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There's Nothing Psychological About It: Defining a New Role for the Other Mother in a State that Treats Her as Legally Invisible

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I. INTRODUCTION

Stranger. Third party. Nonparent. All three of these titles are meaningless to a child who loves her mother. The child has a different name for this stranger. She calls her "mommy." She calls the stranger by that name because that is who she has been told this person is by her relatives, her biological mother, and even by the stranger herself.

She also calls the stranger mommy because the stranger has been there for her throughout her short, yet fulfilling life. She has cooked, played games, tucked her into bed, told her bedtime stories, and taught her all that she knows about the world in which she lives. The child does not know that her mother is denied the legal right to care for her, but she feels the effect when her mother is taken away from her. She may not understand why her mother cannot see her anymore, but she knows that for the rest of her life,

whether or not she ever sees her mother again, she will never think of her as a stranger.

The lesbian nonbiological mother, sometimes called the "other mother" or "psychological parent," is often treated in court as a stranger to her children.[1] So long as she and the biological mother remain a couple, the well being of the children remains intact and the relationship between mother and child is protected.[2] However, in the event of death or separation, the lesbian mother can lose all contact with her child.[3]

Although the interest and participation of lesbian partners in donor insemination have continued to rise since its introduction, the legal system has been resistant to align itself with the medical field when it comes to recognizing the family created by this procedure.[4] Florida has treated this type of family as anything but how they have attempted to define themselves, likening the situation instead to a grandparent verses parent visitation rights case.[5] This state has removed the other mother from the family unit and treated her as an outsider, as if she was never considered to be a parent from the start.

The true irony of this situation is that the state, in implementing this standard, uses the same reasoning to support it as is used to allow for the creation of the family—the fundamental right to privacy.[6] The right to privacy in child bearing allows for artificial insemination of a woman in a lesbian relationship. The state cannot demand that she not have a child because she is gay. But then, after fostering this relationship, the state once again uses the right to privacy, this time in child rearing, to forbid the other mother from maintaining a relationship with her child. In other words, the same right—the fundamental right to privacy—is used both as the creation and destruction of a family.[7]

This article will examine the recent decisions in Florida based upon this fundamental right that have destroyed a lesbian nonbiological mother's chances of maintaining a relationship with her child after separating from the

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1. *E.g.* Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999).

2. Kathryn E. Kovacs, *Recognizing Gay and Lesbian Families: Marriage and Parental Rights*, 5 LAW & SEXUALITY 513, 513–14 (1995).

3. *Id.* at 514.

4. *See* Diane K. Shah & Linda Walters, *Lesbian Mothers*, NEWSWEEK, Feb. 12, 1979, at 61.

5. *See Kazmierazak*, 736 So. 2d at 107.

6. *See* Von Eiff v. Azicri, 720 So. 2d 510, 513 (Fla. 1998); *Kazmierazak*, 736 So. 2d at 109.

7. This right to privacy is found in both the *United States Constitution* and the Florida Constitution. However, as this note will discuss, the Florida Constitution speaks expressly to the right to privacy. *Compare* U.S. CONST. amend. XIV, § 1, *with* FLA. CONST. art. I, § 23.

biological mother. It will propose a test that, in spite of the recent decisions stripping a lesbian mother of her rights, will carve out a path for her to continue to be a mother to her children. This new path will avoid a restructuring of well-settled principles of family law in Florida. Part II of this article will discuss the nontraditional types of parenthood recognized by law. Part III consists of a discussion of the *Florida Statutes* and case law affecting the nonbiological lesbian mother. Part IV will examine a recent Florida case concerning custody rights between the mothers of a child. Part V will discuss why there is no legal label that can truly identify the role of a nonbiological lesbian mother to her daughter. In Part VI of this article, Wisconsin's answer for the lesbian mother will be examined to see how that state handled a problem that its statutes had not addressed. It will demonstrate how the test created in Wisconsin can be altered slightly to fit the needs of Florida. Part VII will conclude this article.

