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FAMILY LAW—Custody Dispute Between Biological Mother and Non-biological, Non-adoptive Party: *A.C. v. C.B.*

I. INTRODUCTION

In *A.C. v. C.B.*,[1] the New Mexico Court of Appeals examined a unique custody dispute. One party was the biological mother of the child. The other party had no biological or adoptive relationship to the child. However, this party was living with the biological mother before, during, and after the child was born. Both parties were female.

This casenote outlines the decision of the court of appeals and the issues district courts should consider when determining whether a non-biological, non-adoptive party may seek joint custody and/or visitation rights of a child born to her and her partner, the biological mother of the child.

II. STATEMENT OF THE CASE

A.C. and C.B., both female, lived together from 1973 until July 1, 1987. In 1980, C.B. became pregnant through artificial insemination from an unknown donor. During the pregnancy, A.C. attended Lamaze classes with C.B. C.B. gave birth in September of 1980. For the next seven years, A.C. lived in the same house with C.B. and the child.[2] A.C. and C.B. set up a trust fund for the child's education, and established a savings account and life insurance policy for the child's benefit.[3] On July 1, 1987, A.C. and C.B. separated.

A.C. and C.B. developed a coparenting agreement[4] in 1987, before their separation. That agreement was honored until March of 1988, when A.C. alleged that C.B. breached the agreement by instituting harsh limitations.[5] A.C. claimed that C.B. severely restricted her rights to visit and have any contact with the child. Additionally, A.C.'s offer to pay child support was rejected. Because of the limitations on her visits, A.C. filed a petition for joint legal custody and time sharing in October of 1988. In November of 1988, A.C. filed a motion for immediate visitation.[6]

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1. 113 N.M. 581, 829 P.2d 660 (Ct. App.), *cert. denied*, 113 N.M. 449, 827 P.2d 837 (1992).

2. The parties disputed A.C.'s participation in the "family life" of the child and C.B. *Id.* at 582, 829 P.2d at 661.

3. These facts were also disputed. A.C. asserted that she and C.B. jointly contributed financially to the child's welfare. *Id.*

4. It is unclear whether this was an oral or written agreement and if it was limited to the parties. *Id.*

5. The district court made no finding on this fact, but it could be considered true, because C.B. did not admit nor deny this in her response to the petition. *Id.*

6. *Id.* at 582-84, 829 P.2d at 661-63.

In March of 1989, the district judge signed a court order allowing the "dismissal [of] this action with prejudice."[7] A.C. and C.B., through their attorneys, also signed this dismissal. Further, the court order stated that the parties had "entered into a settlement agreement providing for dismissal for this action with prejudice."[8] In August of 1989, due to C.B.'s failure to uphold the agreement, A.C. filed a motion to reopen the judgment of the district court or, alternatively, for enforcement of an oral settlement agreement.[9] A.C. claimed that the oral settlement agreement, established by the parties in March of 1989, was the basis for her willingness to dismiss the suit with prejudice.[10]

To counter the motion to reopen the judgment, C.B. filed a motion for summary judgment. She asserted several legal defenses, including the claim that "no legal relationship existed between the child and [A.C.] which would confer any 'rights, privileges, duties and obligations' on the latter."[11] C.B. presented with her motion an affidavit denying the existence of any agreement made at any time regarding the child.[12] In response to C.B.'s summary judgment motion, A.C. maintained that there were issues of material fact such as whether an agreement between the parties existed and whether A.C. was a de facto parent. Attached to A.C.'s response was a copy of C.B.'s will, which named A.C. "as guardian and trustee of the child."[13] The district court granted the motion for summary judgment, citing several reasons. The court found that:

> [n]o valid legal marriage exists or existed between the parties; [A.C.] has no standing or rights that she can enforce in this matter; . . . this case [was previously dismissed] with prejudice and [A.C.] has not met the burden under Rule 60 to re-open this case so [A.C.'s] Motion to re-open should be denied; and because the burden has not been met under Rule 60 to re-open the case, the Court need not address the issue of whether or not the parties have an enforceable contract. However, if a contractual relationship existed, it was not in the best interest of the minor child.[14]

The court of appeals held that the district court had jurisdiction, under New Mexico Rule of Civil Procedure 1-060(B)(3),[15] to reopen the judgment if A.C. could demonstrate that she signed the dismissal of the court order under fraud or misrepresentation. If A.C. was able to demonstrate

