Custody Disputes Between Natural Parents and Third Parties: Mason, Estroff, and Heatzig and Beyond

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With increasing frequency, state courts have been confronted with custody disputes between the biological mother and a former same-sex partner who shared the responsibility of raising the child. In 2008, the North Carolina appellate courts addressed the issue for the first time. In a trio of unanimous decisions – Mason v. Dwinnell, Estroff v. Chatterjee, and Heatzig v. MacLean – the North Carolina Court of Appeals defined the circumstances in which the former partner would be entitled to a custody determination based on the best interest of the child. Because the opinions apply the law to three sets of facts, they provide especially helpful guidance to attorneys and the trial courts.

I. Legal Background

A.. North Carolina's Custody Statute

North Carolina's custody statute makes the best interest of the child paramount in custody determinations: "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 institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a).

B. The Constitutional Rights of the Natural Parent

In accordance with the custody statute, the "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).[1] In a custody dispute between a natural parent and a third party who is not a natural parent, however, 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.

The United States Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." Quilloin v. Walcott, 434 U.S. 246, 255 (1978). "[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" Lassister v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981). A "cardinal" constitutional principle is that "custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Stanley v. Illinois, 405 U.S. 645, 651 (1972). Most recently, the Supreme Court declared that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents

[1] The term "natural parent" includes biological and adoptive parents. Id.

to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000).

In Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994), our Supreme Court first considered the impact of the Due Process Clause on North Carolina custody determinations. The Petersen court held "that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." Id. at 403-04, 445 S.E.2d at 905. Because the trial court in that case had made no finding that the natural parents were unfit or had neglected their child's welfare, the trial court "could not award custody to anyone other than [the parents]." Id. at 404, 445 S.E.2d at 905.

Three years later, the North Carolina Supreme Court revisited the constitutional rights of natural parents. In Price v. Howard, 346 N.C. at 71, 484 S.E.2d at 529, the child's biological mother represented to her domestic partner for approximately six years that he (the plaintiff) was the child's biological father. As a result of the mother'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 mother as well. Id. A dispute about the child's custodial arrangements arose when the child was approximately six years old, and the plaintiff 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 mother 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 mother because of the holding in Petersen. 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).

To overcome the constitutional presumption in favor of the natural parent, the third party must meet a heightened burden of proof. In Adams v. Tessener, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001), the Supreme Court held that "a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence."

Although North Carolina's statute appears to permit any "other person" to assert a custody claim in the best interest of the child, N.C. Gen. Stat. § 50-13.1(a), the natural parent's constitutionally protected status limits the standing of third parties. In Ellison v. Ramos, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998), the Court of Appeals concluded that "the relationship between the third party and the child is the relevant consideration for the standing determination." While a third party who has no relationship with the child does not have standing to seek custody of a child from a natural parent, "a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." Id.

II. The Three Decisions of the North Carolina Court of Appeals

In three district court hearings in 2006, same-sex former domestic partners battled over custody rights. In two cases, Mason and Heatzig, the judge applied the best interest of the child standard, and awarded joint custody to the third party. In Estroff, the district judge found that the biological mother had not acted inconsistently with her right to exclusive custody, and rejected the claim by the ex-partner. In each case, the losing party appealed. Recognizing the importance of the issue, the Court of Appeals heard oral argument in all three cases, and issued a trio of decisions in 2008.

A. Mason v. Dwinnell

In Mason v. Dwinnell, 660 S.E.2d 58 (N.C. App. May 6, 2008), the Court of Appeals considered a custody dispute in which the biological mother clearly intended – before the child was conceived and for years thereafter – to create an enduring parental relationship between her same-sex partner and the child. The district court made extensive findings of fact (Attachment A), recited in detail in the Court of Appeals opinion, and in abbreviated form below:

- Mason and Dwinnell were domestic partners for eight years. They jointly decided that Dwinnell would bear a child that they would raise as parents together, and chose an anonymous sperm donor who had physical characteristics resembling Mason's. Mason attended all of Dwinnell's inseminations and all of her prenatal care appointments and childbirth classes.

