No. COA07–875 15B Judicial District

NORTH CAROLINA COURT OF APPEALS

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MARINA HEATZIG, Plaintiff-Appellee, v. ELIZABETH MACLEAN, Defendant-Appellant.	)	From Orange County No. 04 CVD 1228

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PLAINTIFF-APPELLEE’S BRIEF

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NORTH CAROLINA COURT OF APPEALS

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MARINA HEATZIG, Plaintiff-Appellee,	)	
v.	)	From Orange County No. 04 CVD 1228
ELIZABETH MACLEAN, Defendant-Appellant.	)	

* *

PLAINTIFF-APPELLEE'S BRIEF

* *

QUESTIONS PRESENTED

I. WHEN A NATURAL PARENT DELIBERATELY CREATES AND FOSTERS A PARENTAL RELATIONSHIP OF INDEFINITE DURATION BETWEEN HER CHILD AND ANOTHER PERSON FROM BEFORE AND AFTER THE TIME OF THE CHILD'S BIRTH, DOES SHE ABROGATE HER PARAMOUNT CONSTITUTIONAL RIGHT TO CUSTODY, PERMITTING THE COURT TO DETERMINE THE ISSUE OF CUSTODY BASED ON THE BEST INTEREST OF THE CHILD?

II. WHEN A NATURAL PARENT DELIBERATELY CREATES AND FOSTERS A PARENTAL RELATIONSHIP OF INDEFINITE DURATION BETWEEN HER CHILD AND ANOTHER PERSON FROM BEFORE AND AFTER THE TIME OF THE CHILD'S BIRTH, DOES THE OTHER PERSON BECOME A PARENT BY ESTOPPEL, ENTITLED TO ASSERT A CLAIM FOR JOINT CUSTODY BASED ON THE BEST INTEREST OF THE CHILD?

III. DID THE TRIAL COURT PROPERLY ENTER AN ORDER FOR A PARENT COORDINATOR?

STATEMENT OF THE FACTS

I. PLAINTIFF AND DEFENDANT BECOME DOMESTIC PARTNERS.

Plaintiff Marina Heatzig and defendant Elizabeth MacLean were committed domestic partners for approximately twelve years, beginning in 1992. (R. pp. 107, 113). The couple originally met in California and jointly decided to move to North Carolina so that defendant could pursue a graduate degree at Duke University. (R. p. 113). Plaintiff worked part-time jobs while defendant pursued her education. (R. p. 113). After obtaining her degree from Duke, defendant embarked on a career as a professional long-distance runner. (R. p. 113). Plaintiff was hugely supportive of defendant's efforts and provided essential support. (R. p. 113). In May 1999, the couple held a public commitment ceremony, which was attended by friends and relatives of both parties from around the world. (R. p. 113). The couple also registered with the town of Chapel Hill as domestic partners. (R. p. 108).

II. PLAINTIFF AND DEFENDANT JOINTLY DECIDE TO HAVE CHILDREN TOGETHER.

The couple jointly decided to have children together, and worked together to carry out that plan. (R. pp. 107, 113). They determined that defendant should become pregnant through artificial insemination, and jointly sought a sperm donor who would contribute physical characteristics similar to

plaintiff's, i.e. "European, blond, blue-eyed, strong, and tall." (R. p. 113). After defendant became pregnant, the couple followed through on all medical and prenatal care together, and plaintiff attended all birth classes with defendant. (R. pp. 107, 113).

III. PLAINTIFF AND DEFENDANT JOINTLY RAISE THE CHILDREN AS CO-PARENTS.

The parties' efforts culminated in the births of Enid Sofia MacLean and Quinn Heatzig MacLean on 20 December 2000. (R. p. 108). Plaintiff accompanied defendant to the hospital, served as defendant's labor coach, and then cut the umbilical cords when the twins were born. (R. pp. 108, 113; T. p. 48). To recognize the children's joint parentage, Quinn was given plaintiff's surname (Heatzig) and Enid was given a name from plaintiff's family (Sofia). (R. pp. 108, 113). When Quinn had difficulties and was in the neonatal intensive care unit, plaintiff stayed at or near the hospital with defendant and the newborns. (R. p. 113). Both parties signed the birth certificate application form, though by hospital policy only defendant's name was allowed to appear on the birth certificates. (R. pp. 108, 113-14).

From pre-conception until the parties separated in 2004, it was the established intent of plaintiff and defendant to function as equal co-parents. (R. p. 109). Within one month of

the births, both parties met with a lawyer who drew up the necessary documents to enable plaintiff to obtain health care treatment for the children. (R. p. 114). In December 2001, plaintiff and defendant each signed durable powers of attorney naming the other as attorney-in-fact and wills naming the other as beneficiary. (R. p. 114). In defendant's will, plaintiff was designated as guardian of the children in the event of defendant's death. (R. p. 114). When the children were baptized by defendant's grandfather, both parties' names appear on the baptism certificate. (R. p. 114). Both parties also signed forms as a parent for the medical needs of the children. (R. p. 109). In addition, both parties signed required forms for preschool enrollment for the children. (R. p. 109).