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7. *Id.* at 582, 829 P.2d at 661; *see also* Order Dismissing Action with Prejudice, A.C. v. C.B., 113 N.M. 581, 829 P.2d 660 (Ct. App. 1992) (No. 12335).
8. *A.C.*, 113 N.M. at 582, 829 P.2d at 661.
9. *Id.*
10. *Id.* at 583, 829 P.2d at 662.
11. *Id.*
12. *Id.*
13. *Id.*
14. Slip Opinion at 1-2, A.C. v. C.B. 113 N.M. 581, 829 P.2d 660 (Ct. App. 1992) (No. DR-88-04122).
15. This rule states: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment . . . for . . . (3) fraud . . . misrepresentation or other misconduct of an adverse party." N.M. R. Civ. P. 1-060(B)(3).

fraud or misrepresentation, the district court could reopen the case and consider the merits. The court of appeals remanded the case to the district court for a finding on the fraud issue.

The court of appeals also held that it was not possible for the district court to determine, as a matter of law, that enforcement of the settlement agreement was not in the best interest of the child.[16] In order to determine what is in the best interest of the child, the district court must examine the evidence brought before the court.[17] Finally, the court of appeals specifically stated that A.C.'s "sexual orientation, standing alone, is not a permissible basis for the denial of shared custody or visitation."[18]

III. LEGAL ANALYSIS

A. Historical Treatment of Custody

Prior to the seventeenth century in England, the feudal concept of a child as property, or chattels, was the norm.[19] Parents had absolute power over their children. Because of this perspective no one, not even the court, had standing to intervene in the parent-child relationship. Over time, the courts, assuming the responsibility of protecting those subjects it determined were unable to protect themselves, employed the theory of parens patriae.[20] From this the courts gained standing to intervene in the parent-child relationship. Historically, courts have limited each child to exactly one male parent and one female parent.[21] In New Mexico this idea has been altered to include other persons in the child's life. The New Mexico courts have recognized that children may have many people who act as parents.[22]

This case presented to the New Mexico courts for the first time the threshold issues of whether a non-biological, non-adoptive party has standing to seek joint custody and visitation rights, and whether the non-biological, non-adoptive party must show that the biological mother is unfit to obtain those rights. The court of appeals did not directly address the issue of whether A.C. has standing as a "parent" to seek joint

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16. *A.C.*, 113 N.M. at 585, 829 P.2d at 664; *see* N.M. STAT. ANN. § 40-4-9.1(I) (Repl. Pamp. 1989).

17. *A.C.*, 113 N.M. at 585, 829 P.2d at 664.

18. *Id.*

19. Sandra R. Blair, Note, *Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes—In re Marriage of Allen, 28 WN.APP. 637, 622 P.2d 16 (1981)*, 58 WASH. L. REV. 111, 112 n.12 (1982).

20. Literally this means "parent of the country." The theory originated from the English common law, where the King had a royal prerogative to act as guardian to persons with legal disabilities, such as infants. In the United States, this function belongs with the states. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

21. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) [hereinafter Polikoff].

22. Not only through case law have these relationships been recognized, but also by statute. *See, e.g.*, N.M. STAT. ANN. §§ 40-9-1 and 40-9-2 (Repl. Pamp. 1989).

custody. Similarly, the court of appeals did not offer any guidance on the issue of whether the non-biological, non-adoptive party must show that the biological mother is an unfit parent to be able to establish her own rights of custody or visitation.

B. Who is a Parent?

Under section 40-4-9.1(L)(4) of the New Mexico statutes,[23] the term parent has several meanings; "'parent' means a natural parent, adoptive parent or person who is acting as a parent who has or shares legal custody of a child or who claims a right to have or share legal custody."[24] This broad definition suggests limitless possibilities of who might qualify as a parent, seemingly including someone in the position of appellant, A.C.. However, it is the implicit desire of some courts to prevent third parties from pursuing custody simply because of some feeling of affection for that child.[25] On the other hand, some courts have broadened the definition of a parent. There are three doctrines that have been employed by the courts to determine who is a parent: (1) in loco parentis; (2) equitable estoppel; and (3) equitable parenthood.[26]

1. In Loco Parentis

New Mexico has expressed the doctrine of in loco parentis in a particular manner. It states that:

