In Re Interest of Z.J.H.: Are Two Moms Too Many?

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IN RE INTEREST OF Z.J.H.: ARE TWO MOMS TOO MANY?

Social fragmentation and the myriad configurations of modern families have presented us with new problems and complexities that cannot be solved by idealizing the past. Today a child who receives proper nutrition, adequate schooling and supportive sustaining shelter is among the fortunate, whatever the source. A child who also receives the love and nurture of even a single parent can be counted among the blessed. Here this Court finds a child who has all of the above benefits and two adults dedicated to his welfare, secure in their loving partnership, and determined to raise him to the very best of their considerable abilities. There is no reason in law, logic or social philosophy to obstruct such a favorable situation.¹

Lesbian mother [sic] has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation.²

INTRODUCTION

Over the past twenty years, homosexuals have fought to gain recognition and acceptance in society, as well as in the courtroom. As the two preceding quotes demonstrate, they have won some battles, but they continue to face deeply felt hostility and bias. Although some courts and legislatures have worked to expand family law to accommodate the rights of homosexuals and their children, the majority has not. Custody and visitation disputes involving one or more homosexual parents have been common since the 1970s.³ At first, most of these disputes involved both biological parents of the child

and took place after the parents divorced. When it became known that one of the parents was homosexual, that parent often faced difficulties gaining custody rights.

This scenario still frequently appears in the courtroom and has been joined by another. In the last few years, many lesbian couples have decided to have and raise children together. Experts estimate that hundreds, possibly thousands, of babies have been born to lesbian mothers in recent years as a result of artificial insemination alone. Some couples have two children, with each woman being the biological or adoptive mother of one of the children. The children may grow up together as siblings, call both women “mommy,” and have the same hyphenated last name.

If a lesbian couple separates, it may face disputes involving custody and visitation identical to those experienced by separated hetero-

4. Id. at 464-65.
5. Like many other people, some judges hold beliefs that homosexuality is immoral, unnatural, and destructive of society. These beliefs often appear explicitly or implicitly in judicial opinions. Id. at 548-49; see, e.g., In re Diehl, 582 N.E.2d 281, 293 (Ill. App. Ct. 1991) (“Because a parent's associations are relevant to her ability to care for a child, we find that [the mother's] freedom of association was not violated by the trial court's consideration of her sexual orientation.”); Chicoine, 479 N.W.2d at 893 (listing a mother's “active homosexual relationships” as part of her "myriad of psychological problems"). For commentary on various courts' approaches to homosexual custody disputes, see Donald H. Stone, The Moral Dilemma: Child Custody When One Parent Is Homosexual or Lesbian — An Empirical Study, 23 Suffolk U. L. Rev. 711 (1989); Davis S. Dooley, Comment, Immoral Because They're Bad, Bad Because They're Wrong: Sexual Orientation and Presumptions of Parental Unfitness in Custody Disputes, 26 Cal. W. L. Rev. 395 (1989-90); Darryl Robin Wishard, Comment, Out of the Closet and into the Courts: Homosexual Fathers and Child Custody, 93 Dick. L. Rev. 401 (1989).

6. There are a variety of methods by which a lesbian may have a child. Among these methods are: (1) conceiving with a male friend by artificial insemination; (2) artificial insemination by a confidential donor; (3) surrogate motherhood; (4) adoption; and (5) foster parenting. Hayden Currey & Denis Clifford, A Legal Guide for Lesbian and Gay Couples 7:6-7:30 (5th ed. 1989).

7. Scott Harris, 2 Moms or 2 Dads . . . and a Baby: Gay Parents Give Birth to Families of Their Own, Thanks to Such Methods as Artificial Insemination and Adoption, L.A. Times, Oct. 20, 1991, at A1. One newspaper labeled this increase in gay parenting the “gay baby boom” and stated that the baby boom is evidenced by the following facts: (1) “A 5-year-old New York area organization of gay and lesbian couples, who have created their own families . . . has 1,500 households on the mailing list”; (2) “[A] primer for lesbians who want to have children . . . is in its fourth printing”; and (3) “The first seminar on lesbian parenting held in Chicago was filled to capacity . . . .” Jean Latz Griffin, The Gay Baby Boom: Homosexual Couples Challenge Traditions as They Create New Families, Chi. Trib., Sept. 3, 1992, § 5, at 1. Although this Note focuses on lesbian couples, gay male couples are also deciding to raise children together. Id. These families will undoubtedly encounter the same legal problems facing lesbian couples and their children.


9. Id.
erosexual couples. Unfortunately, most statutes assume that custody and visitation disagreements occur only between heterosexual, married couples. When courts are faced with unorthodox situations, they receive little guidance from those laws. When faced with a custody dispute between two homosexuals, most courts have declined to expand current laws and have treated the nonbiological or nonadoptive mother as if she was a third party, or a “legal stranger” to the child.\(^1\)

In *In re Interest of Z.J.H.*,\(^11\) the Wisconsin Supreme Court confronted a custody and visitation dispute between two lesbians.\(^12\) The court followed the national trend in this type of case and denied both visitation and custody rights to the nonadoptive mother despite evidence that both women had intended to act as the child’s mother. This Note examines the legal rights of nonbiological and nonadoptive “parents” in custody and visitation disputes. While special emphasis is placed on Wisconsin law, relevant cases and statutes from other jurisdictions are also discussed. The Note then analyzes the *Z.J.H.* decision in light of the development of custody and visitation rights in Wisconsin. Finally, this Note concludes that the court’s decision was incorrect and that it will have a negative impact on the children of same-sex couples in Wisconsin and across the nation.

As one commentator has stated, “[C]ourts may believe that by granting sole parental rights to the biological mother in a lesbian-mother family they are discouraging the formation of these families, but this cause-and-effect relationship does not exist.”\(^13\) In other words, the legislatures and courts cannot prevent same-sex couples from raising children by refusing to develop laws that address the problems of these nontraditional families.

### I. Background

This section begins by discussing the concepts of “traditional” families and “nontraditional” families. It then briefly explains how custody and visitation disputes arise. Next, this section describes parental rights and the policy of protecting the “best interests of the child” and how these two interests sometimes conflict in custody and visitation disputes. A person petitioning for child custody or visi-
tion generally will argue for these rights under the appropriate custody and visitation statutes. Moreover, there are sometimes other arguments to be made. When a couple has had the foresight to make a contract regarding custody and visitation rights in the event of separation, the petitioner may attempt to enforce the contract. Also, where the petitioner has relied on her partner's assurances that both partners are considered to be parents, she may argue for custody or visitation under a theory of equitable estoppel.

Therefore, the major portion of the Background describes custody statutes, visitation statutes, contract principles, and the doctrine of equitable estoppel, as related to third-party custody and visitation rights. Wisconsin cases and statutes are analyzed as well as the relevant law in other jurisdictions.

A. What Is a Family?

1. The Concept of a "Traditional Family"

When attempting to decide who is and who is not a legal parent, courts seem to be heavily influenced by society's concept of a "traditional family." The concept of a traditional family is grounded in two theories. The first is that a child should have "one mother and one father, neither more nor less." The second theory is that those people who are identified as the father and mother should have exclusive possession of the rights and responsibilities associated with parenthood. In fact, the Supreme Court has decided that the interest of the parent is a constitutionally protected right. This principle underlies the presumption made by virtually all courts that a child's best interests will be served by living in the home of a parent.

14. Id. at 468-73.
15. Id. at 468.
16. Id.; see also Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed, 70 Va. L. Rev. 879, 879 (1984) ("The law recognizes only one set of parents for a child at any one time, and these parents are autonomous, possessing comprehensive privileges and duties that they share with no one else.").
17. See Stanley v. Illinois, 405 U.S. 645, 651 (1972). In this case, the Court held that the Due Process Clause of the United States Constitution required that a natural father be given a hearing to decide his fitness as a parent before his children were taken from him, even though the father was not married to the children's mother. Id.
18. See 4 LYNN D. WARDLE ET AL., CONTEMPORARY FAMILY LAW: PRINCIPLES, POLICY AND PRACTICE § 39.09 (1988) ("In most states there has long been a presumption that it is in the child's best interest barring exceptional circumstances, to be in the custody of his or her natural
These two concepts underlie many court decisions involving custody and visitation rights. On the one hand, a court faced with the prospect of a child having more than one mother or father may be less likely to grant visitation or custody rights to a third party. On the other hand, a court deciding a case where the child is missing one or both parents may go to great lengths to provide the child with a mother or a father. Society’s desire to provide children with a traditional family is often at odds with the desires of third parties who wish to maintain contact with a child.

Advocates of third-party custody and visitation rights are not limited to the third parties themselves; they include a wide variety of commentators. These advocates do not necessarily argue that parents should be deprived of their exclusive rights and responsibilities. They do, however, maintain that the courts should re-think the theory that each child should have only one mother and one father. In other words, they advocate a more flexible “functional approach” for defining a family, as opposed to the traditional, stricter “formal approach.”

parent(s). This is supported by the constitutionally protected right of the parent to association with and to determine the upbringing of his or her child.

19. See, e.g., Klipstein v. Zalewski, 553 A.2d 1384 (N.J. Super. Ct. Ch. Div. 1988). In Klipstein, a seven-year-old child had three father figures in her life: a biological father who visited once a month, a stepfather who was seeking visitation rights, and her mother’s live-in boyfriend. Id. at 1386. In refusing the stepfather’s request for visitation, the court stated: “There must be some limits on stepparent visitation rights because in our society it is not difficult to conceive of a child having three, four or even more stepfathers and there are not enough days in a week for the child to have visitation with all of them.” Id.

20. See, e.g., In re J.W.F., 799 P.2d 710, 716 (Utah 1990) (granting a stepfather the right to seek custody of an abandoned child even though the child’s mother had left the stepfather before the child was born); see also MARIANNE TAKAS, CHILD CUSTODY: A COMPLETE GUIDE FOR CONCERNED MOTHERS 87 (1987) (“[Judges] would rather see children raised in a traditional home than in a less traditional one. Particularly if the father is remarried, or has a housekeeper or his own mother who can provide child care, the judge may be inclined to see the father’s new household as more suitable.”).

21. For works by these commentators, see JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 68 (1989); JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD (1979); Bartlett, supra note 16; Polikoff, supra note 3; Mary Patricia Treuthart, Adopting a More Realistic Definition of “Family,” 26 GONZAGA L. REV. 91 (1990-91); Elizabeth A. Delaney, Comment, Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child, 43 HASTINGS L.J. 177 (1991).