For more than three years after the twins were born, the parties lived together as a family unit with the children. (R. p. 108). Defendant voluntarily included plaintiff as an equal co-parent, fostered plaintiff's relationship with the children, and accepted the benefits of plaintiff's parental relationship with the children, including substantial economic support. (R. p. 109). Plaintiff relied on defendant's representations in forming a parental relationship with the children. (R. p. 109).

The couple made decisions as a unit for the interests of the children. (R. p. 114) In the initial months of parenthood, the couple jointly decided that defendant would primarily stay

at home with the infants. (R. p. 114). To make that decision financially feasible, plaintiff worked part time and contributed her savings to the family. (R. pp. 109, 114). After twenty-one months, the parties agreed to exchange roles. (R. p. 114). Plaintiff cared for the children at home while defendant worked at North Carolina A&T University in Greensboro, practicing livestock production. (R. p. 114).

The parties took family vacations with the children. (R. p. 114). In January 2002, the couple traveled together with the children to New Zealand with defendant's extended family to attend a wedding. (R. p. 114). They also made several other trips together to see defendant's family in Canada, California, and Connecticut, and traveled to see plaintiff's aunt and other family members in Sweden. (R. p. 114).

IV. AFTER DEFENDANT MOVES OUT OF THE FAMILY HOME, PLAINTIFF CONTINUES TO SPEND EQUAL TIME WITH THE CHILDREN.

Over time, however, the relationship between plaintiff and defendant began to deteriorate. (R. pp. 114-15). Tensions developed over differences concerning household duties and care of the children. (R. p. 114). After their hostilities escalated, the parties sought relationship counseling. (R. p. 114). When the counseling failed to resolve these issues, defendant moved out of the family home in April 2004. (R. p. 115). At that point, the children began to split time between the two

households, following a parenting schedule that allowed each parent equal access. (R. p. 11).

On 26 June 2004, defendant informed plaintiff that the children would live solely with her and that defendant would unilaterally decide whether to afford plaintiff visits with them. (R. p. 115). Plaintiff filed this action on 28 June 2004. (R. pp. 3, 115). On the same date, the district court entered a temporary order vesting custody jointly with plaintiff and defendant, and continuing the previous parenting schedule. (R. p. 12).

From the time of birth in December 2000 through the custody hearing in September 2006, the children shared time equally with both parties. (R. p. 109).

V. THE TRIAL COURT AWARDS PLAINTIFF AND DEFENDANT JOINT PHYSICAL CUSTODY, BASED ON THE BEST INTEREST OF THE CHILDREN.

A custody hearing was held between 18 and 20 September 2006. (R. p. 106). The trial court found the children to be adorable, smart, and healthy. (R. p. 116). The children are comfortable with both parties, need both parties, and are bonded to both parties. (R. p. 115). The children consider plaintiff to be a parent. (R. p. 109). The Guardian Ad Litem reported after observation that the children are “happy to go with each parent and happy at the end of a visit with each parent.” (R. p. 116). Both parties are committed to the nurture, safety, and well

being of the children, and each party brings valuable talent to the parenting process. (R. p. 116). The court found, however, that the parties have quite different ideas regarding the care and upbringing of the children, and that the parties cannot agree on decisions. (R. p. 117).

As a matter of law, the court concluded that plaintiff is a "parent" of the children, with the same legal status and right to claim custody as defendant. (R. pp. 110 (Conclusion of Law #2), 119 (Conclusion of Law #5)). Alternatively, the court also concluded that "Plaintiff is a parent by estoppel, given Defendant's conduct in establishing Plaintiff as a parent of the children from preconception through separation." (R. p. 110 (Conclusion of Law #3)). Finally, the court concluded that "Defendant has abrogated her primary, paramount right to custody of the minor children in that she has supported, encouraged, and allowed Plaintiff to share the position of parent." (R. pp. 110-11 (Conclusion of Law #4)).

Applying the best interest of the child standard, the court awarded joint physical custody to both parties, and sole legal custody to defendant. (R. pp. 120-21). The trial court also entered an order appointing a parent coordinator. (R. pp. 121, 123).

In this appeal, defendant challenges the order awarding joint physical custody and the appointment of a parent coordinator.

STATEMENT OF STANDARD OF REVIEW

The decision of a trial court as to child custody should not be upset on appeal absent a showing that the trial court abused its discretion. Diehl v. Diehl, 177 N.C. App. 642, 645, 630 S.E.2d 25, 27 (2006).

"In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence, and its conclusions of law must be supported by its findings of fact." Cantrell v. Wishon, 141 N.C. App. 340, 342, 540 S.E.2d 804, 805-06 (2000).