- Mason attended the child's birth in 1997 and cut his umbilical cord. Combining their surnames, Dwinnell and Mason named the child Mason Dwinnell**.**

- At the baptismal ceremony, they publicly presented themselves to family and friends as the child's two parents.

- Dwinnell and Mason shared caretaking responsibilities for the child. Although the women shared paying household expenses and the child's individual expenses, Dwinnell and Mason agreed that Mason would claim the child as a dependent for all income tax purposes.

- When the child was three years old, Dwinnell and Mason signed before a notary public a "Parenting Agreement" prepared by an attorney. According to the district court, Dwinnell and Mason both wished to enter into an agreement that gave Mason all of the rights and responsibilities of an equal parent.

- The document recited that (1) each party acknowledged and agreed that "they jointly decided to conceive and bear a child, based upon their commitment to each other and their commitment to jointly parent a child;" (2) Mason "would legally adopt this child, with the consent and joinder of [Dwinnell], if the laws of the State of North Carolina allowed for second parent adoptions, which they currently do not;" (3) each party acknowledged and agreed that "although [Mason] is not the biological mother, she is a *de facto* parent who has and will provide the parties' child with a stable environment and she has formed a psychological parenting relationship with the parties' child;" (4) "each party further acknowledges and agrees that their child's relationship with [Mason] should be protected and promoted to preserve the strong emotional ties that exist between them;" and (5) "the parties desire to make provisions regarding the support, custody and care of their child in the event that they should cease living together as a family . . . ."

- The document then set forth provisions relating to Mason's custody, visitation, and financial support should the women's relationship terminate, as well as other provisions addressing what would happen if Dwinnell was unable to care for the child. The document specifically stated: "Each party acknowledges and agrees that all major decisions regarding their child, including, but not limited to, residence, support, education, religious upbringing and medical care shall be made jointly by the parties."

- Mason paid the majority of daycare and preschool expenses; all of the child's private school tuition for four years and one semester, with a fifth year's tuition paid by a trust funded by Mason's parents; and all of the child's before- and after-care from 2000 through June 2004. Mason's parents established an irrevocable trust for the minor child, as they had for all of their grandchildren. Mason established a college savings account for the child funded by Mason and her parents.

- When completing forms relating to the child, Dwinnell marked through "Husband," "Father," or "Guardian" and inserted "co- parent," followed by Mason's name.

- In 2001, Dwinnell and Mason decided to cease living together and Mason moved one block away. From the date of their separation until 2004, Dwinnell and Mason equally shared parental responsibilities for the child in their respective homes, including overnight stays.

- Beginning in October 2004, Dwinnell only allowed her child to visit Mason every other weekend and one evening each week for dinner. Mason responded by filing a complaint for custody.

The trial court granted the parties temporary joint legal and physical custody of the child, specifying that the child would spend equal time with each party. Following a 10-day hearing, the district court entered an order of permanent custody.

In its order, the district court found, in addition to the findings recited above, that Dwinnell "encouraged, fostered, and facilitated the emotional and psychological bond between the minor child and [Mason]." Further, "[t]hroughout the child's life, [Mason] has provided care for him, financially supported him, and been an integral part of his life such that the child has benefited from her love and affection, caretaking, emotional and financial support, guidance, and decision-making."

The court then concluded that "[b]y allowing [Mason] to be involved in the minor child['s] life as set forth above in the findings of fact and voluntarily executing a Parenting Agreement to share parental rights and responsibilities, [Dwinnell] has acted inconsistent with her paramount parental right . . . ." As a result, the court concluded that it should determine the custody issues based on the child's best interests.[2] Finally, the court concluded that it was in the best interest of the child that the parties be granted permanent joint legal and physical custody of the child.

The Court of Appeals affirmed. Judge Geer, writing for a unanimous court (Bryant and Steelman concurring), began by observing that "the factual context of this case – involving same sex domestic partners – is immaterial to the proper analysis of the legal issues involved." Id. at 60.[3] The court tersely rejected Dwinnell's contention that further legislation was required before a same-sex partner could assert a claim for custody: "The legislature … has already spoken." 660 S.E.2d at 63. The custody statute, N.C. Gen. Stat. § 50-13.2(a), provides that custody shall be awarded "to such person … as will best promote the interest of the child." The only limits on

[2] Alternatively, the district court concluded that Mason "is a parent by estoppel, given [Dwinnell']s conduct in establishing [Mason] as a parent to the child from preconception through 2004. Therefore, [Dwinnell] is now estopped from alleging that [Mason] is not a parent." Id. at 62. The Court of Appeals noted that the case involved questions of custody only, and therefore did not present the issue of whether a former domestic partner may acquire the status of legal parent. Accordingly, the Court of Appeals declined to address "the doctrine of parent by estoppel adopted in other jurisdictions." Id. at 64.