22. See, e.g., Polikoff, supra note 3, at 472 (“For purposes of awarding custody, courts should retain a distinction between those who fall within the redefinition of parenthood and those who do not.”).

23. See generally Bartlett, supra note 16 (advocating a more flexible definition of family); Polikoff, supra note 3 (encouraging the adoption of an expanded definition of “parent” and explaining how the concept of “traditional family” influences the current definition).

24. See, e.g., Treuthart, supra note 21, at 99. Under a formal approach, a family relationship is
2. The Current Status of Third Parties in Nontraditional Families

The visitation and custody rights of third parties in nontraditional families vary considerably according to both the type of situation considered and the state in which the rights are determined. The most common types of third parties are grandparents, other relatives, men whose wives have been artificially inseminated, stepparents, and live-in partners (both heterosexual and homosexual). The third party whose visitation rights have gained the most acceptance in state courts and legislatures is the grandparent. The rationale behind granting grandparent visitation "is that a child's contact with grandparents will enrich the child's life and give the child the love and security of an extended family." Some states have used this rationale to extend the same visitation rights to other relatives. However, the reasoning used to grant such rights to third parties other than relatives differs in that it is generally based on the par-

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25. For the purposes of this Note, a third party is a party who is not the adoptive or biological parent of the child. A nontraditional family is a family that contains a third party with a parent-like relationship with the child.

26. Forty states have statutes which grant grandparents visitation rights in the event of a divorce. See Sandra Joan Morris, Grandparents, Uncles, Aunts, Cousins, Friends: How Is the Court to Decide Which Relationships Will Continue?, 12 FAM. ADVOC. 10, 10 (1989); see also Patricia Wendlandt, Comment, Grandparent Visitation Statutes: Remaining Problems and the Need for Uniformity, 67 MARQUETTE L. REV. 730, 739 n.59 (1984) (listing each of the forty state statutes granting grandparent visitation after divorce). However, the grandparent rights generally extend only as far as visitation. Grandparents are not on equal footing with legal parents when the issue is custody. See, e.g., Barstad v. Frazier, 348 N.W.2d 479, 489 (Wis. 1984) (denying grandparents custody of their grandchildren without proof that the father was unfit). Furthermore, grandparent visitation rights may terminate when a parent voluntarily relinquishes his rights. See, e.g., In re Soergel, 453 N.W.2d 624, 628 (Wis. 1990) (denying a paternal grandparent visitation rights after the natural father had consented to his children's adoption).

27. 2 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 8.12 (1986).

28. See, e.g., In re D.M.M., 404 N.W.2d 530, 537 (Wis. 1987) (granting a great-aunt the right to petition for visitation under a statute written for grandparents and greatgrandparents).
ent-like relationship that has developed between the third party and
the child. 29

Husbands who consent to their wives being artificially inseminated
generally have all of the legal duties and responsibilities of
fatherhood. 30 These men are not considered biological parents since
they did not physically father the children, but courts will generally
use a contract theory or equitable estoppel to confer the status of
fatherhood. 31 At least one court impliedly used the traditional fam-
ily concept in its analysis by stating that two parents supporting the
child would be preferable to the mother supporting the child alone. 32

The rights and obligations of stepparents vary from state to state.
Many states allow a stepparent to petition for visitation rights. 33
Some have even held that a stepparent may petition for custody
rights. 34 Stepparents have a much better chance of obtaining cus-
tody when they have actively participated in bringing up the child
and have regarded the child as one of their own. 35 The possibility of
getting custody or visitation rights may decline, however, if both of
the child's natural parents are actively involved in the child's life. 36
Thus, if the courts view a stepparent as completing the picture of a
traditional family, the stepparent is more likely to get visitation or
custody rights.

Live-in partners have gained the least ground in third-party cus-
tody and visitation rights. A few courts have granted rights to heter-
osexual cohabitants. 37 However, most courts are reluctant to grant

29. See 2 ATKINSON, supra note 27, § 8.07.
consented to his wife's artificial insemination liable for child support after divorce); L.M.S. v.
S.L.S., 312 N.W.2d 853, 855 (Wis. Ct. App. 1981) ("We hold that a husband who, because of his
sterile condition, consents to his wife's impregnation, with the understanding that a child will be
created whom they will treat as their own, has the legal duties and responsibilities of fatherhood,
including support.").
31. See, e.g., Gursky, 242 N.Y.S.2d at 412.
32. See L.M.S., 312 N.W.2d at 855-56.
33. See, e.g., Carter v. Brodrick, 644 P.2d 850, 855 (Alaska 1982) (allowing a stepfather to
petition for visitation when he stood in loco parentis to the child); Gribble v. Gribble, 583 P.2d 64,
68 (Utah 1978) (allowing a stepfather to petition for visitation rights). But see Hughes v. Creigh-
rights even if he stands in loco parentis to the child).
34. See, e.g., In re J.W.F., 799 P.2d 710, 716 (Utah 1990) (granting a stepfather standing to
seek custody).
35. 2 ATKINSON, supra note 27, § 8.06.
(refusing to grant stepparent visitation to a stepfather who would be considered the child's "third
father").
37. E.g., Buness v. Gillen, 781 P.2d 985 (Alaska 1989). In Buness, the mother's live-in boy-
these rights. Even when a court thinks that the live-in partner has "earned visitation rights," it is generally constrained by the rights of the natural parent along with the distinct lack of statutory or common law authority to grant the rights. Homosexual cohabitants fare even worse.

So far, almost all state appellate courts that have addressed the situation have refused to grant visitation or custody rights to nonbiological lesbian mothers. To date, there have been no appellate decisions regarding two homosexual fathers, but there is no reason to believe that a court would grant them visitation or custody rights either. Homosexual couples face two major barriers in the courts. First, because both parents are of the same sex, their situations do not fit the "traditional family" prototype. Second, many courts do not look favorably upon homosexual parenting.

friend cared for her son after the couple separated. Id. at 986. The court found that the welfare of the child required further proceedings to determine if he should be allowed to live with his nonbiological "father." Id. at 989.

38. E.g., In re Freel, 448 N.W.2d 26, 26 (Iowa 1989) (refusing to grant visitation rights to an ex-girlfriend even after acknowledging that she was very close to the young boy); Cooper v. Merkel, 470 N.W.2d 253, 255-56 (S.D. 1991) (refusing to grant visitation rights to an ex-boyfriend in the absence of a showing that the mother was unfit).

39. See Freel, 448 N.W.2d at 27.

40. See Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991) (refusing to extend the definition of "parent" to include lesbian mothers); Curiale v. Reagan, 272 Cal. Rptr. 520, 522 (Ct. App. 1990) (holding that only the legislature could extend visitation rights to lesbian mothers); Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (refusing to extend custody rights to a lesbian partner); In re Z.J.H., 471 N.W.2d 202 (Wis. 1991) (denying a nonadoptive lesbian mother's request for custody and visitation). But see A.C. v. C.B., 829 P.2d 660, 665 (N.M. Ct. App. 1992) (holding that a nonbiological lesbian mother had a "colorable claim of standing to seek enforcement of [custody and visitation] rights"). Also, some courts on the trial level have granted visitation and custody rights to lesbian mothers. See Gaines-Carter, supra note 8, at A39.

Some nonbiological and nonadoptive lesbian mothers have attempted to adopt their partners' children. In general, however, adoption statutes are not available for "the purpose of extending legal parental status to a lesbian partner in a same-sex relationship." Delaney, supra note 21, at 213; see Shaista-Parveen Ali, Comment, Homosexual Parenting: Child Custody and Adoption, 22 U.C. DAVIS L. REV. 1009, 1034-35 (1989) (discussing the concept of "second parent" adoptions). In fact, two states' statutes explicitly prevent adoption by homosexuals. See FLA. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN. § 170-B:4 (1990). A New York court recently held, however, that the New York adoption statute allows adoption by the nonadoptive or nonbiological lesbian mother. See In re Evan, 583 N.Y.S.2d 997 (Sur. Ct. 1992).

41. See Developments in the Law. Sexual Orientation and the Law, 102 HARV. L. REV. 1508, 1637 (1989). This article explains that there are five rationales frequently used to deny or restrict custody or visitation by gay or lesbian parents. They are: (1) fear that the child will be "harassed or ostracized"; (2) fear that the child will become homosexual; (3) a belief that the child's moral well-being will be harmed; (4) concern that the child may be sexually molested; and (5) the fact that state sodomy statutes show that the state has an interest in preventing homosexuality. Id.; see also Jeff Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 18
B. How Custody and Visitation Disputes Arise

The majority of all custody and visitation disputes arise when a marriage ends. However, custody questions also arise in contexts such as guardianship law, juvenile court and neglect laws, and laws relevant to terminating parental rights to free a child for adoption. Although homosexuals may have trouble getting or retaining custody in any one of these contexts, this Note examines only their rights after the relationship dissolves.

Most custody decisions are made not by judges but by the parties and their attorneys, sometimes with the help of psychiatric professionals or court personnel. It is only after the parties have exhausted all negotiation possibilities that they are forced to turn to the legal system to make the custody or visitation decision for them. Couples often are faced with decisions regarding child support, maintenance, division of assets, and insurance protection. These decisions may complicate the negotiation process by becoming bargaining points that affect the parties' decisions regarding visitation and custody demands.

C. Competing Interests

There are two major competing interests in visitation and custody disputes involving third parties: 1) the custodial rights of the natural (biological or adoptive) parent and 2) the best interests of the child. "Both the right of a parent to custody and the liberty interest of parents and children to relate to one another in the context of the family, free from governmental interference, are fundamental rights protected by the due process clause of the Fourteenth Amendment."

Fam. L.Q. 1, 33 (1984) (stating that not all, but many, courts seem more willing to assume harm from a homosexual relationship than a heterosexual one); Ali, supra note 40, at 1013-21 (discussing "common preconceptions" regarding homosexual parenting); Judith A. Lintz, Note, The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children, 16 U. Dayton L. Rev. 471, 487-93 (1991) (discussing several of the arguments commonly stated by courts opposed to homosexual parenting).