> [a] person is said to stand in loco parentis when he puts himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necessary to a legal adoption. However, the person must intend to assume toward the child the status of a parent.[27]

This doctrine was first articulated in *Spells v. Spells*.[28] In *Spells* the Pennsylvania trial court refused to grant visitation rights to a stepparent. The appellate court reversed this decision and remanded the case for a hearing to determine if the stepparent stood in loco parentis to the child. The appellate court was persuaded that the step-parent-child relationship was analogous to the biological parent-child relationship. The court explained that "it is against public policy to limit or destroy the relationship of parent to child . . . . Accordingly, when a step-parent stands 'in loco parentis' with his stepchildren, courts must jealously guard his rights to visitation."[29]

In *Carter v. Broderick*,[30] the court conducted a similar examination of the in loco parentis doctrine. Here a step-parent was seeking visitation

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23. N.M. STAT. ANN. § 40-4-9.1(L)(4) (Repl. Pamp. 1989).
24. *Id.*
25. *See* Carter v. Brodrick, 644 P.2d 850, 855 n.5 (Alaska 1982).
26. Polikoff, *supra* note 22, at 470.
27. Fevig v. Fevig, 90 N.M. 51, 53, 559 P.2d 839, 841 (1977).
28. 378 A.2d 879 (1977).
29. *Id.* at 883.
30. 644 P.2d 850 (Alaska 1982).

rights under a statute that allowed custody or visitation with "any child of the marriage."[31] The Alaska Supreme Court adopted the common law doctrine as stated in *Spells* and then expanded it through a discussion of "psychological parentage." According to the court a psychological parent is described as:

> one who, on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological need for an adult. This adult becomes an essential focus of the child's life, for he is not only the source of the fulfillment of the child's physical needs, but also the source of his emotional and psychological needs . . . . This relationship may exist between a child and any adult; it depends not upon the category into which the adult falls—biological, adoptive, foster, or common-law—but upon the quality and mutuality of the interaction.[32]

Two factors seemed to provide A.C. with the standing to seek joint custody. First, the doctrine of in loco parentis fits with New Mexico's statutory definition of parent, especially "[a] person who is acting as a parent who has or shares legal custody of a child . . . ."[33] Second, it is impossible for New Mexico courts to determine, as a matter of law, whether a person is in loco parentis because the doctrine mandates a factual determination. The guiding principle is a concern with preserving the parent-child relationship. To that end, the court must do all within its power to determine where those relationships exist, formal or not, and then it must enact court orders to keep them intact.

A.C. alleged that she participated in the child's life as a co-parent, supporting him financially and emotionally.[34] A.C. also provided a copy of C.B.'s will, naming A.C. as trustee and guardian of C.B.'s estate and her child.[35] With this evidence before it, the district court should have taken the time to explore the nature of A.C.'s relationship to the child. Here it seems the court did not want to engage in the sometimes difficult and awkward task of identifying *all* the parent-child relationships that may truly exist.

An example of the seeming hesitation to recognize non-biological relationships is *In re Melvin B.*,[36] where a stepmother moved to intervene in a periodic hearing. The stepmother was briefly married to the father of Melvin B. When the father disappeared, he left the child with the stepmother. The child was removed from the foster home where he had lived before living with his father and stepmother. The stepmother, in her motion to intervene, stated that she had developed a strong bond with the child. The court of appeals was not satisfied that the stepmother

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31. *Id.* at 855 (citing Alaska Stat. § 09.55.205 (1977)).

32. *Id.* at 853 (citing Gruengerg & Mackey, *A New Direction for Child Custody in Alaska*, 6 U.C.L.A.-ALASKA L. REV. 34, 36 (1976)).

33. N.M. STAT. ANN. § 40-4-9.1(L)(4) (Repl. Pamp. 1989).

34. Petitioner's Answer to Respondent's Motion for Summary Judgment at RP 52, A.C. v. C.B., 113 N.M. 581, 829 P.2d 660 (Ct. App. 1992) (No. 12335).

35. *Id.* Exhibit "B", at RP 64.

36. 109 N.M. 18, 780 P.2d 1165 (Ct. App. 1989).

was a custodian of the child under the statute.[37] Further, the court of appeals found that even if the stepmother was "a person in loco parentis," it could find no evidence that the trial court abused its discretion.[38] The court was willing to overlook an important and perhaps meaningful relationship to this young child whose father had abandoned him. The court disregarded the parent-child relationship possibly because it was not based on biology and because it was not easily determinable.