II. THE LEGALLY RECOGNIZED PARENT

As a starting point, it is important to understand the definition and rights of a parent verses those of a nonparent. A parent is "[t]he lawful father or mother of a person."[8] The definition suggests that:

> [T]he word comprehends much more than mere fact of who was responsible for the child's conception and birth and is commonly understood to describe or refer to a person or persons who share mutual love and affection with a child and who supply child support and maintenance, instruction, discipline and guidance.[9]

"Parent" includes the natural or biological mother and father of a child and parenthood created through adoption.[10] "Biological parent" is "a parent who has conceived or sired a child rather than adopted a child and whose genes are therefore transmitted to the child."[11] An adoptive parent does not have biological ties to the child but has gone through the legal process of becoming a parent.[12] Florida statutory law has also defined "parent" as such.[13]

The definition of nonparent is not found in the dictionary per se. However, the prefix "non" means not and implies the negative of that which

8. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).
9. *Id.*
10. *See id.*
11. RANDOM HOUSE UNABRIDGED DICTIONARY 210 (2d ed. 1993).
12. *See id.* at 27.
13. *See* FLA. STAT. § 39.01(50) (1999).

it precedes.[14] This would therefore make the term nonparent meaning the reverse of one who brings up or cares for another. Nonparents who care for and raise children know that this classification is anything but accurate.

Both a parent and a nonparent can essentially perform the same functions for a child. Many times, the nonparent has a closer relationship with the child than does the parent. However, the parent has legal ties to the child whereas the nonparent does not. Because of this distinction, numerous theories of parentage have emerged in an attempt to maintain the relationship between a nonparent and the child that the nonparent has raised.

A nonparent must first acquire standing to fight for custody or visitation of his or her child.[15] In order to acquire standing to fight for parental rights, nonparents must first show that they have created a relationship with their child whereby they have assumed the role of the child's parent.[16] If this can be proven, the law affords alternatives to these parents who do not share biological or adoptive ties with their children.[17] Nonparents may attempt to meet the standing requirement by proving that they are either a psychological parent, that they stand *in loco parentis* with their child, or that they are an equitable parent.[18]

A. *Psychological Parent*

A psychological parent, also called a de facto parent, is "'one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs.'"[19] The psychological parent theory was first used in legal proceedings in 1963.[20] At that time, the theory was described as "'mutual interaction between adult and child, which might be described in such terms as love, affection, basic trust, and confidence.'"[21]

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14. RANDOM HOUSE UNABRIDGED DICTIONARY 1306–07 (2d ed. 1993).

15. *See* Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child,* 43 HASTINGS L.J. 177, 187 (1991).

16. *See id.*

17. *Id.*

18. *Id.*

19. Theresa A. Nitti, Comment, *Stepping Back from the Psychological Parenting Theory: A Comment On* In Re J.C., 46 RUTGERS L. REV. 1003, 1003 (1994) (quoting JOSPEH GOLDSTEIN ET. AL., BEYOND THE BEST INTERESTS OF THE CHILD 98 (2d ed. 1979)).

20. *Id.* at 1010.

21. *Id.* at 1010 n.57 (quoting *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963)).

The psychological bond may, if the two are separated, lead to socialization problems for the child.[22] This is because the bond is formed through daily interaction between the parent and the child.[23] The psychological parent theory often occurs when children are placed in foster care.[24] This theory of parenthood does not protect parental autonomy.[25] It can be a problem because the parents who are recognized by law do not have to intend to have this relationship develop between their child and another in order for a third party to assume the role of psychological parent.[26]

B. *In Loco Parentis*

Similar to the psychological parent theory is the *in loco parentis* doctrine, wherein "a person who intentionally provides support or takes custody without adopting may incur the rights and responsibilities of parenthood."[27] This relationship is often created by marriage and terminated by divorce.[28] However, some courts have extended the relationship, rights, and obligations past the termination of marriage.[29]

The theory is that the person stands in the shoes of an already existing parent.[30] This most likely occurs in situations where there is a stepparent that cares for the children of the spouse. That person, although not the biological or adoptive parent, acts like the child's parent. Furthermore, the stepparent in assuming this roll, takes the place of an already existing parent. The nonparent gains standing through the marriage, which has created the *in loco parentis* relationship.