42. 4 Wardle et al., supra note 18, § 39.01.
43. Id.
44. Black & Cantor, supra note 21, at 33; see also Lois Weithorn, Psychology and Child Custody Determination: Knowledge, Roles and Expertise 62 (1987) ("[T]he typical child custody case is not contested. Of the child custody cases resulting from parental divorce, 83% to 90% have been estimated to be uncontested as a result of parental agreements concerning custody arrangements before the custody hearing.").
45. See Black & Cantor, supra note 21, at 32.
46. Id.
to the United States Constitution."\(^{47}\) Virtually all courts accept this proposition.\(^{48}\) These same courts, however, along with many commentators, recognize that the best interests of the child are also an extremely important consideration.\(^{49}\) The modern trend seems to favor the best interests of the child over parental rights when the two directly conflict.\(^{50}\)

The best interests analysis varies from state to state, but most courts consider a variety of factors, which can be divided into four categories: 1) the age and gender of the parents and of the child; 2) the physical and material needs of the child; 3) the moral, religious, philosophical, and intellectual needs of the child; and 4) the physical, moral, and material position of the parents, along with their desire and capacity to respond to the child's needs.\(^{51}\) Best interest standards are often "ambiguous and indeterminate"; however, they generally afford courts some flexibility in their evaluations.\(^{52}\)

Wisconsin has experienced the conflict between parental rights and the best interests test, as have most other states.\(^{53}\) In *Ponsford v. Crute*,\(^{54}\) the Wisconsin Supreme Court granted custody of a child

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49. *See Hughes*, 798 P.2d at 406. *See generally* GOLDSTEIN ET AL., supra note 21 (advocating the use of the best interests of the child standard as the main criterion in custody and visitation disputes).

50. *E.g.*, Paquette, 499 A.2d at 27. In *Paquette*, the court held that a stepparent who stands *in loco parentis* to a stepchild may obtain custody under "extraordinary circumstances." Id. at 30; *see also* BLACK & CANTOR, supra note 21, at 68 ("[C]hildren have the right to be reared in the most healthful alternative available and society has an interest in the healthful rearing of its minor citizens. These considerations must precede parental desires.").

51. 4 WARDLE ET AL., supra note 18, § 39.06. Under Wisconsin law, the court may consider (but is not limited to) the following factors: 1) the wishes of the child's legal parents; 2) the wishes of the child; 3) the relationship of the child with his parents and/or siblings; 4) the child's adjustment to school, home, religion, and community; 5) the mental and physical health of the child and the parents; 6) the availability of child care services; 7) whether one party is likely to interfere with the other party's relationship with the child; 8) whether there is any evidence of child abuse; 9) whether there is evidence of spousal abuse; 10) whether either party has a drug or alcohol problem; and 11) other factors that the judge deems relevant. Wis. STAT. ANN. § 767.24(5)(a-k) (West Supp. 1992).

52. 4 WARDLE ET AL., supra note 18, § 39.06.

53. This Note analyzes Wisconsin law because the Wisconsin Supreme Court relied heavily on the state's statutes and case law in deciding *In re Z.J.H.* The *Z.J.H.* case was chosen for this Note because it provides a thorough analysis of a lesbian partner's rights under custody law, visitation law, contract law, and equitable estoppel principles. While it is not the first state court decision regarding custody and visitation rights in the context of same-sex couples, it is the most comprehensive and detailed.

54. 202 N.W.2d 5 (Wis. 1972).
to her biological father even though the child had lived with her maternal grandparents for several years. The court held that a natural parent cannot be deprived custody of his child unless he is unfit or unable to care for the child. The court defined neither "unfit" nor "unable," but it is generally recognized that this requirement is extremely difficult to prove.

Just shortly more than two years later, however, that same court warned that Ponsford should not be interpreted as providing an "inflexible rule" that the doctrine of the best interests of the child can never prevail over parental rights. In Mawhinney v. Mawhinney, the court stated that "[a]s a general matter, but not invariably, the child's best interest will be served by living in a parent's home. However, if circumstances compel a contrary conclusion, the interests of the child, not a supposed right of even a fit parent to have custody, should control." The court reversed and remanded the decision, concluding that the best interests of the child was an element which should have been considered by the trial court in its determination. These two cases reflect the difficulty a court may have when deciding between the two competing interests.

Third parties attempting to get custody and visitation rights use a variety of methods, some more successful than others. Many try to work within a state's custody and visitation statutes. Couples with the foresight to sign parenting agreements may attempt to enforce those agreements. Finally, the third parties may rely on principles of equitable estoppel.

55. Id. at 7-8.
56. Id. at 8.
57. Takas, supra note 20, at 87; see 2 Atkinson, supra note 27, § 8.03.
Examples of conduct or conditions giving rise to findings of unfitness and resulting in third party custody include: commission of felonies, child abuse, drug abuse, alcohol abuse (usually including driving while intoxicated), and severe mental illness. Other conduct or conditions, while perhaps not so egregious as to result in a finding of unfitness, but which nevertheless have resulted in custody being given to a third party have included: hitting a child with a belt, harsh spanking, lack of attention to a child's health care, physical inability to care for a child, child snatching, and mental instability with threats of suicide.

2 id.
59. Id.
60. Id. at 504. The court distinguished Ponsford on several bases, including the age of the children, the behavior of the father, and whether the child wished to remain with the grandparents. Id. at 503-04.
D. Custody Statutes

1. In General

The standard generally applied by courts in custody disputes between two parents (or any two people who have standing as parents) is the "best interests of the child standard." This standard provides that custody will be granted to the parent who will more likely satisfy the best interests requirements of the child. If a third party seeking custody rights is able to achieve standing as a "parent," he or she may be granted custody if the court determines that this is in the best interests of the child. However, it is difficult to achieve this standing since most states have custody statutes that embody the "parental preference" standard. This standard allows only biological or adoptive parents to have standing to petition for custody of a child unless these parents are declared to be unfit or they consent to the third party having custody.

There are a few cases throughout the country in which the courts have conferred the status of a parent on third parties for the purpose of achieving custody standing. In one such case, Buness v. Gillen, the Alaska Supreme Court held that a man who lived with the natural mother of a child, but who had never been married to her, had standing to seek custody of the child. The court found that the child had developed a strong emotional bond with his

61. 4 Wardle et al., supra note 18, § 39.06.
62. For a discussion of the best interests test, see supra notes 51-52 and accompanying text.
63. See 2 Atkinson, supra note 27, § 8.01.
64. See, e.g., Nev. Rev. Stat. § 125.500 (1987) ("Before the court makes an order awarding custody to any person other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child . . . "). But see Or. Rev. Stat. § 109.119 (1991) (granting custody standing to "any person including but not limited to a foster parent, stepparent, grandparent or relative by blood or marriage" (emphasis added)). For a critique of the parental preference standard, see Eric P. Salthe, Note, Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone's Best Interest?, 29 J. Fam. L. 539 (1991).
65. The rationale behind these decisions was phrased well by the Utah Supreme Court in In re J.W.F., 799 P.2d 710, 714 (Utah 1990). The court stated:
   It may be that no one has the same rights toward a child as his or her parents. However, the fact that a person is not a child's natural or legal parent does not mean that he or she must stand as a total stranger to the child where custody is concerned. Certain people, because of their relationship to a child, are at least entitled to standing to seek a determination as to whether it would be in the best interests of the child for them to have custody.
67. Id. at 988.
nonbiological "parent" and gave great weight to the fact that this "parent" had been the child's primary caregiver and father figure.\textsuperscript{68}

The \textit{Buness} court used a concept called psychological parentage.\textsuperscript{69} The concept was first developed in \textit{Carter v. Brodrick},\textsuperscript{70} where the court decided that a stepparent who had earned the status of "psychological parent" had standing to obtain visitation rights.\textsuperscript{71} The \textit{Carter} court reasoned that the concept of a psychological parent was grounded in the common law doctrine of \textit{in loco parentis}. The court explained the \textit{in loco parentis} doctrine as follows:

"The term 'in loco parentis' means in the place of a parent, and a 'person in loco parentis' is one who has assumed the status and obligations of a parent without formal adoption. Whether or not one assumes this status depends on whether that person \textit{intends} to assume that obligation.

'Where one stands in loco parentis to another, the rights and liabilities arising out of that relation are, as the words imply, exactly the same as between parent and child.' "\textsuperscript{72}

The \textit{in loco parentis} doctrine has been used by third parties to obtain standing under both custody and visitation statutes.\textsuperscript{73} The benefit of using the doctrine in disputes involving third parties is that it places no arbitrary limit on the gender or number of persons who seek custody rights.\textsuperscript{74} It has a drawback, however, in that it does not require any intent on the part of the legal parent.\textsuperscript{75} Thus, a third party could obtain standing even though the legal parent never intended that party to assume parental obligations.\textsuperscript{76}

\textsuperscript{68} Id. at 989.
\textsuperscript{69} Id. at 988.
\textsuperscript{70} 644 P.2d 850 (Alaska 1982).
\textsuperscript{71} Id. at 855.
\textsuperscript{72} Id. at 853 (quoting Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978) (footnotes omitted)).
\textsuperscript{73} See Gribble v. Gribble, 583 P.2d 64, 68 (Utah 1978) (holding that a stepfather who had lived with a mother and her child for about four years was entitled to a hearing on the issue of visitation rights on the basis of \textit{in loco parentis}); Paquette v. Paquette, 499 A.2d 23, 30 (Vt. 1985) (interpreting "child of the marriage" to include stepchildren if an \textit{in loco parentis} relationship had existed and the mother was unfit or if there were extraordinary circumstances). \textbf{But see} Pierce v. Pierce, 645 P.2d 1353, 1357 (Mont. 1982) (holding that a stepfather had no standing to contest custody in a dispute with the natural mother even though both parties testified that they intended for the stepfather to adopt the child).
\textsuperscript{74} Polikoff, supra note 3, at 507.
\textsuperscript{75} Id.
\textsuperscript{76} An example of a situation where the legal parent did not have this intent might be where the parent has hired a live-in babysitter for her children. The parent undoubtedly would intend for the babysitter to have many parental obligations but would not intend for the babysitter to have parental rights. Most people would likely agree that it would be improper to give a babysitter custody rights.
2. In Wisconsin

The relevant portion of Wisconsin's custody statute reads as follows:

(3) Custody to agency or relative. (a) If the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child, the court may declare the child to be in need of protection or services and transfer legal custody of the child to a relative of the child

In the previous version of section 3(a) of the statute, the word "party" stood in the place of the word "parent." Unfortunately, the legislature gave no specific reason for changing the terminology. The change in wording is relevant in that it can be argued that the legislature was attempting to emphasize that only biological and adoptive parents have superior rights when custody is at issue.