The court's hesitation to recognize non-biological parent-child relationships is particularly interesting in light of the responsibilities of a parent to support a child after dissolution of marriage. This responsibility continues even though the child may not be the biological or adoptive child of the parent.

2. Equitable Estoppel

The doctrine of equitable estoppel has been used to establish the responsibilities of family members as well as to establish their corresponding rights. The elements of equitable estoppel are: (1) representation through acts or conduct; (2) reliance on the assertions of the acts or conduct; and (3) a detriment suffered as a result of the reliance on the representation.[39] New Mexico courts have applied the principles of equitable estoppel to cases determining the responsibilities of biologically-related family members,[40] but not to cases concerning nontraditional families. Other jurisdictions have used it widely to enforce obligations of biological and nonbiological parents.[41] In *M.H.B. v. H.T.B.*,[42] a New Jersey court held that the obligations of a divorced stepparent are equitably estopped from denying an earlier commitment to support his stepchild financially. The facts showed that the stepfather had successfully gained the child's love and established himself as the little girl's parental provider of emotional and material support.[43] The court held that under these circumstances the stepfather was obligated to continue supporting his stepchild.[44]

Applying these facts to the elements of estoppel, it is clear how the court arrived at its holding. The conduct of the stepfather represented to the child the intention of the stepfather to provide financial and emotional support to the child—he assumed the status of a parent to this child. The child relied on this support and, when the divorce occurred and the stepfather discontinued financial support, she suffered a detriment.

Similarly, A.C. alleged she conducted herself as a coparent to the child.[45] She accepted the financial responsibility for the child and offered

37. *Id.*
38. *Id.* at 19-20, 780 P.2d at 1166-67.
39. Matter of Estates of Salas, 105 N.M. 472, 474, 734 P.2d 250, 252 (Ct. App. 1987).
40. *See* Brannock v. Brannock, 104 N.M. 385, 772 P.2d 636 (1986).
41. *See* Berrisford v. Berrisford, 322 N.W.2d 742 (Minn. 1982); M.H.B. v. H.T.B., 498 A.2d 775 (N.J. 1985); Miller v. Miller, 478 A.2d 351 (N.J. 1984).
42. 498 A.2d 775 (N.J. 1985).
43. *Id.* at 780.
44. *Id.*
45. Petitioner's Answer to Respondent's Motion for Summary Judgment at RP 52, A.C. v. C.B., 113 N.M. 581, 829 P.2d 660 (Ct. App. 1992) (No. 12335).

to continue that support after she and C.B. dissolved their relationship.[46] If the court could find that C.B. brought an action under the doctrine of equitable estoppel, her chances of success were good, as A.C.'s failure to continue financial support was a detriment to the child. Similarly, C.B.'s failure to allow continued emotional support can be seen as a detriment to the child.

3. Equitable Parenthood

Finally, courts have developed the doctrine of "equitable parenthood" to preserve a parent-child relationship. Equitable parenthood was created to allow a non-biological parent, who treated the child as his own, to custody and visitation rights.[47] In *Atkinson v. Atkinson*, the former husband was denied visitation rights by the mother of a four-year-old child because he was not the biological father of the child. The court held that, even though "the husband is not the biological father of a child born during the marriage, the husband may acquire rights of paternity under the theory of 'equitable parent' and the analogous doctrine of 'equitable adoption.'"[48] The court came to this determination based on the idea that if the husband acted as if the child was his own, and wanted to continue to assume the status of father of the child after nonpaternity was established, then he should be allowed to do so.[49]

The doctrine of equitable parenthood follows from the application of equitable estoppel in divorce cases. As stated in the earlier section, that doctrine does not permit a parent to deny paternity to escape the responsibility of the support of the child when she/he has assumed the status of parent.[50] When a party has related to a child as if it were her/his own, the courts are going to require that party to live up to her/his financial responsibilities to that child. It would neither be logical nor fair to deny that same party the right of custody or visitation. This is the sort of factual examination necessary to determine the actual parental status of A.C. If there is evidence that she assumed the status of mother to the child, then, given this doctrine, she should be able to enjoy the rights that flow from her position as "equitable parent."

