

30. 644 P.2d 850, 853 n.2 (Alaska 1982).

psychological parent.<sup>31</sup> Moreover, in *Custody of H.S.H.-K.*, the Wisconsin Supreme Court articulated a four prong test designed to set out factors that define the essence of a psychological parent and, if fulfilled, determine whether a third party seeking custody and/or visitation qualifies as such.<sup>32</sup> The test requires the third party to prove (1) that the legal parent consented to and fostered the parent-like relationship between the third party and the child; (2) that the third party lived with the child; (3) that the third party performed a significant amount of parental responsibilities as to the child's care, education, and development with no expectation of compensation; and (4) that the third party performed this parental role for a sufficient length of time so as to forge a bonded, dependent relationship that is parental in nature.<sup>33</sup> Effectively, once a third party satisfies these elements, he or she is considered a "parent" for all intents and purposes as concerns the statutory definition for standing and jurisdiction, and therefore "stands in parity with the legal parent."<sup>34</sup>

The next stage in this process of extending parental rights concerns custody and visitation. New Jersey courts must consider the best interests of the child as determinative of whether the petitioner is in a position to be granted either custody or visitation or both.<sup>35</sup> The best interests standard is measured according to the differential weight placed on a host of factors the court must consider, including

the parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time [i.e., visitation] not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.<sup>36</sup>

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31. *See id.*

32. 533 N.W.2d 419, 421 (Wis. 1995).

33. *See id.*

34. *V.C.*, 748 A.2d at 554.

35. *See id.* at 554; *see also* Todd v. Sheridan, 633 A.2d 1009, 1014 (N.J. Super. Ct. App. Div. 1993) (requiring best interests standard be applied in determination of custody as between child's biological father and maternal grandparents who qualified as psychological parents).

36. N.J. STAT. ANN. § 9:2-4 (West Supp. 2000).

The particular weight accorded to each factor will depend on the facts of the particular case at bar and on judicial discretion.

Joint custody can be either joint legal custody or joint physical custody, or a combination of the two.<sup>37</sup> Joint legal custody refers to decision-making authority over the major life concerns of the child where only one parent has primary residential custody of the child but both participate equally in the decision-making process.<sup>38</sup> Joint physical custody involves shared living arrangements between the residences of both parents.<sup>39</sup> Visitation, more specifically, is a presumptive rule such that a noncustodial (i.e., physical custody) parent is presumed to be granted visitation rights with his or her child.<sup>40</sup> This is a rebuttable presumption, however, if it is proven that such contact would not be in the best interests of the child after a review of the aforementioned factors.<sup>41</sup>

In the noted case, the New Jersey Supreme Court recognized the psychological parent doctrine.<sup>42</sup> Focusing its attention on the “when not otherwise described by the context” verbiage of the statutory provision defining the term “parent” for purposes related to the care, custody, guardianship, and support of children, the court was able to incorporate the psychological parent doctrine into the meaning and intent of the statute.<sup>43</sup> Thus, where an individual qualifies as a psychological parent, he or she is effectively a *parent* for purposes of the statute and therefore has standing to bring the cause of action before the court which, accordingly, has subject matter jurisdiction over the case.<sup>44</sup>

Under the statute, in order for the court to have proper subject matter jurisdiction over a custody or visitation dispute, the petitioning party must be statutorily authorized to bring the cause of action before the court.<sup>45</sup> In its interpretation of the statute, the court reasoned that a third party may have standing if she is able to prove that she has established a psychological parent-child relationship.<sup>46</sup> By establishing herself as a psychological parent, the third party meets the statutory definition of the term “parent” and therefore has standing to petition the

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37. See *V.C.*, 748 A.2d at 544 n.2 (quoting GARY N. SKOLOFF & LAURENCE J. CUTLER, NEW JERSEY FAMILY LAW PRACTICE, CUSTODY § 4.2B (8th ed. 1996)).