The custody statute was interpreted by the Wisconsin Supreme Court in Barstad v. Frazier. This case involved a custody dispute between the natural mother and the maternal grandparent of the child. In awarding custody to the mother, the court held that "in custody disputes between parents and third parties . . . a parent is entitled to custody of his or her children unless the parent is either unfit or unable to care for the children or there are compelling reasons for awarding custody to a third party." The majority stated that "[c]ompelling reasons include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of the child." The court recognized that it was balancing the best interests of the child and the rights of the natural parent and developed this rule after analyzing several cases from other jurisdictions, as well as the relevant cases in Wisconsin.

79. 348 N.W.2d 479 (Wis. 1984).
80. Id. at 481.
81. Id. at 489.
82. Id.
83. Id.
84. Id.; see Mawhinney v. Mawhinney, 225 N.W.2d 501, 503 (Wis. 1975) (deciding that the best interests of the child can prevail over the custody rights of a fit parent); Ponsford v. Crute, 202 N.W.2d 5, 8 (Wis. 1972) (holding that a father could not be deprived of visitation with his child unless he was unfit or unable to care for the child).
The standard for determining third-party custody rights in Wisconsin has remained unchallenged since the court's decision in Barstad. The same cannot be said, however, for third-party visitation rights.

D. Visitation Statutes

1. In General

Visitation statutes vary greatly from state to state, but the majority of states allows third-party visitation rights in one form or another. When faced with an ambiguous statute, most courts are willing to extend the third-party rights to steprelatives of the child. They have been reluctant, however, to extend the same rights to third parties who are not related to the child or the child's parent by marriage. A majority of the states gives the courts more leeway in disputes over visitation rights than is granted in disputes over custody. As a result, third parties may find it easier to obtain visitation rights than custody rights. Wisconsin is one of several states that has made a concerted effort to provide third parties with visitation rights.

2. In Wisconsin

Grandparent visitation rights were the first type of third-party visitation rights.

85. See supra notes 25-41 and accompanying text (discussing the current status of third-party custody and visitation rights).


87. See, e.g., Hughes v. Creighton, 798 P.2d 403, 404 (Ariz. Ct. App. 1990) (refusing to allow a live-in boyfriend who believed he was the natural father to have visitation rights); In re Freel, 448 N.W.2d 26, 26 (Iowa 1989) (refusing to grant a woman visitation even though she had lived with the young child for five years and the court strongly felt that visitation should take place); Cooper v. Merkel, 470 N.W.2d 253, 256 (S.D. 1991) (holding that a live-in boyfriend of seven years did not have standing to sue for visitation).

88. See Gribble v. Gribble, 583 P.2d 64, 67 (Utah 1978) ("[T]here is greater flexibility in determining visitation [rights] than there is in determining custody."), But see Cooper, 470 N.W.2d at 255-56 (using the same standard for visitation as was used for custody — "a clear showing against the parent of gross misconduct, unfitness or other extraordinary circumstances affecting the welfare of the child").

89. Custody gives the custodial party the legal authority to make important decisions for a child in matters such as health, education, and religion. BLACK & CANTOR, supra note 21, at 22. Visitation rights do not include these decisionmaking powers. Thus, when a court grants visitation to a third party, it is not infringing on the rights of the natural parents to the extent it would be if it granted custody to the third party. Id.
visitation rights officially recognized in Wisconsin. These rights were granted by the supreme court in *Ponsford v. Crute* and *Weichman v. Weichman*. The court was not bothered by the fact that the existing statute did not explicitly give these rights to grandparents:

There is no statutory or commonlaw rule which forbids a court in a divorce action from granting visitation rights to parents or to others. The question is not one of the power of the court but of judgment or of judicial discretion. The underlying principle or guideline for the granting of visitation privileges, as it is for granting custody, is what is for the best interest and welfare of the child.

In 1977, the legislature followed the court's lead and enacted a statute expressly granting grandparent and greatgrandparent rights. After this statute was enacted, the supreme court decided that the legislature intended to include relatives other than grandparents and greatgrandparents. The court's opinion in *In re D.M.M.* is interesting because of its discussion of the definition of the word "parent" under the statute governing parental visitation rights. The court examined the possibility that the definition of "parent" might include a person *in loco parentis*. The court also mentioned, however, that the definition could be restricted to mean "natural parent." Ultimately, it did not decide this issue and examined the legislature's intent instead. The court found that "[t]he grandparent language ... was a codification of case law to further protect grandparent and greatgrandparents' rights and was not meant thereby to exclude other relatives." It remanded the case to the trial court for determination of whether visitation would be in the best interest of the child.

Shortly after the decision in *D.M.M.*, the Wisconsin legislature took the court's reasoning a step further and enacted its present

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90. 202 N.W.2d 5 (Wis. 1972).
91. 184 N.W.2d 882 (Wis. 1971).
92. Id. at 884 (citation omitted).
94. See *In re D.M.M.*, 404 N.W.2d 530, 536 (Wis. 1987) (allowing a child's great-aunt to petition for visitation rights).
95. 404 N.W.2d 530 (Wis. 1987).
97. *D.M.M.*, 404 N.W.2d at 534.
98. Id. at 535.
99. Id.
100. Id. at 536.
101. Id. at 537.
third-party visitation statute:

(1) Upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.
(2) Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the child.\

While the previous statute reflected only the legislature's approval of the decision to give grandparents and greatgrandparents visitation rights, the current statute reflects the legislature's concern that the previous statute failed to "recognize the importance to the child of continuing contact with stepparents and persons with whom the child has lived in a relationship similar to a parent-child relationship."\

The next relevant visitation decision was issued by the Wisconsin Appellate Court in Van Cleve v. Hemminger. In that case, a grandmother sought visitation rights from the court even though the child's natural parents were still married. The court construed the visitation statute to apply only in cases where "an underlying action affecting the family unit has previously been filed." The court cited public policy reasons for its decision:

It is appropriate for the state to protect the children's best interests by ordering visitation with appropriate adults to mitigate the trauma and impact of a dissolving family relationship. In the absence of such factors, however, there is no justifiable reason for the state to override determinations made by parents as to what is in the best interests of their children.

Since the child was not experiencing the trauma of a family in dissolution, the court was in favor of preserving parental rights and denied the grandmother's claim.

The court's most recent decision concerning visitation rights oc-

103. In re Soergel, 453 N.W.2d 624, 626 (Wis. 1990).
106. Id. at 572.
107. Id. at 574.
108. Id.
109. Id.
curred in In re Soergel. In Soergel, paternal grandparents peti-
tioned for visitation rights after their son allowed the child’s stepfa-
ther to adopt their grandson. The court held that the adoption
severed the rights of the family related to the child’s biological fa-
ther. It stated that the natural mother and adoptive father had
the right to determine what was in the best interest of their child.

In general, it is almost impossible for a third party to gain stand-
ing in a custody dispute in Wisconsin and in most other juris-
dictions. A third party seeking visitation rights may face more lenient
standards, but the visitation laws often favor some third parties (i.e.,
blood relatives) over others (i.e., live-in partners). Many couples in
nontraditional families realize their rights are not fully defined
within the law. Some of these couples attempt to define their inten-
tions and to preserve their rights by creating and signing coparent-
ing agreements.

E. Contracts Involving Custody and Visitation Rights

1. In General

Although the right to contract is well-recognized, “it is axio-
matic that a mother cannot bargain away the best interest of the
child.” This is because the state has an interest in minor children
that is superior even to parental rights. No legislature or court
has disputed these principles. Many courts, however, will not auto-
matically declare a visitation or custody contract null and void. In
fact, the Restatement (Second) of Contracts states the current rule
as follows: “A promise affecting the right of custody of a minor
child is unenforceable on grounds of public policy unless the disposi-
tion as to custody is consistent with the best interest of the child.”

110. 453 N.W.2d 624 (Wis. 1990).
111. Id. at 625.
112. Id. at 627.
113. Id. at 628. In 1992, The Wisconsin Supreme Court decided that when the natural father
has died (as opposed to wilfully terminating his parental rights as the father in Soergel did), the
114. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that freedom to contract is
embodied in the concept of liberty in the Due Process Clause of the Fourteenth Amendment).
116. 15 SAMUEL WILLISTON & WALTER H.E. JAEGGER, A TREATISE ON THE LAW OF CON-
117. 15 id. ("[T]here is a steadily increasing line of cases clearly indicative of a trend to sus-
tain the bargain when it is to the advantage of the child.").
118. RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981). The same philosophy holds true
This rule is also applicable to contracts affecting visitation rights.\textsuperscript{119}

For example, in \textit{In re John Doe},\textsuperscript{120} a New Mexico appellate court evaluated a contract in which the natural mother agreed to leave her son in the custody of her former husband but retained her parental visitation rights.\textsuperscript{121} A dispute between the mother and her former husband arose when the mother tried to regain custody of the child.\textsuperscript{122} The court did not void the contract when it decided to terminate the mother's rights; instead, it declared that contracts "regarding the guardianship, care, custody, maintenance or education of children are subject to judicial modification."\textsuperscript{123}

Thus, while some courts may still strike down a custody or visitation contract as being against public policy per se, others may decide to modify it only to the extent necessary to satisfy the best interests test.

\textbf{2. In Wisconsin}

In 1931, the Wisconsin Supreme Court was faced with a visitation rights contract in \textit{Stickles v. Reichardt}.\textsuperscript{124} In that case, a father agreed to let a couple adopt his three-year-old son in exchange for their promise to allow him to continue to visit the boy.\textsuperscript{125} After the adoption was final, the couple refused to allow the natural father to visit his son.\textsuperscript{126} In its opinion, the court first mentioned that it was against public policy for a parent to permanently transfer custody of

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\textsuperscript{119} \textit{Restatement (Second) of Contracts} § 191 cmt. a (1981).
\textsuperscript{120} 648 P.2d 798 (N.M. Ct. App. 1982).
\textsuperscript{121} \textit{Id.} at 800.
\textsuperscript{122} \textit{Id.} at 801.
\textsuperscript{123} \textit{Id.} at 804. \textit{But see} Street \textit{v. Hubert}, 491 N.E.2d 29, 32 (Ill. App. Ct. 1986) (refusing to enforce an oral agreement allowing a natural mother to have visitation rights after the adoption).
\textsuperscript{124} 234 N.W. 728 (Wis. 1931).
\textsuperscript{125} \textit{Id.} at 729.
\textsuperscript{126} \textit{Id.}
his or her child to another.\textsuperscript{127} It then acknowledged that the contract would not permanently transfer custody rights back to the natural father but that it might intrude upon the adoptive parents' right to custody.\textsuperscript{128} The court expressed concern that the contract might "greatly impair the new parent-child relationship with very undesirable consequences to the child."\textsuperscript{129} Even though the court found the natural father's plight emotionally appealing, it refused to grant him visitation rights.\textsuperscript{130}

In reality, it was the court's concern for the interests of the child that motivated its decision not to enforce the contract. The court ended its opinion by stating:

\begin{quote}
A great deal of the confusion which exists in the cases arises from the fact that there has been a failure to distinguish between the validity of a contract as such and the consequences to the child which have arisen by reason of the making of the contract. In determining the matters having to do with custody of children, the primary question is, What is for the best interest of the child? . . . In many cases language is used which indicates that the court's conclusion is based upon the contractual rights of the parties as such, but in reality that is only one factor in a number of factors which leads the court to the conclusion that the best interests of the child require its custody to be left where the contract placed it.\textsuperscript{131}
\end{quote}

With this language, the court in \textit{Stickles} clearly indicated that the best interests of the child is the overriding concern when evaluating a custody or visitation agreement.