"[T]he findings and conclusions of the trial court must comport with [the] case law regarding child custody matters." Id. at 342, 540 S.E.2d at 806. "Conclusions of law drawn by the court from the facts found . . . involve legal questions and are always reviewable *de novo* by the appellate court." Cochrane v. City of Charlotte, 148 N.C. App. 621, 623, 559 S.E.2d 260, 261 (2002).

ARGUMENT

The central question on appeal is whether the trial court correctly decided as a matter of law to use the best interest of the child standard in determining custody. The trial court's

findings of fact, unchallenged on appeal, support its determination under two alternative legal theories. First, by allowing, encouraging, and fostering plaintiff's parental relationship with the children, defendant abrogated her constitutionally protected paramount interest as a natural parent, thereby requiring the court to use the best interest of the child standard in determining custody. See Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997). Second, as a result of defendant's conduct in establishing plaintiff as a co-parent from pre-conception through separation, plaintiff is a parent by estoppel, entitled to assert a claim for custody based on the best interests of the children.

I. THE TRIAL COURT'S USE OF THE BEST INTEREST OF THE CHILD STANDARD WAS CORRECT UNDER PRICE V. HOWARD.

(Cross-Assignments of Error 1-3)[1]

A. By creating and fostering plaintiff's parental relationship with the children from before and after the time of their birth, defendant acted inconsistently with her constitutionally protected paramount interest as a natural parent.

The General Assembly has prescribed the standard to be applied in a custody proceeding: "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or

[1] On 26 October 2007 and 7 November 2007, plaintiff moved to amend the record on appeal to add three cross-assignments of error. On 7 November 2007, the Court issued an order referring plaintiff's motion to the panel to which the case will be assigned.

institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a). This "best interest of the child" standard is always applied in a custody dispute between two natural parents or between two parties who are not natural parents. Price v. Howard, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997).[2] In a custody dispute between a natural parent and a third party who is not a natural parent, however, the North Carolina Supreme Court has held that the "best interest of the child" standard is applicable only if the natural parent's conduct has been inconsistent with her constitutionally protected status. Id. at 79, 484 S.E.2d at 534.

In Price, the child's biological mother, the defendant, represented to the plaintiff for approximately six years that the plaintiff was the child's biological father. Id. at 71, 484 S.E.2d at 529. As a result of the defendant's representations, the plaintiff and the minor child believed that the plaintiff was in fact the child's father. Id. The parties lived together with the child for three years. Id. When the parties separated, the child continued to live primarily with the plaintiff, though spent time with the defendant as well. Id. A dispute about the child's custodial arrangements arose when the child was approximately six years old, and the plaintiff

[2] The term "natural parent" includes, at least, both biological and adoptive parents. Id.

responded by filing an action for custody of the child. Id. The plaintiff first learned that he was not the child's biological father when the defendant denied his paternity in the custody action and the resulting paternity test excluded the plaintiff as the biological father of the child. Id. at 71, 484 S.E.2d at 529-30. The trial court concluded that, although both parties were fit to have custody of the minor child and it was in the child's best interest to award primary physical custody to the plaintiff, exclusive custody had to be awarded to the defendant because of the Supreme Court's decision in Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994). Id. at 71, 484 S.E.2d at 530. In a split decision, the Court of Appeals affirmed. Id. at 71-72, 484 S.E.2d at 530.

The Supreme Court reversed. While recognizing that a natural parent has a "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child," the court concluded that "application of the 'best interest of the child' standard in a custody dispute with a nonparent" would not violate the Due Process Clause if the natural parent's conduct has been "inconsistent with his or her constitutionally protected status." Id. at 79, 484 S.E.2d at 534. Such conduct need not rise to the level warranting termination of parental rights. Id. "Other types of conduct, which must be viewed on a case-by-case basis, can also rise to

this level so long as to be inconsistent with the protected status of natural parents." Id. at 79, 484 S.E.2d at 534-35.

Applying this standard to the facts before it, the Price court focused on the extent to which the mother (defendant) fostered an indefinite parent-child relationship between the putative father (plaintiff) and the minor child. Id. at 83, 484 S.E.2d at 537. The court found that "defendant created the existing family unit that includes plaintiff" and that she "chose to rear the child in a family unit with plaintiff being the child's *de facto* father." Id. The court remanded the case so that the trial court could determine whether defendant intended that plaintiff's custody of the child be temporary or permanent. Id. at 83-84, 484 S.E.2d at 537. If custody was only meant to be temporary, defendant would still enjoy her constitutionally protected status. Id. at 83, 484 S.E.2d at 537. On the other hand, defendant would not retain her protected paramount status if she "not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." Id. (emphasis added).