38. See, e.g., *Pascale v. Pascale*, 660 A.2d 485, 491-93 (N.J. 1995).

39. See *id.*

40. See *V.C.*, 748 A.2d at 554.

41. See *id.* at 554-55.

42. See *id.* at 549.

43. See *id.* at 548.

44. See *id.* at 550; see also *Watkins*, 748 A.2d at 568 (stating that once a person has established psychological parentage then he or she “stands in the shoes of a natural parent”).

45. N.J. STAT. ANN. § 9:2-1 (West 1993).

46. See *V.C.*, 748 A.2d at 550.

court for custody and visitation.<sup>47</sup> As the court reasoned, the legislature's use of the words "when not otherwise described in the context" demonstrates an understanding and an intent to recognize the legitimate relationship between a child and a person not explicitly mentioned in the statute but who has performed a parental role in the life of the child.<sup>48</sup>

Furthermore, under the "exceptional circumstances" doctrine, if an individual can establish that she is a psychological parent, the court may intervene in the biological or adoptive parent's fundamental right to the care, custody, and nurturance of his or her child because the psychological parent stands in parity with the legal parent and therefore possesses the same rights with regard to the child.<sup>49</sup> As the court explained, even where there is no allegation of unfitness, abandonment, or misconduct, the psychological parent presents an exceptional circumstance.<sup>50</sup> Her interest in custody and visitation with the child is of tantamount importance to that of the legal parent's because of a child's need to maintain ties with adults who provide love and care and to protect the emotional bonds of familial relationships and intimate association.<sup>51</sup> Hence, the privacy and protection afforded to the parent-child relationship is extended to include that which is developed between a psychological parent and a child such that the rights of the biological or adoptive parent do not limit and in no way diminish those of the psychological parent.<sup>52</sup> Further, relying on *Watkins v. Nelson*, which was decided at the same time, the court demonstrated that the deprivation of contact between a psychological parent and a child is an exceptional circumstance that poses a serious harm to the psychological well-being of the child because of the important role the psychological parent plays in the child's life.<sup>53</sup>

In order for a third party to establish that she has developed a psychological parent-child relationship, the court in the noted case adopted the four prong test as propounded by the Wisconsin Supreme Court in *Custody of H.S.H.-K.*<sup>54</sup> Thus, a third party seeking custody or visitation of a child who is not related biologically or by adoption must

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47. *See id.*

48. *See id.* at 548.

49. *See id.* at 549, 554.

50. *See id.* at 550.

51. *See id.*

52. *See id.*

53. *See id.* at 549; *see also Watkins*, 748 A.2d at 565 (explaining that the prevention and mitigation of the exceptional circumstance of changing custody that causes serious psychological harm to a child is the *raison d'être* of the court's *parens patriae* power).

54. *See V.C.*, 748 A.2d at 551-52 (quoting *Custody of H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995)).

prove that the legal parent actually consented to and encouraged the development of the relationship between the third party and the child; that the third party actually lived with the child; that the third party performed substantial parental duties; and that indeed a bonded, parent-child relationship exists.<sup>55</sup> The court stressed in its explication of this framework the importance of the third party and the child having actually lived together for a sufficient length of time as well as the noncompensatory nature of the relationship as the crucial determining factors of the existence of the relationship.<sup>56</sup>

The court explained that the framework it has adopted for determining whether a psychological parent-child relationship exists is the most appropriate test to employ because prong one ensures that such a relationship is actually a product of the legal parent's doing, and is therefore more legitimate.<sup>57</sup> The legal parent must actually give the third party "a measure of parental authority and autonomy and . . . rights and duties vis-à-vis the child that the third party's status would not otherwise warrant."<sup>58</sup> Effectively, the court reasoned, by giving up some of the autonomous privacy sacred to the family and protected by the Constitution, the legal parent's expectation of privacy is reduced when he or she brings in the third party as a part of that family.<sup>59</sup> The legal parent cannot thereafter exclude the third party once a relationship with the child has been fostered, forged, and bonded just because the relationship between the adults ends.<sup>60</sup> Thus, it is at this point where the interests of the child may dictate an intrusion into the otherwise private parent-child relationship (i.e., the family).<sup>61</sup> Moreover, the court explained that the actual existence of a parent-child bond is perhaps the most important prong of the test because this goes to the emotional and psychological well-being of the child, which is of paramount importance in the weighing of the child's best interests.<sup>62</sup>

In a concurring opinion, Judge Long noted that the traditional conception of the American family as a nuclear unit consisting of husband, wife, and children is a relic of an era long gone, noting that court judgments which do not take notice of changing social mores will fail in their attempts to safeguard the interests of a child whose family

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55. *See id.*

56. *See id.* at 553.