Almost seventy years later, the Wisconsin Supreme Court gave further insight into its approach to contract analysis in \textit{Watts v. Watts}\.\textsuperscript{132} In that case, the court was faced with a property agreement between unmarried cohabitants.\textsuperscript{133} The court first stressed that the freedom to contract is an important right worthy of judicial protection.\textsuperscript{134} It then addressed the defendant's claims that the contract was void for public policy reasons.\textsuperscript{135} The court decided that the

\begin{flushleft}
127. \textit{Id.} at 730.
128. \textit{Id.}
129. \textit{Id.}
130. \textit{Id.}
131. \textit{Id.}
132. 405 N.W.2d 303 (Wis. 1987).
133. \textit{Id.} at 309.
134. \textit{Id.}
135. \textit{Id.} at 309-10. The defendant had three theories underlying his public policy argument. First, he claimed that enforcement of the agreement would contravene Wisconsin's Family Code. \textit{Id.} at 310. Next, he asserted that the legislature was the body responsible for determining property rights of unmarried couples. \textit{Id.} Finally, he claimed that the court's recognition of the con-
\end{flushleft}
plaintiff had a valid contract claim and explained that a declaration that a "contract is against public policy should be made only after a careful balancing, in the light of all the circumstances, of the interest in enforcing a particular promise against the policy against enforcement."\textsuperscript{136}

Through \textit{Stickles} and \textit{Watts}, the Wisconsin Supreme Court showed its reluctance to automatically declare a contract void for public policy reasons. In \textit{Stickles}, the court considered the contract in light of the best interests of the child,\textsuperscript{137} and in \textit{Watts}, it balanced contractual rights against public policy.\textsuperscript{138} These cases imply that the court adopted the flexible approach espoused in the \textit{Restatement (Second) of Contracts} and adopted by a number of other states.\textsuperscript{139}

\textbf{F. Equitable Estoppel}

\textbf{1. In General}

When statutory and contractual principles fail to establish third-party rights, courts may be willing to extend custody and visitation rights using the principle of equitable estoppel. The \textit{Restatement (Second) of Contracts} explains the equitable estoppel doctrine as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."\textsuperscript{140}

The appearance of the principle of equitable estoppel as applied to the status of parents first occurred in the context of child support disputes. The doctrine operated to enforce a child support obligation upon a party who had acted as a parent to a child. It has been used in the context of stepfathers,\textsuperscript{141} husbands of women who have been
Once the courts began to use the equitable estoppel doctrine for child support enforcement, they realized that it was only fair to use the principle to recognize the nonbiological parent's corresponding right to visitation. Thus, the doctrine has been used to grant visitation rights, as well as to create the status of "equitable parent." In the visitation and custody context, the doctrine basically works to prevent a natural mother from denying that her ex-husband is the father of her child. In Atkinson v. Atkinson, a mother claimed that her ex-husband was not the biological father of her son and attempted to deny him custody and visitation rights. The court explained that even if a husband is not the biological father of a child, he may still have standing as an "equitable parent" under the custody and visitation statutes. It found that when a child is born or conceived during a marriage, the mother's husband may be considered an equitable parent when:

1. the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce,
2. the husband desires to have the rights afforded to a parent, and
3. the husband is willing to take on the responsibility of paying child support.


143. See Karin T. v. Michael T., 484 N.Y.S.2d 780 (Fam. Ct. 1985). In this case, a woman (Michael) living as a transsexual, lived as "husband and wife" with another woman (Karin). Id. at 781. Karin had two children by artificial insemination, and Michael agreed to waive any right she had to disclaim the children as her own. Id. at 781-82. Later, when the couple separated, Michael tried to avoid her child support obligations. Id. The court used equitable estoppel to enforce the obligations. Id. at 784.

144. See Klipstein v. Zalewski, 553 A.2d 1384, 1387 (N.J. Super. Ct. Ch. Div. 1988) ("[It] can fairly be argued that the obligation to support and the right to visitation are correlative and the two legal tenets should be applied in pari materia.").

145. See In re D.L.J. and R.R.J., 469 N.W.2d 877, 881 (Wis. Ct. App. 1991) (holding that a husband was the equitable parent of his wife's child and was therefore entitled to reasonable visitation).

146. See Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987) (holding that a husband had standing for custody and visitation where both the husband and the child considered their relationship to be a father-son relationship and where the mother had cooperated in developing that relationship).

148. Id. at 517.
149. Id. at 519.
The court held that the father was entitled to be treated as a natural father under the "equitable parent" doctrine and remanded the case for re-evaluation of his custody and visitation rights. One benefit of the equitable estoppel doctrine is that it focuses on the intent of the legally recognized parent. The doctrine is deficient, however, in that it allows only specific relief. In other words, the court's holding is effective only for the specific issue at hand. If another dispute concerning the child should arise, another trial would be necessary. This result would be undesirable since "the court process for determining custody can be extremely hard both on children and on parents."

2. In Wisconsin

Wisconsin courts have made use of the equitable estoppel doctrine both to impose the obligation of child support and to prevent a mother from asserting that her ex-husband was not the father of her child. In In re D.L.H., a mother requested that her ex-husband be dismissed from a paternity action after blood tests determined that he was not the father of the child. The ex-husband knew that he might not be the father but claimed that he had relied on his ex-wife's representations in not filing for adoption. The Wisconsin courts have made use of the equitable estoppel doctrine both to impose the obligation of child support and to prevent a mother from asserting that her ex-husband was not the father of her child. In In re D.L.H., a mother requested that her ex-husband be dismissed from a paternity action after blood tests determined that he was not the father of the child. The ex-husband knew that he might not be the father but claimed that he had relied on his ex-wife's representations in not filing for adoption. The Wisconsin courts have made use of the equitable estoppel doctrine both to impose the obligation of child support and to prevent a mother from asserting that her ex-husband was not the father of her child. In In re D.L.H., a mother requested that her ex-husband be dismissed from a paternity action after blood tests determined that he was not the father of the child. The ex-husband knew that he might not be the father but claimed that he had relied on his ex-wife's representations in not filing for adoption. The Wisconsin
Appellate Court held that the ex-husband could use equitable estoppel to prevent the mother from questioning his paternity if the trial court found that he did in fact rely on representations made by the mother.\textsuperscript{161}

Almost four years later, in \textit{In re D.L.J. and R.R.J.},\textsuperscript{162} the appellate court again used the equitable estoppel doctrine to prevent a mother from withholding visitation rights from her ex-husband.\textsuperscript{163} The Wisconsin Supreme Court has not ruled on the use of the equitable estoppel doctrine in the context of unmarried, heterosexual couples.

With its willingness to extend visitation rights to grandparents and other relatives, its insightful approach to custody and visitation agreements, and its flexible use of the equitable estoppel doctrine, the Wisconsin Supreme Court appeared to be willing to extend some rights to nonbiological and nonadoptive lesbian mothers. However, when the first lesbian custody and visitation dispute was presented to the court in \textit{In re Z.J.H.},\textsuperscript{164} the court demonstrated its unwillingness to do so.

\section*{II. Subject Opinion}

In \textit{In re Z.J.H.},\textsuperscript{165} the Wisconsin Supreme Court applied Wisconsin statutes and case law to a custody and visitation dispute between two women who had at one time decided they wanted to raise a child together. The court analyzed the state custody statute, the visitation statute, contract law, and the principles of equitable estoppel and decided that the nonbiological mother was entitled to neither custody nor visitation rights.

\subsection*{A. Facts and Procedure}

Wendy Sporleder and Janice Hermes lived together for approximately eight years.\textsuperscript{166} They decided to have a child together and first attempted to accomplish a pregnancy through the artificial insemination of Sporleder.\textsuperscript{167} When this attempt failed, the couple de-

\textsuperscript{161} \textit{Id.} at 286-87.
\textsuperscript{162} 469 N.W.2d 877 (Wis. Ct. App. 1981).
\textsuperscript{163} \textit{Id.} at 881.
\textsuperscript{164} 471 N.W.2d 202 (Wis. 1991).
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 204.
\textsuperscript{167} \textit{Id.}
cided that Hermes would adopt a child. The child, Z.J.H., was born on January 19, 1988 and was placed in their home in March of that year. Hermes worked outside of the home, and Sporleder assumed the duties of primary caretaker of the child at home.

In October 1988, the couple separated. Later that month, they signed a coparenting contract providing that in the event of separation, the two women would use mediation to determine the physical placement of their child. It also stated that the party who did not have possession would have reasonable and liberal visitation rights to the child. Hermes's adoption of Z.J.H. was formalized in November, 1988, and Hermes proceeded to prohibit Sporleder, the primary caregiver, from visiting the child.

In March of 1989, one year after the baby was placed with the couple, Sporleder brought an action in the family court in Outagamie County, Wisconsin. She sought physical custody of Z.J.H or visitation rights along with enforcement of the coparenting agreement. The family court commissioner granted the request for visitation rights but declined to decide the other issues.

The circuit court reversed the commissioner's finding, granting summary judgment for Hermes on three grounds: 1) Sporleder did not have legal standing as a parent; 2) the agreement was void as against public policy; and 3) Hermes was not equitably estopped from denying that Sporleder was a parent of the child. The appellate court affirmed the decision of the circuit court.