The *in loco parentis* relationship can occur without the consent of the biological parent.[31] The relationship is also nonexclusive, meaning, "the doctrine does not arbitrarily limit the gender or number of people who may stand *in loco parentis* to a child."[32]

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22. *Id.* at 1010–11.
23. *Id.*
24. *See* Nitti, *supra* note 19, at 1010–11.
25. Lisa M. Pooley, Note, *Heterosexism and Children's Best Interests: Conflicting Concepts in* Nancy S. v. Michele G., 27 U.S.F. L. REV. 477, 487 (1993).
26. *Id.*
27. Kovacs, *supra* note 2, at 523.
28. *Id.*
29. *Id.*
30. Delaney, *supra* note 15, at 194.
31. Pooley, *supra* note 25, at 488.
32. *Id.*

C. *Equitable Parent*

An equitable parent, although not the biological or adoptive parent of the child, "desires such recognition, is willing to accept the obligations of supporting the child and in return wants the 'reciprocal rights' of custody and visitation."[33] This doctrine has its roots in the doctrine of equitable estoppel and equitable adoption.[34] The comparison creates a type of parenthood by action:

> Equitable estoppel is the doctrine that a person may be precluded by his actions, conduct, or silence when he is obligated to speak, from asserting a right that he otherwise would have possessed. Fundamental fairness prevents a party from benefiting from prior inconsistent conduct upon which others have relied to their detriment.[35]

In terms of family law, equitable parenthood is the result of a nonparent who because of prior conduct and actions, is estopped from claiming nonparenthood.[36] Therefore, because others have relied on the nonparent's actions as a parent, the nonparent is precluded from claiming that he or she is not a parent. This title is often given to people who hold themselves out to be parents and then deny biological ties.[37] However, in the context of lesbian parents, it is the nonparent who most often tries to label herself as an equitable parent.[38]

Unlike the psychological parent and the *in loco parentis* relationship, equitable parenthood cannot be created without the consent of the legally recognized parent.[39] The circumstances giving rise to the equitable parent relationship must be created by the legally recognized parent.[40] If they are not, the equitable estoppel doctrine cannot be used.[41]

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33. *See* Delaney, *supra* note 15, at 201–02.

34. *Id.* at 202.

35. *Id.* (footnotes omitted). Equitable adoption refers to an oral contract to adopt a child which is fully performed, resulting in a legal adoption usually for the purposes of inheritance. *Id.*

36. *See id.*

37. *See* Delaney, *supra* note 15, at 201–02.

38. *See, e.g.*, Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991). Michele G.'s attempt to classify herself as an equitable parent was unsuccessful as it had never been applied as a title for the challenger of parental rights. *Id.*

39. Pooley, *supra* note 25, at 488.

40. *Id.*

41. *Id.*

Because lesbian couples are incapable of creating a child with biological ties to only the two of them, when the couple wants to start a family, a decision must be made concerning donor insemination.[42] Couples often choose one parent to be the birth mother and then choose a donor with similar characteristics to the other mother.[43] When lesbian couples separate, after years of planning and raising a family, it is not uncommon for the estranged pair to disagree about custody and visitation arrangements. The legal system's willingness to recognize the rights of the nonparent, or other mother, has not been as generously applied to lesbian parents as to heterosexual "other mothers."[44] The nonbiological mother has traditionally had to prove that she has rights to her child by classifying herself as one of the titles above, mainly a psychological parent.[45]

III. FLORIDA LAW CONCERNING THE LESBIAN MOTHER

In Florida, a lesbian mother, who through donor insemination of her partner, planned for and raised a child, is banned from creating a legal relationship with her family.[46] Although such a lesbian mother is anything but a stranger to her child, the law treats her as one.[47]

A. *Florida Statutes*

Because the lesbian other mother has not given birth to her child, they share no biological ties. Statutory law in Florida does not permit her to adopt her child because of her sexual orientation.[48] Section 63.042(3) of the *Florida Statutes* allows adoption by married and single persons whether they are adults or minors.[49] This same statute forbids a lesbian woman in a long-

42. Shah & Walters, *supra* note 4, at 61. *But see* Kyle C. Velte, Note, *Egging On Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, 434 (1999). New reproductive technology called Tri-Gametic In Vitro Fertilization creates an embryo with the genetic combination of two women. *Id.* Even with this technology, the couple still requires a sperm donor to complete fertilization.

43. Initial Brief of Appellant at 2, Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999) (No. 98-2854).

44. *See, e.g.*, Music v. Rachford, 654 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1995).

45. Delaney, *supra* note 15, at 187. The author noted that even when the lesbian parent proves that she is a psychological parent to her child, she is often times not afforded the same rights as the biological mother. *Id.*

46. *See* FLA. STAT. §§ 63.042(3), 741.212 (1999).

47. *See* FLA. STAT. §§ 63.042(3), 741.212.