[3] The court amplified the point in its conclusion: "Although this appeal arises in the context of a same-sex domestic partnership, it involves only the constitutional standards applicable to all custody disputes between legal parents and third parties." Id. at 73.

application of the best interest of the child standard are the constitutional rights of the natural parent.

The court determined that Mason had standing to bring a custody claim because she had a "relationship in the nature of a parent-child relationship." See Ellison, 130 N.C. App. at 394, 502 S.E.2d at 894. The court then turned to the issue of "whether the district court's findings of fact are sufficient to support its conclusion of law that Dwinnell acted in a manner inconsistent with her constitutionally-protected paramount interest in the companionship, custody, care, and control of her child." Mason, 660 S.E.2d at 66.

The court rejected Dwinnell's argument that a third party could only invoke the best interest of the child standard after a judicial finding of unfitness of the natural parent. Instead, under Price, a natural parent can forfeit her exclusive parental rights either by unfitness or by other conduct inconsistent with her constitutionally protected status. Id. at 66.

The court focused on the intent and conduct of the parties. "The district court made findings of fact unchallenged on appeal that Dwinnell and Mason decided to create a family and intentionally took steps to identify Mason as a parent of the child…." Id. at 67 (emphasis in original). The Court of Appeals then cited multiple findings of fact confirming that "Dwinnell and Mason functioned as if both were parents…." Id.

The Parenting Agreement, signed by the parties when the child was three years old, showed beyond dispute that Dwinnell made a deliberate choice that she and Mason would "jointly parent" the child. Id. at 67-68. Moreover, Dwinnell intended to create a permanent parent-child relationship between Mason and her child. Id. at 67. Borrowing the Supreme Court's language in Price, the Court of Appeals cited powerful evidence that Dwinnell "'induced [Mason and the child] to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.'" Id. at 69 (quoting Price, 346 N.C. at 83, 484 S.E.2d at 537).

The Court of Appeals summarized the legal consequences of Dwinnell's conduct:

> [L]ike all parents, Dwinnell had the constitutionally-protected right to "maintain a zone of privacy" around her and her child…. Indeed, since no biological father was present, Dwinnell exercised exclusive and autonomous parental authority in relation to her child. She nonetheless voluntarily chose to invite Mason into that relationship and function as a parent from birth on, thereby materially altering her child's life. She gave up her right to unilaterally exclude Mason (or unilaterally limit contact with Mason) by choosing to cede to Mason a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child....
>
> In sum, we conclude that the district court's findings of fact establish that Dwinnell, after choosing to forego as to Mason her constitutionally-protected parental rights, cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a

> parent. Her choice does not mean that Mason is entitled to the rights of a legal parent, but only that a trial court may apply the "best interest of the child" standard in considering Mason's request for custody, including visitation.
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> Id. at 69-70.

The Court of Appeals considered and rejected Dwinnell's contention that only "bad acts" could be inconsistent with a parent's constitutionally protected status. "When examining a legal parent's conduct to determine whether it is inconsistent with his or her constitutionally-protected status, the focus is not on whether the conduct consists of 'good acts' or 'bad acts.' Rather, the gravamen of 'inconsistent acts' is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party." Id. at 70. Moreover, unilaterally severing a strong parent-child bond under these circumstances, creating a risk of serious emotional harm to the child, "cannot be viewed as benign conduct." Id.

The Court of Appeals then reviewed the district court's application of the best interest of the child standard, and found no abuse of discretion. Id. at 71-73.

B. Estroff v. Chatterjee

Mason and Estroff were argued in sequence before the same panel of the Court of Appeals, and the opinions in those cases were issued on the same day. Unlike Mason, Estroff's claim for joint custody was rejected.