57. *See id.* at 552.

58. *Id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.* at 554.

life does not fit neatly into this conception.<sup>63</sup> Judge Long stressed that the development of intimate familial relationships can be created in a plethora of settings, where the traditional family is but one, and that unmarried persons and same-sex couples are capable of creating these same sorts of relationships.<sup>64</sup> Further, Judge Long observed that when children are involved, it is critical that a court deciding a custody and/or visitation dispute consider the reality of the situation and not mere legality.<sup>65</sup> This is essential because the child's best interests are better served through the protection of the loving bonds that have developed, whether it be within a traditional family setting or some other amalgamation.<sup>66</sup>

Underlying the court's decision is a seeming recognition of the changing social norms which have come to bear on the family as an institution, and a seeming commitment to the protection of the child's interests in a dispute between adults that is often fraught with great emotion and sensitivities. The court's recognition of the parental role a same-sex partner can play in the life of a child is arguably indicative of a somewhat larger recognition of the basic human rights of homosexual individuals to parent and create families. However, while the essential holdings are evocative of the court's newfound awareness of the changing structure of the family and represent the opening up of opportunities for nontraditional families to forge new pathways in the realm of family law, the holdings are nevertheless limited in the extent to which they transform the system to not only account for alternative and changing family structures but also in the extent to which the child's best interests are truly the paramount decisive element.

First, the psychological parent test set forth by the Wisconsin Supreme Court in *Custody of H.S.H.-K.*, while it affords an easy method for defining characteristics of a psychological parent, is too rigid and mechanical in its application. Just as the court recognizes the changing structure of the modern American family, so too must it recognize the complexity with which these families operate. By adopting such a formal test, the court presents an extra hurdle over which a gay or lesbian partner must jump in order to prove that he or she is truly a parent of the child in question. While parentage is seemingly presumptive among heterosexual couples, same-sex couples who dissolve their relationship are denied this presumption such that the nonbiological parent must

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63. *See id.* at 556-58.

64. *See id.* at 556-57.

65. *See id.*

66. *See id.*

prove that he or she has developed a psychological parent-child relationship.

Additionally, the test places heavy weight on the time factor, requiring sufficient time to develop a relationship with the child and the performance of parental duties. This could be problematic for a couple whose relationship ends during pregnancy or shortly after the birth of the child, although the child was conceived during the relationship and with the intent of both partners becoming parents of the child. The Wisconsin framework essentially ignores the rights of the non-biological parent in this situation, though if it were a heterosexual couple a positive paternity test would arguably confer rights on the father even if he had no desire or intention to become a parent. What this effectively does is to take away from a prospective gay parent the essence of what she has become at the conception of the child, by requiring her to actually have lived with the child, supported the child, and spent time with the child in order to be recognized as a “parent.” The test leaves no room for this unfortunate parent—a victim of otherwise bad timing. Thus, while the court acknowledges the fact that gays and lesbians can create families of their own, the court ultimately does little in the way of transforming the system’s disparate treatment of alternative families as against those that fall within the traditional family model and the heterosexist presumptions of the law.

Second, the court laments the vital importance of the best interests of the child standard as the ultimate determinative factor in a custody and visitation dispute. Problematic in the traditional review of cases under the best interests model is a long and drawn-out, adult-centered process of review and appeal which fails to highlight the child as “a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development.”<sup>67</sup> Instead, this framework creates additional cause for delay in the adjudication of custody and visitation, where the third party must present proof of the psychological parent-child relationship which will inevitably involve an accounting of finances to prove support and evaluation by experts to prove a bonded relationship has been forged, at the very least.<sup>68</sup> The focus is drawn away from the child and placed on the adult parties to the suit.