48. FLA. STAT. § 63.042(3).

49. *Id.*

term committed relationship from adopting the child she planned for and raised solely because she is a homosexual.[50]

Statutory law in Florida also forbids homosexuals from marrying.[51] Section 741.212(1) of the *Florida Statutes* states that "[m]arriages between persons of the same sex entered into in any jurisdiction, whether within or outside the State of Florida . . . are not recognized for any purpose in this state."[52] In prohibiting homosexuals to marry, it has been noted that Florida "denie[s] homosexuals the rights granted to married partners that flow naturally from the marital relationship."[53] Notwithstanding the validity of these statutes, Florida's acceptance of the creation of the lesbian parented family through artificial insemination gives rise to a biased protection of one mother over another.

B. *Florida Case Law*

In 1925, Supreme Court of Florida ruled that a child could not be taken away from its natural mother without a showing that the mother was unfit.[54] Since that ruling, courts in Florida have been hesitant to recognize the role of a psychological parent in terms of custody disputes.[55] Additionally, there was often disagreement concerning the standard that would apply to these proceedings.[56] In some cases, the courts accepted the showing of psychological parenthood as meeting the standing requirement.[57] In other cases, courts held that a showing of demonstrable harm or unfitness was required before the state could intervene in a person's private life concerning child rearing.[58]

Along with the noncohesive standing requirement, came the scattered approach to deciding the proper test for a transfer of custody. In some

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50. *Id.*

51. FLA. STAT. § 741.212 (1999).

52. *Id.*

53. Posik v. Layton, 695 So. 2d 759, 761 (Fla. 5th Dist. Ct. App. 1997).

54. Parker v. Gates, 103 So. 126 (Fla. 1925). Although Parker had allowed her son to be in the custody of Gates for the greater part of his life, she had not relinquished her right to custody of her child. *Id.* at 126.

55. *See infra* notes 57–59.

56. *Id.*

57. *See, e.g.*, Simmons v. Pinkey, 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991). The court reasoned that it was in the best interests of a teenage girl to remain with her foster mother after her father was released from jail. *Id.* at 524. The decision was made after a showing that the father had not been honest in his relationship with his daughter. *Id.*

58 Webb v. Webb, 546 So. 2d 1062 (Fla. 3d Dist. Ct. App. 1989); Paul v. Lusco, 530 So. 2d 362 (Fla. 2d Dist. Ct. App. 1988); Sandor v. Sandor, 444 So. 2d 1029 (Fla. 3d Dist. Ct. App. 1984).

opinions, the courts used the best interests of the child standard.[59] In others, the best interests of the child would only be considered after it was proven that the child's welfare was at stake.[60] One district held that the law did not recognize the role of psychological parents.[61]

Throughout these decisions, the belief that the natural parent had a right that was superior to all others challenging that parent for custody remained. However, there was the opportunity for a nonparent to gain custody in certain circumstances.[62] Despite this, lesbians, who considered themselves to be psychological parents of their partners' biological children, had been unsuccessful in their fight for custody.[63] But, prior to the Supreme Court of Florida decision in *Von Eiff v. Azicri*,[64] the lesbian other mother still had a remote chance of persuading a court that she deserved to be considered in the custody decisions of her child.[65] Although *Von Eiff* was a visitation rights battle between the parents and grandparents of a child, the reasoning behind the case and the resulting decision laid the groundwork for denying a lesbian other mother rights to her child.[66]

1. Von Eiff v. Azicri

In *Von Eiff*, maternal grandparents sued their grandchildren's father and his wife for visitation rights.[67] Von Eiff and the Azicri's daughter, Luisa, were married and had a child the following year.[68] Luisa died, and after Von Eiff remarried, his new wife adopted the child.[69] The grandparents sued for visitation rights under section 752.01(1)(a) of the *Florida Statutes*, which

59. *Simmons*, 587 So. 2d at 524; Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981); Heffernan v. Goldman, 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).

60. *Paul*, 530 So. 2d at 364.

61. Taylor v. Kennedy, 649 So. 2d 270 (Fla. 5th Dist. Ct. App. 1995); Swain v. Swain, 567 So. 2d 1058 (Fla. 5th Dist. Ct. App. 1990) (finding that "[t]here is no such thing [as a psychological parent] recognized in law," and that the duty to support children is only laid upon natural and adoptive parents).

62. *See, e.g.*, *Simmons*, 587 So. 2d at 524.

63. *See* Music v. Rachford, 654 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1995) (holding that a woman who planned to raise a child with her lesbian partner as the biological mother was not considered a de facto parent).