C. *Best Interest of the Child*

The issue that drives custody and visitation determinations is the best interest of the child. Under both the statutory[51] and case law[52] of New

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46. *Id.*
47. Atkinson v. Atkinson, 408 N.W.2d 516, 517 (Mich. Ct. App. 1987).
48. *Id.*
49. *Id.* at 520.
50. *See id.*
51. N.M. STAT. ANN. §§ 40-4-7, -9.1 (Repl. Pamp. 1989).
52. *See* Lopez v. Lopez, 97 N.M. 332, 639 P.2d 1186 (1981); Schuermann v. Schuermann, 94 N.M. 81, 607 P.2d 619 (1980); Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968); Kotrola v. Kotrola, 79 N.M. 258, 442 P.2d 570 (1968); Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968); Tuttle v. Tuttle, 66 N.M. 134, 343 P.2d 838 (1959).

Mexico, the trial court's controlling inquiry, when settling a custody dispute, is the best interest of the child.[53] In *Lopez v. Lopez*, the New Mexico Supreme Court clearly spelled out the priority of the trial court. It said that "[t]he trial court must keep in mind that it is the well-being of the child rather than the reward or punishment of a parent that ought to guide the trial court in determining visitation."[54]

Studies of the psychological development of children indicate that an issue of primary importance to children's well-being is that they feel loved and cared for by their parents.[55] The separation from a person who has assumed the status of parent in a child's eyes could harm the child's feeling of well-being and security.[56]

The New Mexico Court of Appeals clearly stated in *A.C. v. C.B.* that the district court erred when it determined that enforcement of the settlement agreement was not in the best interest of the child. Two factors make the district court's decision questionable. First, the district court made its decision "as a matter of law."[57] In *In re Jacinta M.*,[58] the court of appeals asserted that "[f]indings of a trier of fact must be supported by the evidence presented."[59] Nothing in the decision indicates that the district court adhered to the requirement of *Jacinta M.* It is a contradiction to make a decision as a matter of law and to consider evidence presented.[60] Second, it appears that the district court based its decision on the sexual orientation of the parties. In New Mexico, sexual orientation has been held not to be an adequate basis for denying custody or visitation.[61] The New Mexico custody statutes[62] provide factors of consideration to determine what is in the best interest of the child. These factors are given as a guide to those matters that are necessary to promote the best interest of the child.

Under the New Mexico custody statute[63] the relationship of the child and A.C. should have been considered among other factors before the district court could award custody. This statute specifically states that "[t]he court shall consider all relevant factors including, but not limited to: . . . (3) the interaction and interrelationship of the child with his parents, . . . and any other person who may significantly affect the child's

53. *See, e.g., Schuermann*, 94 N.M. at 83, 607 P.2d at 621.
54. 97 N.M. at 335, 639 P.2d at 1189.
55. Polikoff, *supra* note 21.
56. *Id.*
57. *A.C.*, 113 N.M. at 584, 829 P.2d at 663.
58. 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988).
59. *Id.* at 771, 764 P.2d at 1329 (citing Fitzsimmons v. Fitzsimmons, 104 N.M. 420, 722 P.2d 671 (Ct. App. 1986)).
60. However, it is important to note that the district court could not have enforced the settlement agreement because it was not a court-approved settlement or a consent decree. *See* N.M. STAT. ANN. § 1-060 (Repl. Pamp. 1989).
61. *See In re* Jacinta M., 107 N.M. 769, 764 P.2d 1327 (Ct. App. 1988).
62. *See* N.M. STAT. ANN. §§ 40-4-9, -9.1 (Repl. Pamp. 1989).
63. N.M. STAT. ANN. § 40-4-9(A)(3) (Repl. Pamp. 1989).

best interest."[64] It seems there is no plainer statement of the importance of non-biological, non-adoptive relationships than this statutory language.

D. Unfitness of a Parent

The best interest of the child standard requires a showing of the unfitness of one or both parents to terminate parental rights. The New Mexico Domestic Affairs Code states: "[w]hen any person other than a natural or adoptive parent seeks custody of a child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent."[65] A higher standard is placed upon the non-parent third party. The third party must not only show it is in the best interest of the child to be out of the custody of the parent, but must also show that the parent is unfit as a parent.[66] Similarly, if one parent is seeking to terminate the joint custody award, then the parent seeking the change assumes the burden and must overcome the presumption that the original award of joint custody was reasonable.[67] If the court is asked to terminate the rights of a parent there should be a heavier burden placed on the party seeking termination, but if the inquiry of the court is only to maintain, or to award, joint custody the burden to the party wanting joint custody should be lighter.