Because the ultimate outcome of a custody and visitation dispute turns on the underlying facts of the case, the application of the Wisconsin

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67. GOLDSTEIN ET AL., *supra* note 26, at 54.

68. This is in contrast to the court’s exhortation in *Watkins*, admonishing against the protracted proceedings, suggesting that the Family Part’s “differentiated case management system” should guard against such unnecessary delays. 748 A.2d at 570-71.

test and the best interests of the child standard will inevitably produce a variety of inconsistent outcomes. In the noted case, V.C. is recognized as a psychological parent of the twins she raised with M.J.B., though she is ultimately denied joint legal custody.<sup>69</sup> The court reasoned that, during the pendency of the court action, four years had elapsed since V.C. had served in a decision-making role in the children's lives and that to grant her joint legal custody with M.J.B. would be unnecessarily disruptive.<sup>70</sup> This reasoning is troublesome. On the one hand, the court acknowledges that V.C. is a psychological parent within the best interests standard and is therefore equal to M.J.B. as concerns all of the statutory factors. On the other hand, the court declares that the person whom they just determined to have the best interests of the children in mind would be too disruptive to make decisions on their behalf.<sup>71</sup> Effectively, this convoluted rationale allows M.J.B. to circumvent the system and to get her "way" simply by holding out for so long. This is arguably a failure of the system that in effect defeats V.C.'s otherwise successful claim and rewards M.J.B. for her egregious behavior.

The court does not apply the best interests of the child factors, as stipulated in the New Jersey Statutes, at any point throughout the decision, only concluding that it would not be in the children's best interests to award custody. The court does not explain why its decision seems to place significant weight on the factor relating to the extent and quality of the time spent with the child prior to or subsequent to the separation, as above all other factors listed in the statute.<sup>72</sup> This failure to elucidate the intricacies of its balancing process provides no guidance to the lower courts in assessing how much weight to place on each factor when determining the child's best interests.

Furthermore, and perhaps more problematic, the court stated that once V.C. is declared a psychological parent, she then stands in legal

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69. See *V.C.*, 748 A.2d at 555.

70. See *id.* The court does not lament the lengthy proceedings in the noted case and makes no mention of the problems such a protracted proceeding presents for the parties and especially the child, though it expressed profound disturbance at the protracted proceedings in *Watkins*, *supra* note 68, which involved a biological father seeking custody of his daughter from her maternal grandparents, who had retained custody over the course of the proceedings.

71. This rationale does not square neatly with the court's simultaneous decision in *Watkins*, *supra* note 68, in which the court found that despite the fact that three years had passed since the father had initially sought custody of his child and despite the fact that he never had custody of the child, awarding him custody was warranted. 748 A.2d at 570. Although the court, in *Watkins*, highlights the fact that the biological father had maintained constant contact with his child throughout the pendency of the court action, nothing in the court's statement of the facts in *V.C.* suggests that V.C. was entirely cut off from her children during the four years leading up to the decision, so as to distinguish the two cases.

72. See N.J. STAT. ANN. § 9:2-4 (West Supp. 2000).

parity with M.J.B., but the court then goes on to accord M.J.B. “significant weight” in the best interests balance because she is the legal parent.<sup>73</sup> This inconsistency in the treatment of the psychological parent places her at a distinct disadvantage and therefore confers her lesser value, even where she may have greater emotional ties to the children, as against the legal parent.

Thus, if the psychological parent is akin to a legal parent in virtually all respects, then the psychological parent should be treated equally so as to truly stand in the shoes of a natural parent. The court hails the importance of the psychological parent doctrine, but in the end it punts. Unfortunately for V.C., she gets the recognition of being a psychological parent of the children, but she is not restored to her former and proper role as a “real” parent with the full rights and responsibilities appurtenant thereto.

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73. *See id.* at 554.