64. 720 So. 2d 510 (Fla. 1998).

65. *Id.* at 510.

66. *See* Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999).

67. *Von Eiff*, 720 So. 2d at 510.

68. *Id.* at 511.

69. *Id.*

grants such visitation to grandparents in certain circumstances.[70] The Third District Court of Appeal granted visitation to the grandparents,[71] however, the following question was certified to the Supreme Court of Florida:

> IS SECTION 752.01(1)(a), FLORIDA STATUTES (1993), FACIALLY UNCONSTITUTIONAL BECAUSE IT IMPERMISSIBLY INFRINGES ON PRIVACY RIGHTS PROTECTED BY ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION?[72]

The Supreme Court of Florida answered affirmatively, and "focus[ed] exclusively on whether it is proper for the government, in the absence of demonstrated harm to the child, to force such interaction against the express wishes of at least one parent."[73] The court reasoned that government intervention in the life of a parent, absent a showing of demonstrable harm to the child, violated that parent's fundamental right to privacy.[74]

The court began by reviewing the right to privacy in child rearing that is offered by the *United States Constitution*.[75] One of the liberties afforded by the Due Process Clause of the Fourteenth Amendment[76] is the right to personal privacy.[77] The court stated that it is "'clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"[78] Furthermore, there is a specific liberty afforded to parents concerning the "'care, custody, and management'" of their children.[79]

After discussing the right to privacy granted by the *United States Constitution*, the court explained the extra protection that Florida provides.[80] The right to privacy in Florida is not only protected by the *United States*

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70. FLA. STAT. § 752.01(1)(a) (1999). Section 752.01(1)(a) of the *Florida Statutes* states that a court shall award reasonable visitation rights to grandparents when it is in the child's best interests if one or both of the child's parents are deceased. *Id.*

71. *Von Eiff*, 720 So. 2d at 512.

72. *Id.* at 510–11.

73. *Id.* at 511.

74. *Id.* at 514.

75. *Id.* at 513.

76. U.S. CONST. amend. XIV.

77. *Von Eiff*, 720 So. 2d at 513. *See* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

78. *Von Eiff*, 720 So. 2d at 513 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977)).

79. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

80. *Id.* at 514.

Constitution.[81] Article 1, section 23 of the Florida Constitution states that "[e]very person has the right to be let alone and free from government intrusion into his private life."[82] The court concluded that Florida's explicit right to privacy affords more protection than the implied federal right to privacy in that it "is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart."[83]

The court reasoned that because the right to privacy had been classified as a fundamental right in Florida, the highest standard of scrutiny must be applied when determining whether the government may infringe upon these rights.[84] The state has the burden of justifying the intrusion of privacy by showing that there is a compelling state interest.[85] The state must prove that the challenged regulation serves the compelling state interest and that the interest is served by using the least restrictive means.[86]

The court stressed that the compelling state interest required to be proven by the government before interference with a natural parent's decision-making was the existence of a "significant harm to the child threatened by or resulting from those decisions."[87] The court held that the best interests of the child analysis can only be explored after the state established significant harm.[88] Therefore, the court concluded that section 752.01(1)(a) was unconstitutional because it granted visitation to grandparents only upon a showing of the best interests of the child instead of first requiring proof that the child had suffered demonstrable harm.[89]

Furthermore, the court provided examples of compelling state interests.[90] These interests included protecting children from the threat of abuse, neglect and death,[91] preventing sexual exploitation of children in the home,[92] and ensuring reasonable medical treatment for children.[93] Therefore, there are many different circumstances that can cause demonstrable harm to a child—it does not automatically result from the death of one parent.[94]

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81. U.S. CONST. amend. XIV.
82. *Von Eiff*, 720 So. 2d at 513; FLA. CONST. art. I, § 23.
83. *Von Eiff*, 720 So. 2d at 514.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Von Eiff*, 720 So. 2d at 514.
89. *Id.*
90. *Id.* at 515.
91. *Id.* (referring to Padgett v. Department of Health & Rehabilitative Servs., 577 So. 2d 565, 570 (Fla. 1991)).
92. *Id.* (following Schmitt v. State, 590 So. 2d 404, 415–16 (Fla. 1991)).
93. *Von Eiff*, 720 So. 2d at 515 (relying on M.N. v. Southern Baptist Hosp., 648 So. 2d 769, 770 (Fla. 1st Dist. Ct. App. 1994)).
94. *Id.*