The appellate court first relied on wording from Ponsford v. Crute and Barstad v. Frazier and decided that only a natural
parent has standing under Wisconsin custody law.\textsuperscript{183} In \textit{Ponsford}, the supreme court held that a biological or adoptive parent cannot be deprived of custody unless she is proved to be unfit or unable to care for her child.\textsuperscript{184} In \textit{Barstad}, the court basically reiterated its holding in \textit{Ponsford} and added that “compelling circumstances” may also serve to deprive a natural parent of custody.\textsuperscript{188}

The appellate court in \textit{Z.J.H.} held that a nonbiological parent may not petition for custody “even when that person has established a close parent-like relationship with the child.”\textsuperscript{186} Turning to the coparenting agreement, the court found that the legislature had decided custody and visitation rights and that a contract could not change a statutory scheme.\textsuperscript{187} Finally, the court recalled the reasoning in \textit{Soergel},\textsuperscript{188} which held that the visitation statute cannot be used to provide third parties with visitation rights where the family unit is intact.\textsuperscript{189} The appellate court stated that “[t]he fact that Hermes is a single ‘natural’ parent by virtue of solo adoption in no way diminishes the intact nature of her family unit.”\textsuperscript{190}

\section*{B. The Wisconsin Supreme Court's Opinion}

The Wisconsin Supreme Court affirmed the appellate court's opinion and denied both custody and visitation rights to Sporleder.\textsuperscript{191} The court held that: 1) Sporleder did not have standing to obtain custody rights; 2) she was not entitled to visitation rights because there was no underlying action affecting the family; 3) the coparenting agreement was unenforceable; and 4) Hermes was not equitably estopped from withholding custody and visitation from Sporleder.\textsuperscript{192}

\subsection*{1. The Custody Statute}

The Wisconsin Supreme Court used several different rationales to
are two moms too many?

explain its decision that Sporleder did not have standing under Wisconsin's custody statute. First, it relied on Barstad v. Frazier and stated that nonparents cannot bring custody actions unless either the legal parent is unfit or unable to care for the child or there are compelling reasons for awarding custody to the nonparent. Sporleder had conceded that Hermes was a fit parent, and the court concluded that there was no issue of material fact regarding the presence of "compelling reasons." Since Sporleder could not obtain standing as a nonparent, the only way she could get custody was to be considered a parent under the custody statute.

The court then decided that Sporleder was not a "parent" for the purposes of the custody statute. It acknowledged its previous statement that the definition of "parent" could include a person in loco parentis. However, the court distinguished that statement on the basis that it applied only to visitation rights as opposed to custody rights. It then discussed the implications of applying an in loco parentis approach to custody disputes and declared that the approach would violate Wisconsin's adherence to the "parental preference" standard. This standard would give Hermes rights as the natural parent while regarding Sporleder as a third party who could not obtain custody unless Hermes was declared to be an unfit parent. The court expressed concern that the use of the doctrine would infringe on the "constitutionally protected interest in a parental relationship with the child."

Next the court examined the legislative history of the custody statute. It found that the legislature intended "parent" to mean "biological parent, a husband who has consented to the artificial in-

194. 348 N.W.2d 479 (Wis. 1984).
195. Z.J.H., 471 N.W.2d at 205.
196. Id.
197. Id. Compelling circumstances can include "abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody," and other extraordinary circumstances. Id. at 206.
198. Id. at 206.
199. See In re D.M.M., 404 N.W.2d 530 (Wis. 1987).
200. Z.J.H., 471 N.W.2d at 207.
201. Id. ("While [the standard] recognizes the rights of children, it also assumes that normally it is in the best interests of the child to be raised by his or her parent.").
202. Id. (citing Caban v. Mohammed, 441 U.S. 380 (1979) and Stanley v. Illinois, 405 U.S. 645 (1972)).
203. Id. at 208.
semination of his wife... or a parent by adoption."\textsuperscript{204}

Finally, the court decided that a decision recognizing \textit{in loco parentis} in the context of custody disputes would violate the "public policy consideration of limiting the number of individuals with whom a child is placed, in order to promote stability in that child's life."\textsuperscript{206} The court admitted that its decision might result in "occasional unfortunate circumstances" for children, but it insisted that the legislature "deliberately spared the legal system from an obligation to discern a just result from among the myriad of circumstances in which individuals could claim rights under the \textit{in loco parentis} doctrine."\textsuperscript{206} Thus, Sporleder's claim under the custody statute failed.

2. The Visitation Statute

Similarly, the court held that Sporleder had no rights under Wisconsin's visitation statute.\textsuperscript{207} The court relied on its holdings in \textit{In re Soergel}\textsuperscript{208} and \textit{Van Cleve v. Hemminger}\textsuperscript{209} and declared that Sporleder could not obtain visitation rights in the absence of the filing of an "underlying action affecting the family unit," such as divorce or legal separation.\textsuperscript{210}

3. The Coparenting Agreement

Sporleder's effort to enforce the coparenting contract was also unsuccessful. The court declared the coparenting agreement to be invalid for two reasons. First, it concluded that custody and visitation rights are controlled solely by statutes and by case law and that they cannot be contracted away.\textsuperscript{211} The court reasoned that the legislature had expressed its preference of parents over third parties in the custody and visitation statutes and that the contract was invalid since it conflicted with legislative intent.\textsuperscript{212}

The court next maintained that the contract was void for public

\textsuperscript{204} Id. This definition is given in the definitional section of the Children's Code, Wis. Stat. Ann. § 48.02 (West 1981 & Supp. 1992).
\textsuperscript{205} Z.J.H., 471 N.W.2d at 208.
\textsuperscript{206} Id. at 209.
\textsuperscript{207} Id.
\textsuperscript{208} 453 N.W.2d 624 (Wis. 1990); see supra notes 110-13 (discussing Soergel).
\textsuperscript{209} 415 N.W.2d 571 (Wis. Ct. App. 1987); see supra notes 105-09 (discussing Van Cleve).
\textsuperscript{210} Z.J.H., 471 N.W.2d at 209-10.
\textsuperscript{211} Id. at 211.
\textsuperscript{212} Id.
policy reasons. According to the majority, the public has an “interest in maintaining a stable relationship between a child and his or her parent” and granting custody to Sporleder would be contrary to that public interest. The court then compared the coparenting agreement to the contract in *Stickles v. Reichardt* and decided that the “public interest in maintaining a stable relationship between a child and his or her legal parent” outweighed Sporleder’s expectations under the contract.

**D. Equitable Estoppel**

Finally, the court held that Hermes was not equitably estopped from denying that Sporleder was a parent of the child. It distinguished *In re A.M.N. and A.J.N.* and *In re L.M.S. and S.L.S.* by noting that those two cases used equitable estoppel to impose child support obligations, not to grant the right to custody. The court stated that *In re D.L.H.* was “dissimilar” in that it used the equitable estoppel doctrine as a “shield” to protect the stepfather’s right to a relationship with a child. *In re D.L.J. and R.R.J* was distinguished on the basis that the stepfather in that case truly believed he was the natural father of the child. The court declared that Sporleder, unlike the stepfather in that case, could never have believed she was the legal parent of the child.

**E. The Dissenting Opinions**

Two of the seven justices dissented, each writing a separate opinion. In the first dissent, Justice Abrahamson argued that the majority’s analysis of the coparenting agreement was incorrect. She stated that the visitation and custody statutes do not expressly or impliedly preempt such agreements, and she emphasized the parties’

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213. *Id.*
214. *Id.* at 212.
215. 234 N.W. 728 (Wis. 1931); see supra notes 124-31 (discussing *Stickles*).
217. *Id.* at 212.
218. 414 N.W.2d 68 (Wis. Ct. App. 1987); *supra* note 156.
219. 312 N.W.2d 853 (Wis. Ct. App. 1981); *supra* note 156.
221. 419 N.W.2d 283 (Wis. Ct. App. 1987); *supra* notes 158-61.
223. 469 N.W.2d 877 (Wis. Ct. App. 1991); *supra* notes 162-63.
225. *Id.* at 213 (Abrahamson, J., dissenting).
right to contract. The justice noted that many contracts affect parental relationships and maintained that "[t]hese contracts are not per se against public policy." Citing Watts v. Watts, she stated that a contract can be declared void for public policy reasons only after balancing "the public policies favoring enforcement . . . against the public policies disfavoring enforcement." She also quoted section 191 of the Restatement (Second) of Contracts, concluding that a contract is unenforceable for public policy reasons unless it serves the best interests of the child.

Justice Abrahamson found Stickles v. Reichardt to be distinguishable both in facts and in reasoning. In Stickles, the supreme court invalidated a contract that allowed a biological father to have visitation after he gave up his son for adoption. Justice Abrahamson emphasized that Stickles relied on the best interests of the child, not the validity of the contract. She concluded that "the case should be remanded for a hearing and that the circuit court should consider such public policies as protection of freedom of contract, protection against impairment of family relations, and the best interests of the child."

In a separate dissent, Justice Bablitch also was disturbed by the majority's failure to consider the best interests of the child. He felt that the opinion held that "children of a dissolving non-traditional relationship are not entitled to the same protection" as those in dissolving traditional relationships. Justice Bablitch noted that Van Cleve v. Hemminger stands for the proposition that third parties often should be granted visitation rights to help the child get through the dissolution of a family relationship. He argued that children faced with dissolving nontraditional relationships deserve

226. Id.
227. Id.
228. 405 N.W.2d 303 (Wis. 1987). See supra notes 132-36 and accompanying text for a discussion of Watts.
229. 471 N.W.2d at 214 (Abrahamson, J., dissenting).
230. Id. (quoting Restatement (Second) of Contracts § 191 (1981)).
231. 234 N.W. 728 (Wis. 1931).
233. 234 N.W. at 729.
234. 471 N.W.2d at 214 (Abrahamson, J., dissenting).
235. Id.
236. 471 N.W.2d at 214-15 (Bablitch, J., dissenting).
237. Id.
239. Z.J.H., 471 N.W.2d at 215 (Bablitch, J., dissenting).
that same protection. Finally, the justice stated that the Wisconsin legislature could not have intended the majority’s result, especially since that result ignored the best interests of the child. Like Abrahamson, he concluded that the case should have been remanded to the circuit court for an analysis of the best interests of Z.J.H.

III. Analysis

In *In re Z.J.H.*, the Wisconsin Supreme Court was faced with a difficult and controversial situation. The court’s decision undoubtedly will be very unpopular among the many advocates of third-party rights in nontraditional families due to the court’s analysis, which is even more disturbing than the result of the case. The Wisconsin court failed to adhere to the advice of the Utah Supreme Court: “The question of who should have custody of [a] child is too important to exclude participants on narrowly drawn technical grounds.” Instead, the Wisconsin court used such narrowly drawn reasoning to avoid analysis of the best interests of the child. It overemphasized the rights of Hermes despite evidence that she had intended to share her parental rights and responsibilities with Sporleder. Had the court analyzed the two women and the child as a family unit and then decided that visitation and custody were inappropriate, its decision might have been more palatable. Instead, the court ignored the realities of the situation and failed to use much of the reasoning that it had used in similar traditional-family cases throughout the years.