Contrary to defendant's assertion, Def's Br. at 12-13, there is no requirement under Price that conduct inconsistent with a parent's protected status must "negatively impact" the

minor child. The court explicitly stated that conduct other than unfitness, neglect or abandonment could constitute inconsistent conduct. Price, 346 N.C. at 79, 484 S.E.2d at 534-35; see also Adams v. Tessner, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) ("the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, or where the parent's conduct is inconsistent with his or her constitutionally protected status" (emphasis added)). Moreover, the facts in Price refute defendant's contention that only acts harmful to the child can be inconsistent with a natural parent's constitutionally protected status. If the mother in Price fostered a parent-child relationship of indefinite duration between the plaintiff and the child, that would be conduct "inconsistent" with her constitutionally protected status even though it likely benefited the child. Price, 346 N.C. at 83, 484 S.E.2d at 537.

The Court of Appeals applied Price in Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998). In that case, the plaintiff alleged that the parties were "intimate companions" for five years, the plaintiff "mothered" the defendant's child over that time, the child resided with plaintiff for the majority of this time, and the plaintiff was responsible for the child's health and education. Id. at 391-92, 502 S.E.2d at 892-93. Following Price, this Court concluded that plaintiff's

allegations were sufficient to show that the defendant biological father had acted inconsistently with his protected status. Id. at 399, 502 S.E.2d at 897. As a result, the plaintiff was allowed to proceed with her custody claim against the father under Price. Id. at 399, 502 S.E.2d at 897.

Similarly, in Cantrell v. Wishon, 141 N.C. App. at 340, 540 S.E.2d at 804, this Court remanded the case to the trial court for additional findings of fact as to whether the biological mother had acted inconsistently with her protected status, with particular instruction to consider the mother's role in building the relationship between her children and the plaintiffs. Id. at 344, 530 S.E.2d at 807.

Defendant cites Petersen v. Rogers, 337 N.C. at 397, 445 S.E.2d at 901, as authority for the proposition that a finding of unfitness or neglect is necessary to overcome the constitutionally protected status of the natural parent. Def's Br. at 14. Defendant's reliance on Petersen is misplaced. After citing its decision in Petersen, the Price court recognized that it faced a new issue: "We are now called upon to decide whether other circumstances [than unfitness or neglect] can require [the natural parent's constitutionally protected] interest to yield to the 'best interest of the child' test prescribed by N.C. Gen. Stat. § 50-13.2(a)."). Price, 346 N.C. at 72, 484 S.E.2d at 530. The court in Price answered in the affirmative, holding that

"other types of conduct" could be inconsistent with the natural parent's paramount status. Id. at 79, 484 S.E.2d at 534-35. Contrary to defendant's suggestion, Price's "broadened holding of Petersen applies to all child custody disputes." Cantrell v. Wishon, 141 N.C. App. at 344, 540 S.E.2d at 806.

In this case, the trial court's unchallenged findings of fact demonstrate that defendant acted inconsistently with her constitutionally protected paramount status by fostering an indefinite parent-child relationship between plaintiff and the minor children that pre-existed the birth of the children. These findings include: (1) the parties had a public commitment ceremony and registered as domestic partners; (2) the parties jointly decided to have defendant achieve a pregnancy through artificial insemination; (3) they jointly decided to seek a sperm donor who would contribute physical characteristics similar to plaintiff's; (4) plaintiff attended all birth classes, was present at the births, and cut the babies' cords; (5) both parties signed the birth certificate application form; (6) the parties jointly decided that each child would be given a name from plaintiff's family; (7) plaintiff was assigned the power to obtain health care treatment for the children; (7) plaintiff was named as defendant's beneficiary and the children's guardian in defendant's will; (8) both parties' names appear on the children's baptism certificate; (9) both parties

signed forms for the medical needs of the children and to enroll them in school; (10) the family traveled together to see relatives of both parties; (11) the family lived together as a unit and both parties were primary care-givers at home for periods of time; (12) the children are comfortable with both parties, need both parties, and are bonded to both parties; and (13) both parties are committed to the nurture, safety, and well being of the children. (R. pp. 108-09, 113-16).

In addition, the court explicitly found that defendant "abrogated her primary, paramount right to custody of the children," when she "supported, encouraged and allowed Plaintiff to share the position of parent," (R. pp. 110-11), "voluntarily included Plaintiff as an equal co-parent," and "fostered Plaintiff's relationship as an equal co-parent" of the children. (R. p. 109). As in Price, defendant "not only created the family unit that plaintiff and the child[ren] have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated." Price, 346 N.C. at 83, 484 S.E.2d at 537. Accordingly, defendant has acted inconsistently with her constitutionally protected paramount status, and the trial court was correct to apply the best interest of the child standard to resolve the custody dispute.

B. Other state courts facing similar custody disputes between biological and non-biological parents have used the best interest of the child standard.