A.C. had no need to show that C.B., the biological mother, was unfit to obtain joint custody. The district court misinterpreted the "parental right doctrine"[68] to decide that A.C. lacked standing to secure joint custody. The district court ignored the statutory definition of parent,[69] and the other parental status doctrines discussed above. Thus, the district court declared de facto that A.C. was an unfit parent. A.C. did not want to extinguish C.B.'s parental rights, but only to join in those rights as another parent. Here the district court should have placed the burden on C.B. to prove that A.C. was an unfit parent because C.B. wanted to terminate A.C.'s parental rights. Because joint custody by the parents is presumed to be in the best interest of the child,[70] then the district court should have recognized A.C.'s standing as a parent, per the definition, and should have analyzed the facts to determine whether this arrangement would be in the best interest of the child.

Essentially, a district court must analyze the evidence and decide that the facts prove that joint custody should be terminated because it does

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64. *Id.*
65. N.M. STAT. ANN. § 40-4-9.1(K) (Repl. Pamp. 1989).
66. RUTHANN ROBSON, LESBIAN (OUT) LAW SURVIVAL UNDER THE RULE OF LAW 132 (1992).
67. Jeantete v. Jeantete, 111 N.M. 417, 806 P.2d 66 (Ct. App. 1990).
68. The "parental right doctrine" is defined as:
> [a] parent who is able to care for his children and desires to do so, and who has not been found to be an unfit person to have their custody in an action or proceeding where that question is in issue, is entitled to custody as against grandparents or others who have no permanent or legal right to custody.

Shorty v. Scott, 87 N.M. 490, 492 n.1, 535 P.2d 1341, 1343 n.1 (1975) (citations omitted).
69. *See* N.M. STAT. ANN. § 40-4-9.1(L)(4) (Repl. Pamp. 1989).
70. *Id.* § 40-4-9.1(A) (Repl. Pamp. 1989).

not benefit the child. To terminate joint custody, evidence that "visitation interferes with the child's emotional well-being or significantly disrupts the child's day to day environment, [and] should [] be limited," must be presented.[71] The fact that a child's "day to day environment" consists of two female parents and no male parent cannot be reason enough to decide one female parent, or both, is unfit.[72]

IV. CONCLUSION

In New Mexico the welfare of the child is the controlling consideration in custody proceedings.[73] However, in cases such as this one, where a non-traditional family is part of the dispute, the court usually defers to the allocation of one parent of each gender. It is often very difficult for the courts, and the state, to recognize that this ideology comes from the same prejudicial ideologies that fueled antimiscegenation laws of years past.[74]

The district court erred on several points and must consider them in its future analysis. The court cannot determine as a matter of law whether a proposed custody arrangement is in the best interest of the child. The legislature established specific guidelines for the court because, most likely, the legislature recognizes the importance of various non-traditional relationships.

Although it may be a difficult issue to address directly, someday the courts of New Mexico will be forced to address the ultimate question presented here. The courts will have to determine whether both "parents" in a lesbian or gay-male relationship have the same parental rights as those given to parents in heterosexual non-biological, non-adoptive relationships. The difficulty with this issue does not necessarily flow from the lesbian or gay-male relationship versus the heterosexual relationship. The difficulty, most likely, flows from the factual inquiry this determination requires. The court will need to examine at a minimum three factors. First, the court must find that the non-biological parent has a relationship with the child. Second, it must conclude that the relationship rises to the level of parent-child. Finally, the court must find that continuation of the relationship is in the best interest of the child. As one commentator has stated, "[t]he court's role is neither to embrace the creation of a nontraditional family nor to punish the parents for failing to adhere to the one-mother/one-father family form. Rather, the court's role is to serve the child's best interest."[75]

S. ELIZABETH MOORE

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71. Lopez v. Lopez, 97 N.M. 332, 335, 639 P.2d 1186, 1189 (1981).

72. *See generally* Polikoff, *supra* note 21.

73. *See* Schuermann v. Schuermann, 94 N.M. 81, 607 P.2d 619 (1980); Roberts v. Staples, 79 N.M. 298, 442 P.2d 788 (1968); Kotrola v. Kotrola, 79 N.M. 258, 442 P.2d 570 (1968); Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968).

74. Polikoff, *supra* note 21.

75. *Id.* at 543.