A. The Denial of Statutory Rights

1. The Custody Statute

The court correctly concluded that Sporleder could not obtain custody of the child as a third party under the custody statute. Sporleder did not allege that Hermes was an unfit mother, and no “compelling circumstances,” as described in *Barstad v. Frazier*,

240. *Id.*
241. *Id.*
242. *Id.*
244. *Z.J.H.*, 471 N.W.2d at 205.
245. 348 N.W.2d 479, 489 (Wis. 1984) (including abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar circumstances that would
were present in the case. The court interpreted "compelling circumstances" to include only situations in which there is a deficiency in the relationship between the (natural) parent and the child.\textsuperscript{246} This interpretation seems correct since a broader meaning would severely dilute the standard set out in the Wisconsin custody statute.\textsuperscript{247}

While the court was correct in denying Sporleder custody as a third party, it incorrectly denied her standing as a parent under the doctrine of \textit{in loco parentis}. The court refused to use this doctrine because it felt that it was inconsistent with the parental preference standard.\textsuperscript{248} However, that standard is greatly flawed in that it does not distinguish between different types of third parties.\textsuperscript{249}

The majority in \textit{Z.J.H.} stated that the parental preference standard assumes that "it is in the best interests of the child to be raised by his or her natural parent."\textsuperscript{250} This assumption is inappropriate in the context of same-sex couples. Unlike many other nontraditional families, same-sex couples generally make a mutual decision that both mothers (or fathers) will act as parents. In this situation, there is no reason to assume that one mother is better than the other simply because she gave birth to or formally adopted the child.\textsuperscript{251}

There is considerable support from both courts and commentators for the proposition that a best interests analysis should take place regardless of who is petitioning for custody.\textsuperscript{252} The \textit{Z.J.H.} majority

\begin{itemize}
\item \textsuperscript{246} Z.J.H., 471 N.W.2d at 206.
\item \textsuperscript{247} See supra text accompanying note 77 for the provisions of the statute.
\item \textsuperscript{248} Z.J.H., 471 N.W.2d at 207; see supra notes 63-64 and accompanying text (discussing the parental preference standard).
\item \textsuperscript{249} Polikoff, supra note 3, at 512.
\item \textsuperscript{250} 471 N.W.2d at 207.
\item \textsuperscript{251} See generally Salthe, supra note 64. This commentator maintains that the "general rule used in many states favoring natural parents over other individuals in custody battles is an archaic and often harmful rule." \textit{Id.} at 550.
\item \textsuperscript{252} See Black & Cantor, supra note 21, at 68. These authors recommend that: (1) "[a]ny person be allowed to seek rights of custody and/or visitation whether or not a divorce is pending, regardless of that person's relationship to the child, and with the full status of a party to any existing controversy"; and (2) "[t]he best interests of the child should be in any action the sole barometer utilized to apportion custodial and visitation rights." \textit{Id.} See In re J.W.F., 799 P.2d 710, 714 (Utah 1990), where the court states:
\begin{itemize}
\item It may be that no one has the same rights toward a child as his or her parents.
\item However, the fact that a person is not a child's natural or legal parent does not mean that he or she must stand as a total stranger to the child where custody is concerned.
\item Certain people, because of their relationship to a child are at least entitled to standing to seek a determination as to whether it would be in the best interests of the child for them to have custody.
\end{itemize}
\textit{Id.} On remand, the appellate court affirmed the trial court's decision that third-party custody was
expressed concern that a broader definition of parent would allow "housekeepers, prior companions, day-care providers and others" standing to seek custody. The court stated that it would be almost impossible to protect the best interests of the child under the broader standard. However, the court's worries could be overcome if it imposed "a heavy substantive burden on those who try to overcome a parental preference." For example, the third party could be required to show that: 1) she stood in loco parentis to the child and 2) the biological or adoptive parent intended for her to assume this position permanently. This standard would distinguish same-sex partners from housekeepers and babysitters since most parents do not express an intent for housekeepers and babysitters to permanently act in loco parentis to their children.

While the court in Z.J.H. expressed an unwavering faith in the parental preference standard, this has not always been the case. In Mawhinney v. Mawhinney, the Wisconsin Supreme Court declared that the rights of even a competent parent will not always overcome the best interest of the child. The court then ruled that the child's grandparents should have custody, even though the father was not unfit. The Z.J.H. majority distinguished Mawhinney on the basis that it involved compelling circumstances (virtual abandonment). In Barstad v. Frazier, the court wrote that "biological relationship is not solely determinative of the existence of a family" and that "the zone of constitutionally protected family autonomy is not defined solely by genetic ties." This case was distinguished by the majority on the grounds that it, too, involved "compelling circumstances." While the facts of these two decisions differ considerably from those in Z.J.H., the reasoning should apply. The best interests of the child is an interest that should be considered above all others, even those of the natural parent. The assumption that granting biological or adoptive parents exclusive parental rights invariably protects the best interests of the child is both unrealistic and

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253. Z.J.H., 471 N.W.2d at 208 n.10.
254. Id. at 209.
255. Polikoff, supra note 3, at 510.
257. Z.J.H., 471 N.W.2d at 206.
258. 348 N.W.2d 479 (Wis. 1984).
259. Id. at 486.
260. Z.J.H., 471 N.W.2d at 206.
Virtually no one will dispute that Hermes has a constitutionally protected right to care for her child. However, it is not clear that this right is absolute when pitted against the best interests of the child. The fact that Sporleder was the child's primary caretaker suggests that she did sustain an *in loco parentis* relationship. The intentions of the women, combined with this *in loco parentis* relationship, strongly support the argument that Sporleder also had rights concerning the child.

If the court had conferred the status of parent on Sporleder, she would not have automatically gained custody rights, but at least she would have had the opportunity to show that she could better serve the best interests of the child. In the event that Sporleder did obtain the status of a legal parent, Z.J.H. would benefit in many ways. He would retain the parent-child relationship that he had during the first year of his life while also obtaining other legal and economic benefits. For example, Z.J.H. might have gained additional economic security, eligibility for intestate succession to Sporleder's estate, and eligibility for Social Security benefits in the event of Sporleder's death or disability. Moreover, if Sporleder were to become employed in a position that offered medical or educational benefits to its employees' children, Z.J.H. may have been eligible for those benefits.

2. *The Visitation Statute*

The Wisconsin legislature expressly granted visitation standing to persons who have sustained a parent-child relationship with a child. However, the *Z.J.H.* court found that third parties cannot have standing under this provision unless there is an underlying action affecting a family unit. Since lesbians currently have no way of entering into a legal marriage, there is no possible way for Sporleder to obtain visitation rights under this reading of the statute. This result defies the intention of the legislature.

261. *See supra* notes 47-60 (discussing the competing interests of the parents' constitutional rights and the best interests of the child).
263. *See id.*
264. *See supra* text accompanying note 102 (quoting Wisconsin's current visitation statute).
266. *See supra* note 104 and accompanying text (discussing the Wisconsin legislature's comments to the current visitation statute).
The court relied on the statutory interpretations discussed in Soergel\textsuperscript{267} and Van Cleve v. Hemminger.\textsuperscript{268} Both decisions declared that the legislature did not intend the visitation statute to interfere with families that are "intact."\textsuperscript{269} The reasoning behind these decisions was sound. In Soergel, the court refused to extend visitation rights to grandparents whose son had agreed to allow his child's stepfather to adopt him.\textsuperscript{270} In Van Cleve, an appellate court denied visitation rights to a grandmother after both parents had decided not to allow visitation.\textsuperscript{271}

Neither of these decisions involved a child who was in the midst of a disrupted family relationship. Z.J.H., however, was a victim of a dissolving family relationship.\textsuperscript{272} Emotionally, the separation of Sporleder and Hermes paralleled a divorce or separation in a traditional family. For the first year of his life, Z.J.H. had two parental figures.\textsuperscript{273} After the separation, he lived with one mother and then faced a battle between two people who had both served as parents. Meanwhile, he was deprived of the care and companionship of Sporleder.\textsuperscript{274} To deny that this separation has the same affect as a divorce is to deny the reality that homosexual couples can form bona fide families.

The Z.J.H court declared that the legislature must have been aware of the Van Cleve decision when it enacted the new visitation law and that it would have expanded the statute further if it had intended to extend rights to same-sex couples.\textsuperscript{275} The legislature undoubtedly was aware of the Van Cleve decision; however, the facts in that case vary so greatly from the facts in Z.J.H. that it seems unlikely that it analogized the two situations. What is apparent is that the legislature clearly wanted to ensure that children are able to maintain relationships with persons with whom they had a par-

\begin{itemize}
  \item 267. 453 N.W.2d 624 (Wis. 1990).
  \item 268. 415 N.W.2d 571, 573-74 (Wis. Ct. App. 1987).
  \item 269. Soergel, 453 N.W.2d at 627-28; Van Cleve, 415 N.W.2d at 573.
  \item 270. Soergel, 453 N.W.2d at 628.
  \item 271. Van Cleve, 415 N.W.2d at 574.
  \item 272. In re Z.J.H., 471 N.W.2d 202, 204 (Wis. 1991).
  \item 273. Id.
  \item 274. "[T]he greatest damage to children living with nontraditional caretakers occurs when they are forced to relinquish the attachments formed with these parents. Children of lesbian parents, for example, experience sadness and loss when they are separated from one of their mothers, much as children might mourn the loss or absence of a biological parent." Looking for a Family Resemblance, supra note 24, at 1657 n.94.
  \item 275. Z.J.H., 471 N.W.2d at 211.
\end{itemize}
ent-child relationship.\textsuperscript{276}

It is important to note that the Wisconsin Supreme Court created grandparent visitation rights before the legislature decided to do so.\textsuperscript{277} In \textit{Weichman}, the court was persuaded by the fact that there was no statute \textit{forbidding} a court from granting visitation rights to third parties.\textsuperscript{278} Wisconsin currently has no statute preventing the court from extending visitation rights when homosexual relationships dissolve. The reasoning and policy behind the current statute support a judicial determination that children raised by a same-sex couple deserve to maintain ties with parental figures, just as children of divorce have that right. The Wisconsin Supreme Court extended visitation rights to grandparents without explicit statutory authorization. It should not have backed away from the opportunity to extend similar rights to same-sex partners.