In Estroff v. Chatterjee, 660 S.E.2d 73 (N.C. App. May 6, 2008), the plaintiff sought joint custody of the twin children of her former domestic partner. Many of their circumstances were similar to those of the parties in Mason. The parties had an established domestic partner relationship for at least six years and held themselves out as a couple. Id. at 75. When Chatterjee decided that she wanted to conceive a child, the couple jointly paid for the purchase of the sperm and Estroff went to medical appointments with a reproductive specialist and with an obstetrician for prenatal care. Id. The children were given Estroff's name as their middle name. Id. at 76. Estroff and Chatterjee shared daily care of the children and Estroff's family also assisted with their care. Id. Estroff helped to support the children financially and held them out as her own at university events where she was a professor. Id.

According to the trial court's factual findings, however, Chatterjee did not consider Estroff to be a co-parent either before or after the birth of the children. Chatterjee did not jointly decide with Estroff to create a family; rather she made the decision on her own and asked only if Estroff had any objection to sharing her home with children. Id. at 75. Chatterjee chose the sperm donor on her own. Id. Unlike Estroff, Chatterjee did not announce to others that the couple was going to raise the twins together. Id. at 76. When the children were born, Chatterjee objected to the hospital staff referring to Estroff as the other "mom." Id. Then, while the couple lived together with the twins, Chatterjee objected to Estroff's being called the children's "mom" and reminded Estroff that Estroff was not the mother of the children and that Chatterjee was and always would be their only mother. Id. Finally, the parties never entered into any written or verbal agreement that Estroff was a parent, custodian, or legal guardian, nor even discussed

entering into a such an agreement or taking other action to provide Estroff with parental or custodial rights. Id.

The trial court ultimately found that Chatterjee had "not conveyed or relinquished custody or parental status to [Estroff] by her conduct and/or by her actions." Id. at 76. Therefore, the court concluded Chatterjee had not engaged in conduct inconsistent with her constitutionally-protected status as a parent. Id. at 77. The court thus dismissed Estroff's claims for custody.

Estroff's initial argument on appeal was that the trial court erred in considering Chatterjee's intent regarding Estroff's role with the children instead of solely considering her conduct. The Court of Appeals (Geer; Bryant and Steelman concurring) disagreed. Following Mason, the court held that the operative standard is "whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child." Id. at 78. "The parent's intentions regarding that relationship are necessarily relevant to that inquiry." Id. By including intent within the standard, custody will not be awarded to a third party who has assumed a parent-like status on her own without that being the goal of the legal parent. Id.

The Court of Appeals also rejected Estroff's challenges to the trial court's findings of fact. Based on those findings, the court concluded that Chatterjee did not choose to create a family unit with two parents, did not intend that Estroff would be a parent, and did not allow Estroff to function fully as a parent. Id. at 81. These conclusions were dispositive, even though Estroff acted in many ways as a parent of the children. "The fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of Price and Mason." Id.

C. Heatzig v. MacLean

The Court of Appeals issued the third opinion, Heatzig v. MacLean, three months after Mason and Estroff. Heatzig, heard by a different panel (Steelman, Elmore, Arrowood), was authored by Judge Steelman, the only judge to serve on all three panels.. In Heatzig, 664 S.E.2d 347 (N.C. App. August 5, 2008), the trial court was again faced with a custody dispute between previously committed domestic partners. The facts in Heatzig fall between those in Mason and Estroff.

Some of the evidence indicated an intentional co-parent relationship between the parties. The trial court found, *inter alia*, that:

> (1) it was a joint decision for defendant to get pregnant by artificial insemination; (2) the sperm donor was selected based upon physical characteristics similar to plaintiff; (3) plaintiff participated in the birthing classes and was present at the birth; (4) both parties signed the birth certificate application; (5) there was a baptismal ceremony where both plaintiff and defendant were identified as parents;

> (6) plaintiff was given authority to obtain health care treatment for the children; and (7) names from plaintiff's family were used in the names of each of the children.

Id. at 354. On the other hand, the court also found that "(1) [the] defendant had been trying to get pregnant for many years before she and plaintiff began their relationship; (2) the timing and methodology decisions regarding defendant's pregnancy were made primarily by defendant; and (3) the parties were unable to work out a parenting agreement." Id.