Courts in other states have recently confronted similar disputes between a biological parent and another party. Most state courts have adopted a similar framework for evaluating these claims, examining whether the non-biological parent had an established parent-child relationship and whether the biological parent fostered the relationship. This framework closely approximates the analysis described in Section I.A., supra, and supports the trial court's application of the best interest of the child standard in this case.

In V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000), the New Jersey Supreme Court addressed whether a woman who had helped her same-sex partner to conceive and raise a child could petition for custody and visitation after the couple separated. Id. at 541-43. The court recognized that "children have a strong interest in maintaining the ties that connect them to adults who love and provide for them" and that "for constitutional as well as social purposes, [that interest] lies in the emotional bonds that develop between family members as a result of shared daily life." Id. at 550. Adopting a test articulated by the Wisconsin Supreme Court, Holtzman v. Knott (In re H.S.H-K), 533 N.W.2d 419, 421 (Wis. 1995), the New Jersey court held that a "psychological parent" relationship could be proved by evidence

that (1) the natural or legal parent consented to and fostered the parent-like relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature. Id. at 551-52. If the test is met, the trial court determines custody and visitation based on the best interest of the child. Id. at 554.

The first prong of the test is "critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child." Id. at 552. "That parent has the absolute ability to maintain a zone of autonomous privacy for herself and her child, [but] if she wishes to maintain that zone of privacy she cannot invite a third party to function as a parent to her child." Id.; see also id. at 553 (noting that joint participation in the family's decision to have a child is probative evidence of the legally recognized parent's intentions). The third prong is "determined by the nature, quality, and extent of the functions undertaken by the third party and the response of the child to that nurturance." Id. at 553. Financial contributions by the third party support the finding that she assumed parental obligations.

Id. "[T]he fourth prong is most important because it requires the existence of a parent-child bond," which depends on the duration and strength of the parent-child relationship. Id.

In addition to New Jersey and Wisconsin, other states have used the same four-part test, or one substantively identical, in adjudicating custody or visitation disputes similar to the case at hand. See, e.g., Middleton v. Johnson, 633 S.E.2d 162, 168-69 (S.C. Ct. App. 2006) (allowing non-biological father visitation rights because he was a psychological parent); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (allowing non-biological parent of a former same-sex couple visitation rights because she was a *de facto* parent); In re the Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005) (same); Rubano v. DiCenzo, 759 A.2d 959, 974-75 (R.I. 2000) (same); In re E.L.M.C., 100 P.3d. 546, 560-61 (Colo. Ct. App. 2004) (allowing non-biological parent of a former same-sex couple custody and visitation rights because she was a psychological parent); S.F. v. M.D., 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000) (same). Finally, the American Law Institute's recent recommendation supports the modern common trend of recognizing the status of psychological or *de facto* parents in line with the four-part test. See In re the Parentage of L.B., 122 P.3d at 176 n.24 (citing AM. LAW INST., Principles of the Law of Family Dissolution: Analysis and Recommendations, §§ 2.01-2.04, 2.18 (2002)).

Here, plaintiff satisfies the four-part test. The trial court's factual findings establish that: (1) defendant deliberately established and fostered plaintiff's relationship with the children as an equal co-parent; (2) plaintiff and defendant lived together with the children as a family unit; (3) without expecting compensation, plaintiff assumed obligations of parenthood, such as providing care in the home, working outside the home to provide financial support, and participating in medical and educational decisions for the children; and (4) plaintiff lived with the children from their birth until age three years, four months, and shared equal time with the children for the next two years, so that they bonded with plaintiff as a parent. (R. pp. 108-09, 113-16).

The analysis in Price described in Section I.A., supra, is virtually identical in substance to the framework adopted by New Jersey and other states. Under Price, a natural parent acts inconsistently with her constitutionally protected status if she fosters an indefinite parent-child relationship between a third party and minor child, and that party acts as a *de facto* parent to the child. See Price, 346 N.C. at 83, 484 S.E.2d at 537. This standard corresponds with the first, third, and fourth prongs of the four-part test. See V.C., 748 A.2d at 551-53. As in the other states, if the test is satisfied, a custody dispute between the biological parent and *de facto* parent is settled by

determining the best interest of the child. Price, 346 N.C. at 83, 484 S.E.2d at 537; V.C., 748 A.2d at 554. Plaintiff satisfies all four prongs of the test. Therefore, the modern trend in custody law among the states supports – as does Price – the trial court's application of the best interest of the child standard to this case.