Had the court chosen not to exclude Sporleder on a technicality, she easily would have qualified for visitation rights under Wisconsin’s visitation statute. The statute allows a person to petition for visitation if she has “maintained a relationship similar to a parent-child relationship with the child.”\textsuperscript{279} In essence, this wording describes the \textit{in loco parentis} relationship that Sporleder had developed with the child. Unfortunately for both Sporleder and the child, this relationship was completely terminated by the court’s decision.

\textbf{B. The Coparenting Agreement}

The Wisconsin court summarily dismissed the coparenting agreement by stating that custody and visitation rights “are controlled by statutory and case law, and cannot be contracted away.”\textsuperscript{280} As Justice Abrahamson correctly pointed out in her dissent, however, the Wisconsin statutes do not “expressly or impliedly bar parents from entering into agreements about the physical placement, care and financial support of a child that protect the best interests of the child.”\textsuperscript{281} Four years earlier, in \textit{Watts}, the Wisconsin Supreme Court extended statutory, marital property law to unmarried

\textsuperscript{276} See supra note 104 and accompanying text (discussing the Wisconsin legislature’s comments to the current visitation statute).
\textsuperscript{277} See Ponsford v. Crute, 202 N.W.2d 5, 9 (Wis. 1972); Weichman v. Weichman, 184 N.W.2d 882, 884 (Wis. 1971).
\textsuperscript{278} \textit{Weichman}, 184 N.W.2d at 884.
\textsuperscript{280} \textit{In re Z.J.H.}, 471 N.W.2d 202, 211 (Wis. 1991).
\textsuperscript{281} 471 N.W.2d at 213 (Abrahamson, J., dissenting).
ARE TWO MOMS TOO MANY?

Couples while declaring that a court should not always wait for the legislature to give it direction before resolving disputes between unmarried couples. The case for judicial intervention is even stronger in Z.J.H. Sporleder and Hermes's separation has serious consequences for Z.J.H., as a similar situation would for any children of same-sex couples. The court's decision to wait for legislative guidance will only suspend the rights of children and homosexuals throughout the state.

In declaring the coparenting contract void, the court relied heavily on its 1931 decision in Stickles v. Reichardt. While the court in Stickles did declare a visitation agreement to be unenforceable, it did so only after careful consideration of the child's best interests. In fact, the court explicitly stated that the determinative factor in evaluating custody contracts is the best interests of the child, not the validity of the contract. Both Stickles and Watts involved a balancing of the interests of all involved parties. The Z.J.H. court neglected to apply the same reasoning. A proper contract analysis would have voided the coparenting agreement only if it was not in the best interests of the child. Instead, the court looked only at the "public interest in maintaining a stable relationship between a child and his or her legal parent." Surely, the public also has a similarly strong interest in protecting the best interests of the child. Although some may argue that lesbian parenting is never in the best interests of the child, the reasoning behind this argument is not supported by research.

Had the court balanced public interest against the best interests of the child, it may have found that the best interests of the child were better served by allowing him to maintain a relationship with both of his parental figures.

283. 234 N.W. 728 (Wis. 1931).
284. Id. at 730.
285. Id.
286. Id.; Watts, 405 N.W.2d at 309-10.
288. For an example, see the text accompanying supra note 2.
289. See In re Evan, 583 N.Y.S.2d 997, 1001 n.1 (Sur. Ct. 1992). The Evan court stated: "Concern that a child would be disadvantaged by growing up in a single sex household is not borne out by the professional literature examined by this Court." Id. (citing more than ten different studies); see also Dooley, supra note 5, at 414-23 (explaining why arguments against gay male parenting are invalid); Lintz, supra note 41, at 487-93 (refuting arguments against allowing homosexuals to parent).
C. Equitable Estoppel

Before Z.J.H., the Wisconsin appellate courts had consistently accepted equitable estoppel as a fair and appropriate means of imposing the rights and responsibilities of parenthood on third parties.\(^{290}\) The supreme court did not reject the concept of estoppel in the previous cases; however, it refused to accept estoppel in the context of same-sex couples.\(^{291}\) The court claimed that Sporleder was attempting to use equitable estoppel as a "sword" instead of as a "shield" against a paternity action as it was used in \textit{D.L.H}.\(^{292}\) This is an artificial distinction. In the court's words, the husband in that case used the estoppel defense "to protect his right to a relationship with the child."\(^{293}\) Sporleder was attempting to assert her right in precisely the same way. She had developed a parental relationship with the child and was trying to protect this relationship just as a husband might.

The court also distinguished \textit{D.L.J. and R.R.J.},\(^{294}\) stating that R.R.J. had the "status of 'natural parent'" before the blood test.\(^{295}\) The court believed that Z.J.H. presented a different scenario in that neither woman believed that Sporleder was the legal parent of the child.\(^{296}\) This assertion is probably true since currently there is no way that Sporleder could hope to achieve the status of natural parent of this child. However, the equitable estoppel doctrine does not require that the third party believe she was the legal parent; it merely requires a \textit{reasonable reliance} on the natural parent's assertions regarding the third party's status.\(^{297}\) Under the Wisconsin Supreme Court's interpretation of estoppel, the concept would be appropriate only when a biological mother lied to her husband regarding the paternity of her child.

The situation in \textit{Z.J.H.} fits well within the requirements for equi-
ARE TWO MOMS TOO MANY?

Hermes represented to Sporleder that both women would have parental status. The coparenting agreement was evidence of that representation as were the facts that the two women lived together for eight years and that they first tried to have a child by using artificial insemination to impregnate Sporleder. Sporleder reasonably relied on that representation. Her willingness to assume the responsibility of primary caregiver indicated her expectation that she would also have the rights of a parent. Finally, Sporleder relied on Hermes's representation to her detriment. It is not difficult to imagine the trauma experienced by Sporleder when she was separated from a child whom she had helped raise during the first year of his life. Thus, all three elements of equitable estoppel were met in this case.

Equitable estoppel would also protect the interests of the child, in that a child can also rely on the parents' representations of their status, to his detriment. It should not matter that the child was not old enough to question whether Sporleder was his biological mother. Instead, the focus should be on the child's psychological relationship with his parents. Had the relationship between Sporleder and Hermes continued, their child might have called both women "mommy" and relied on both of them to fulfill parental roles. Equitable estoppel would protect this reliance by the child.

Sporleder presented the Wisconsin Supreme Court with four solid legal grounds for granting her parental rights: the custody statute, the visitation statute, the coparenting agreement, and the equitable estoppel doctrine. By failing to accept Sporleder's arguments, the court ignored the plights of Sporleder, the child, and others similarly situated throughout the state of Wisconsin.

IV. IMPACT

The court's decision in Z.J.H. will have an adverse affect not only

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298. One commentator lists other ways in which this representation can be found: (1) the child may be treated as "part of both mothers' extended families"; (2) the child may have the last names of both parties; (3) a birth announcement may list two mothers; and (4) the "legally unrecognized mother can contribute to the child's financial support and the legally recognized mother can accept such payment." Polikoff, supra note 3, at 499.

299. Id. at 500.

300. Even if the child was old enough, his views of the biological relationship should have little relevance. "It is not determinative whether the child believes she is biologically related to both her parents; indeed, it would be offensive to develop a rule of law that depends upon parents lying to their children." Id.
on same-sex couples who wish to raise children together, but also on the children themselves. Homosexual couples will have virtually no way to ensure that both parties are considered parents of the child. The nonadoptive or nonbiological party cannot obtain custody or visitation under the Wisconsin statutes. The court will not declare any coparenting agreement involving custody or visitation to be valid. Finally, the “third party” may not use equity concepts to prevent the “parent” from denying her former partner her rights. The court’s decision will serve only to make the law less fair and more confusing; it will, however, not deter homosexuals from making the decision to raise a child together. As a result, the nonbiological parent will be deprived of her reasonable expectation of parenthood, and the child will be deprived of a relationship with someone who has served as a parental figure in his or her life.

In Z.J.H., the child had not even turned one year old when Sporleder and Hermes separated. However, a similar situation could occur involving a child who is much older and who has established complex emotional and psychological relationships with both parties. The court left no room for a best interests analysis that could prevent the child from being separated from a person he or she considers to be a parent. Some lesbian couples have decided to raise two children, with one woman the legal parent of each child. Under the Z.J.H. decision, a separation of a couple with two children could result in the permanent separation of children who considered themselves to be siblings. Situations like those described above generally do not occur when the children are a product of a heterosexual marriage. These children are protected by the best interests of the child standard. The Wisconsin Supreme Court has apparently decided that children of nontraditional families do not deserve the same protection.

Furthermore, since the right to visitation and the duty to pay child support go hand-in-hand, the court’s decision will effectively

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302. Id. at 212.
303. Id. at 213.
304. See Polikoff, supra note 3, at 486.
305. Z.J.H., 471 N.W.2d at 204.
306. Polikoff, supra note 3, at 466.
307. See Z.J.H., 471 N.W.2d at 214 (Bablitch, J., dissenting).
308. See supra note 144 and accompanying text (discussing the relationship between the child support obligation and visitation rights).
allow the nonbiological parent to avoid any child support obligations. Such a result could be financially disastrous for both the legal mother and for the child. Consider the example of a child who was afflicted with a serious disease that absorbed both the time and the money of the legal mother. If the other mother was estranged from the legal mother and refused to pay child support, both the child and the legal mother would suffer. Thus, the Z.J.H. case has the potential to negatively impact both adult parties and the child.

CONCLUSION

The traditional, nuclear family is simply not as prevalent as it once was; it has been joined by the nontraditional family. Children are being raised in homes that provide a variety of parental figures. Families may differ both in the number of parental figures and the gender of the parties. While many people would prefer to see the legislature make decisions regarding nontraditional families, it is virtually impossible for the legislative bodies to keep up with the constant challenges presented by society.

If all of the state courts treat same-sex couples and their children as the Wisconsin Supreme Court has, these families will be deprived of the benefit of having the judicial system help them with their disputes. Even worse, children of the nontraditional families will be deprived of the benefit of the best interests of the child standard. As Justice Bablitch pointed out in his dissent, "children of non-traditional relationships are just as likely to become victims of parental warfare in a dissolving relationship as are any other children." The Z.J.H. decision is harmful and unfair. Hopefully, the Wisconsin legislature will act to ensure that its laws reflect the reality of today's families, as opposed to the narrow views of the Wisconsin Supreme Court.

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309. Z.J.H., 471 N.W.2d at 215 (Bablitch, J., dissenting).