Unlike the trial courts in Mason and Estroff, however, the district court in Heatzig did not proceed under the standard already established by Price. Accepting MacLean's contention that only "bad acts" could be conduct inconsistent with a parent's constitutionally-protected status, the court found that defendant MacLean had not acted inconsistently with her paramount constitutional status. Id. at 352. Instead, the court concluded that Heatzig was a "parent" under the law and entitled to shared custody, based on the best interest of the children. Id. at 352-53.

The Court of Appeals quickly rejected the conclusion that Heatzig was a legal parent, as only biological and adoptive parents are recognized by the law. Id. at 353. Instead the trial court should have proceeded under Price in determining whether Heatzig could be awarded custody of the children. The Court of Appeals was unable to apply the analysis from Mason because the trial court had not made the key factual findings addressing MacLean's intent to create a family unit that included Heatzig and the two children or to cede to Heatzig parental responsibility and decision-making authority. Nor had the trial court required Heatzig to meet the clear and convincing evidence standard. The Court of Appeals remanded for "further findings of fact, and their consideration in light of the principles of Price as explained by Mason and Estroff." Id. at 354.

Under N.C. Gen .Stat. § 7A-30, MacLean filed a notice of appeal to the North Carolina Supreme Court, asserting that the case involved substantial constitutional questions. Alternatively, MacLean filed a petition for discretionary review. On December 11, 2008, the Supreme Court granted Heatzig's motion to dismiss the appeal, and denied MacLean's petition for discretionary review.

III. Comment

Applying Price v. Howard in a new context, the Court of Appeals in Mason and Estroff struck a careful balance between the rights and interests of the legal parent, the third party, and the child. Citing materially different facts as to the intent of the natural parent, the court upheld one custody claim and rejected the other. In Heatzig, the Court of Appeals correctly identified the district court's misapprehensions of law, and remanded the case for reconsideration in light of Price, Mason and Estroff.

The trio of decisions by the Court of Appeals provides helpful guidance to the bar and the bench. In Mason, Estroff and Heatzig, the court clearly and consistently articulated the governing

legal principles. The court's analyses of the facts – and the divergent results in the three cases – illuminate the evidence that will be needed to support or defeat a third party custody claim.

In a future custody dispute, advocates for the natural parent may, like the defendant in Heatzig, invite the North Carolina Supreme Court to overturn the Court of Appeals' interpretation of Price. For at least four reasons, it is safe to predict that the Supreme Court will reject the invitation. First, the notice of appeal in Heatzig gave the court a perfect opportunity to articulate a different standard, yet it declined to do so. Second, Mason, Estroff and Heatzig are well reasoned opinions, solidly grounded in North Carolina Supreme Court precedent. Third, the analysis in Mason is consistent with recent decisions of other state courts that have confronted custody claims by former domestic partners.[4] Fourth, as time passes, long-term parent-child relationships with domestic partners will become increasingly common. The Supreme Court is not likely to embrace a legal principle that will sever those bonds, disregarding the best interest of the child.

While the legal principles announced in Mason and Estroff are likely to endure, future appellate decisions may refine the test for determining when a natural parent has acted inconsistently with her constitutionally protected status. Perhaps the North Carolina courts will move toward the four-part test first articulated by the Wisconsin Supreme Court in Holtzman v. Knott (In re H.S.H-K), 533 N.W.2d 419 (Wis.1995), and later adopted in New Jersey and South Carolina. V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006).[5] Under that test, the domestic partner is entitled to a custody determination based on the best interest of the child if she proves that 1) the natural 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. Holtzman, 533 N.W.2d at 421. Virtually identical in substance to the analysis in Mason and Price, the four-part test would give further direction to the trial courts in evaluating third party custody claims.

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[4] See Mason, 660 S.E.2d at 69-70 (citing cases from other jurisdictions); see also Holtzman v. Knott (In re H.S.H-K), 533 N.W.2d 419 (Wis.1995) (four-part test for "psychological parent" relationship); 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).

[5] In Mason, the court cited with approval the New Jersey and South Carolina decisions. 660 S.E.2d at 69-70.