C. The trial court's misinterpretation of Price is not binding on this Court.

Consistent with its findings of fact, the trial court properly concluded that defendant "abrogated her primary, paramount right to custody of the children," when she "supported, encouraged and allowed Plaintiff to share the position of parent." (R. pp. 110-11). As discussed above, Section I.A, supra, defendant's deliberate abrogation of her constitutionally protected status triggered the application of the best interest of the child standard under Price. Elsewhere in its orders, however, the court mistakenly concluded that, because defendant is a "fit" parent and did not abandon, abuse, or neglect the children, she has not "acted in a manner inconsistent with her constitutionally protected status." (R. p. 119). The court erred as a matter of law in merging defendant's acknowledged fitness as a parent with the separate determination of whether she acted in a manner inconsistent with her constitutionally protected status. This legal error, identified

in plaintiff's cross-assignments of error, is subject to *de novo* review and does not bind this Court. See Cross-Assignments of Error 1-3 (attached to plaintiff's motions to amend record on appeal). Under the proper interpretation of Price, the court's findings of fact require the legal conclusion that defendant's acts were inconsistent with her constitutionally protected status.

Defendant contends that the trial court's Conclusion of Law that defendant "has not acted in a manner inconsistent with her constitutionally protected status," (R. p. 119) "compels the rejection of plaintiff's custody claim." Def's Br. at 14. Defendant's argument misapprehends the standard of review. "Conclusions of law drawn by the court from the facts found. . . involve legal questions and are always reviewable *de novo* by the appellate court." Cochrane v. City of Charlotte, 148 N.C. App. at 623, 559 S.E.2d at 261.[3] If the district court judge misstated the law, this Court has the power and duty to correct the error.

Defendant argues that the trial court's erroneous interpretation of Price is "binding," Def's Br. at 16, because "[p]laintiff has not challenged the Conclusion of Law." Id. at 14. Defendant's attempt to block appellate review of the trial court's misstatement of law must fail. Defendant's appeal

[3] Elsewhere in its brief, defendant correctly states the standard of review: "the trial court's legal determination must be reviewed *de novo* on appeal." Def's Br. at 7.

places the issue squarely before this Court. Defendant assigned as error the trial court's conclusion of law that defendant "abrogated her primary, paramount right to custody of the minor children in that she has supported, encouraged and allowed Plaintiff to share in the position of parent." Assignment of Error No. 32 (R. p. 149); see R. pp. 110-11 (Conclusion of Law #4). In her assignment of error, defendant contended that "such actions by Defendant do not as a matter of law abrogate a natural parent's constitutionally protected paramount status as parent. . . ." (R. pp. 149-50). Having raised and fully briefed the issue, Def's Br. at 11-18, defendant cannot bar this Court from addressing it.

Lest there be any doubt about this Court's ability to correct the trial court's misinterpretation of Price, plaintiff moved to amend the record to add cross-assignments of error on the issue. Cross-assignment of Error No. 1 states: "In its Permanent Custody Order, the trial court erred as a matter of law in Conclusion of Law #4 by accepting defendant's contention that only neglect, abandonment or other acts showing parental unfitness could constitute conduct 'inconsistent with the parent's protected status,' under Price v. Howard, 346 N.C. 68,

79, 484 S.E.2d 528, 534-35."[4] Cross-Assignment of Error No. 3 identifies precisely the same legal error, embedded in a finding of fact, R. p. 109 (Finding of Fact #25), and also subject to *de novo* review. See Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter, 291 N.C. 208, 219-20, 230 S.E.2d 529, 534 (1976) ("[T]he 'finding of fact' is in reality a mixed finding of fact and law. Such findings are reviewable on appeal."); Choate v. Sara Lee Products, 133 N.C. App. 14, 20, 514 S.E.2d 529, 534 (1999) ("finding of fact" "can be properly regarded as either a conclusion of law, or mixed finding of fact and law, or finding of jurisdictional fact, and is therefore not binding upon us").

Defendant is unable to show any prejudice from the amendment to the record on appeal. Defendant has already briefed the issue in this Court. To the extent that plaintiff's brief presents any new or additional questions, defendant will have the opportunity to file a reply brief. Rule 28(h)(2). In the absence of any prejudice, plaintiff's motions to amend the record on appeal should be granted. Whether or not the motions are granted, defendant's appeal places the trial judge's interpretation of Price before this Court, subject to its *de novo* review.

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[4] Plaintiff squarely presented the issue to the trial court. Plaintiff's Memorandum of Law (7/16/04) at 4-6 (Attachment A to Plaintiff-Appellee's Motion to Amend the Record on Appeal).

II. PLAINTIFF IS A PARENT BY ESTOPPEL, ENTITLED TO USE OF THE BEST INTEREST OF THE CHILD STANDARD.

In the trial court's Order Denying Defendant's Motion for Judgment on the Pleadings, the court concluded that plaintiff is a "parent" and that "Plaintiff is a parent by estoppel, given Defendant's conduct in establishing Plaintiff as a parent to the children from preconception through separation." (R. p. 110).[5] In the final custody order, the court stated that plaintiff "is a non-biological parent of the children and is to be given legal status equal to that of [defendant]." (R. p. 119).

By its use of the terms "parent," "parent by estoppel," and "non-biological parent," the court referred to the same concept that other state courts have variously labeled "parent by estoppel," "*de facto* parent" or "psychological parent." See In re the Parentage of L.B., 122 P.3d 161, 176-77 & n.24 (Wash. 2005) (discussing the overlapping terminology of "*de facto* parent" and "parent by estoppel"); In re E.L.M.C., 100 P.3d.

[5] Defendant contends that plaintiff could not be found to be a "parent by estoppel" because plaintiff did not explicitly allege that legal theory in her amended complaint. Def's Br. at 19-20. In her Amended Complaint (R. pp. 28-34), however, plaintiff alleged facts sufficient to support the relief sought, which is all that is required under Rule 12(b)(6). Harris v. NCNB Nat'l Bank, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (a complaint is sufficient under Rule 12(b)(6) if its allegations, "treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not" (emphasis added)).

546, 559-60 (Colo. Ct. App. 2004) (discussing similar definitions of "psychological parent" and "*de facto* parent").

Confronted by custody disputes involving children born to unmarried couples through assisted reproduction, courts across the country have applied estoppel and related doctrines to hold that an unmarried partner who jointly agrees to have a child through assisted reproduction may be held legally responsible as a parent. See, e.g., In re Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003) (man who agreed to have a child through artificial insemination with unmarried female partner was estopped from denying financial responsibility for the child); A.B. v. S.B., 837 N.E.2d 965, 967 (Ind. 2005) (mother's former female partner could have parental rights and responsibilities with regard to child born through artificial insemination); In re Parentage of L.B., 122 P.3d 161, 176-77 (2005) (same-sex partner who agreed to have a child through artificial insemination and who parented child with the biological mother could have all of the legal rights and responsibilities of a legal parent); Karin T. v. Michael T., 484 N.Y.S.2d 780, 784 (Fam. Ct. 1975) (same-sex partner who agreed to have child through artificial insemination was estopped from denying parental responsibility).

This approach has been endorsed by the American Law Institute, which defines a "parent by estoppel" as a person who, although not a biological or adoptive parent:

> Lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent . . . to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests.

AM. LAW INST., Principles of the Law of Family Dissolution: Analysis and Recommendations, § 2.03(b) (2000). The ALI Principles expressly state that a lesbian partner is a parent by estoppel if, before the child's conception, she and the biological mother agree to conceive a child through artificial insemination and parent the child together. Id. § 2.03(1). The Uniform Parentage Act also provides that an unmarried partner who agrees to have a child through assisted reproduction is a legal parent. Uniform Parentage Act § 73 (2002).

The parent by estoppel concept is grounded in the recognition that biology is not the "exclusive determination of the existence of a family." Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 844 (1977). "[A] deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship." Id. at 845; see also Price v. Howard, 346 N.C. at 76-79, 484 S.E.2d at 533-34 (parental rights are not based exclusively on biology but rather are "a counterpart of the parental responsibilities the parent has assumed," thereby

suggesting that a person who assumes all of the obligations of a parent may over time acquire parental rights).

In most cases, the biological and the social/psychological aspects of parentage coincide. Increasingly, however, because of the greater numbers of children of unmarried parents and the variety of households in which they are being raised, as well as greater use of assisted reproduction and advances in the ability to ascertain genetic parentage, North Carolina courts have had to resolve tensions between parentage claims based on biology and claims based on equitable considerations, such as conduct and intention. In resolving these disputes, North Carolina courts have struck a careful balance. This Court should apply the same careful, balanced approach to cases involving children born through assisted reproduction to same-sex and other unmarried couples.

For example, although the artificial insemination statute specifically addresses only married couples, it is significant that North Carolina General Statute § 49A-1 confers parental status on a husband even though the child conceived via artificial insemination is not biologically related to him. As the Tennessee Supreme Court observed in an analogous case involving children born to an unmarried heterosexual couple through assisted reproduction, "[t]he artificial insemination statute thus reflects a policy which favors taking into account

intent [as well as biology] in establishing parentage when technological assistance is involved." In re C.K.G., 173 S.W.3d 714, 728 (Tenn. 2005).

Similarly, North Carolina courts have applied estoppel beyond its traditional use to prevent putative fathers who have acknowledged paternity from later denying parentage based on the absence of a genetic tie. See 3 Suzanne Reynolds, Lee's North Carolina Family Law § 16.18 (describing cases). This application of estoppel is broader than in many other states and reflects a strong policy in favor of protecting children's established relationships with non-biological parents. See, e.g., Withrow v Webb, 53 N.C. App. 67, 71-72, 280 S.E.2d 22, 26 (1981) (man who had held himself out as child's father was estopped from seeking to disavow paternity through blood test); Dorton v. Dorton, 69 N.C. App. 764, 766, 318 S.E.2d 344, 346 (1984) (same).

Similar considerations support the application of estoppel here. Where necessary to achieve fundamental fairness and to protect the child, a biological parent should be prevented from disrupting parent-child bonds that she previously acknowledged and played an essential role in creating.

In multiple contexts, North Carolina courts have acknowledged the devastating impact on a child of losing a parental relationship and have acted to protect children from that loss. See, e.g., Withrow, 53 N.C. App. at 72, 280 S.E.2d at

26 (loss of parent-child relationship "clearly would result in irreparable harm to the child"); Price, 346 N.C. at 83, 484 S.E.2d at 537 (child would be harmed by permitting biological mother to disrupt child's "family unit" after encouraging non-biological parent and child to develop "a relationship of love and duty with no expectations that it would be terminated"); In re Gibbons, 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957) (separating child from his non-biological parents "would tear at the heart of the child, and mar his happiness"). The same protections should be afforded to children, like Quinn and Enid, who are born into same-sex parent families and who develop bonded relationships with their non-biological parents. In the absence of this Court's protection, these children will be harmed by losing parental bonds that have been of critical importance to them in their earliest years.

These children – and potentially the public fisc as well - will also be harmed by losing the financial and practical support of having two parents. North Carolina law places primary responsibility for supporting children on the parents rather than the taxpayers. See, e.g., Nisbet v. Nisbet, 102 N.C. App. 232, 238, 402 S.E.2d 151, 154 (1991). This duty applies equally to unmarried as well as married parents. Wilkes County by Child Support Enforcement Agency v. Gentry, 311 N.C. 580, 584, 319 S.E.2d 224, 227 (1984) (citing N.C. Gen. Stat. § 49-7). By

holding that unmarried persons who jointly decide to have a child through artificial insemination are parents by estoppel, this Court will further these policies by ensuring that the two people who are responsible for procreating a child are responsible for his or her support. This is particularly appropriate since a child born through artificial insemination does not have an opportunity to seek support from a biological father. If the second parent is not held legally accountable, the child will be left in the vulnerable position of having only one parent responsible for his or her support.

Both the North Carolina legislature and North Carolina courts have long since abandoned the common law rule that "an illegitimate child was *nullius filius*," literally the child of no one. Rosero v. Blake, 357 N.C. 193, 199-201, 581 S.E.2d 41, 45-46 (2003) (describing legislative and judicial efforts to equalize treatment of so-called legitimate and illegitimate children); Fisher v. Fisher, 124 N.C. App. 442, 445, 477 S.E.2d 251, 253 (1996) (unmarried parents and their children are entitled to recognition as "family units"); Conley v. Johnson, 24 N.C. App. 122, 124, 210 S.E.2d 88, 89-90 (1974) (unmarried fathers have equal right to custody).

Recognition of parenthood by estoppel would promote equal treatment by protecting children born through assisted reproduction regardless of whether their parents are married or

unmarried. Indeed, since the law imposes parental responsibility on a man who *accidentally* conceives a child outside of wedlock, Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986), it would be particularly irrational to fail to do so for a man (or woman) who *deliberately* causes the birth of a child through assisted reproduction. In re Marriage of Buzzanca, 61 Cal. App. 4th 1410, 1420 (Cal. App. 1998)(a "deliberate procreator" should be held as responsible as a "casual inseminator").

The facts found by the trial court fully support its conclusion that plaintiff is a parent by estoppel. As a result, the court acted properly in resolving the parties' custody dispute in the best interest of the children.

III. THE TRIAL COURT'S ORDER FOR A PARENT COORDINATOR SHOULD BE UPHELD.

The trial court properly issued an order appointing a parenting coordinator upon entry of the final custody order. Defendant's only challenge to the parenting coordinator order is that the final custody order was invalid and that the trial court erred in applying the best interest of the child standard. Def's Br. at 19. Because the final custody order is valid, the parenting coordinator order should be upheld.

CONCLUSION

For the foregoing reasons, the trial court's orders for joint physical custody and a parenting coordinator should be affirmed.

Respectfully submitted, this the 13th of November, 2007.

Burton Craige, NC Bar No. 9180
Patterson Harkavy LLP
Post Office Box 27927
Raleigh, NC 27611
Tel: 919.755.1812; Fax: 919.755.0124
Email: bcraige@pathlaw.com

Karen P. Davidson, NC Bar No. 9768
Epting & Hackney
Post Office Drawer 1329
Chapel Hill, NC 27514
Tel: 919.929.0323; Fax: 919.929.3960
Email: kpdavidson@gmail.com

CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff-appellee hereby certifies that a copy of Plaintiff-Appellee's Brief was served via first class mail, addressed to:

K. Edward Greene
Tobias S. Hampson
Wyrick Robbins Yates & Ponton LLP
Post Office Drawer 17803
Raleigh, NC 27619

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Burton Craige