In quashing the decision of the lower court, the Supreme Court of Florida agreed with and followed the dissenting opinion of Judge Green.[95] Judge Green, arguing for the interests of the natural parent, noted that "it appears to be an unassailable proposition that otherwise fit parents . . . who have neither abused, neglected, or abandoned their child, have a reasonable expectation that the state will not interfere with their decision to exclude or limit the grandparents' visitation with their child."[96] Therefore, because the grandparents had not proven that their grandchildren suffered demonstrable harm under the care and supervision of Von Eiff and his new wife, they failed to meet the standing requirement to argue their case.[97]

Finally, the court in *Von Eiff* noted that despite the constitutional hurdle, using a best interests analysis instead of mandating proof of demonstrable harm to the child "permits the State to substitute its own views regarding how a child should be raised for those of the parent."[98] The court reasoned that doing this would be "stripping [the parents] of their right to control in parenting decisions."[99]

2. After *Von Eiff*

Von Eiff strengthened the rights of the natural parent. By requiring a showing of demonstrable harm to the child before entertaining a change of custody from a natural parent to a nonparent, the court solidified the biological mother's right to care for and make decisions for her child without government intervention.[100] Interpreting the right to privacy in Florida to include the right to privacy in child rearing grants natural parents the autonomy deeply rooted in our belief system as free individuals.[101] However, requiring a showing of demonstrable harm adds an additional hurdle for a lesbian mother to overcome in her battle to maintain a relationship with her child.

In Florida, the statutory ban on the creation of the nontraditional family has forced the nonbiological mother in a lesbian partnership to use the psychological parent status in order to gain standing at a custody hearing.[102] Proving the existence of her relationship was, until *Von Eiff*, her only avenue. Although it had not been persuasive when applied to the lesbian

95. *Id.*
96. *Von Eiff*, 699 So. 2d 772, 781 (Green, J., dissenting).
97. *Von Eiff*, 720 So. 2d at 516.
98. *Id.*
99. *Id.*
100. *See id.*
101. *Von Eiff*, 699 So. 2d at 780–85 (Green, J., dissenting). Judge Green noted that only four other state constitutions contain an explicit right to privacy. *Id.* These include Alaska, California, Hawaii, and Montana. *Id.*
102. *See* Music v. Rachford, 654 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1995).

psychological parent relationship, a small body of precedent was available to work with.[103] Due to the *Von Eiff* decision, those opportunities for relief are no longer available to her.[104]

Although the interpretation of the right to privacy in *Von Eiff* leaves grandparents and stepparents with the same hurdles as the lesbian parent,[105] it does not have the same crushing effect on heterosexual psychological parents. If the natural parent consents, a heterosexual can adopt the child of his or her spouse, which then places the new parent on equal footing with the biological parent.[106]

Furthermore, the other parent in heterosexual unions is introduced as a third party. Children in that situation either know or they are told about their original parent. Often times, children maintain the relationships with their natural parents while creating and fostering new relationships with their psychological parents. Therefore, the effect of *Von Eiff* is different on a lesbian who has been treated and considered an equal parent by her partner and her child.

IV. Kazmierazak v. Query

A. *Background*

Penny Kazmierazak and Pamela Query were involved in a long term, lesbian relationship.[107] During the course of the relationship, the couple decided to have a child through donor insemination.[108] They chose Query as the parent to carry the child.[109] Query delivered the couple's daughter on December 24, 1993.[110] On their baby's medical records, Kazmierazak was

103. *See, e.g.*, Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981).

104. The decision took away a lesbian, nonbiological parent's ability to claim status as a psychological parent because the existence of that relationship will not be acknowledged as a compelling state interest. *Von Eiff*, 720 So. 2d at 516. The *Von Eiff* interpretation of the right to privacy changed the standing requirement in that it solidified the standard that demonstrable harm to the child must be proven as the interest justifying state intervention. *Id.*

105. *See id.*

106. *Id.* The court noted that in adopting the child, Von Eiff's new wife had created the same relationship between herself and the child as would have been had the child been her biological daughter. *Id.*

107. Initial Brief of Appellant at 2, Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999) (No. 98-2854).

108. *Id.*

109. *Id.*

110. *Id.*

listed as a "parent" and "responsible party."[111] She was also listed on the baby's family tree as "mom."[112] Despite the family's belief that Kazmierazak was a mother of their baby, she had no biological ties with the child.[113] Because Florida law bars homosexuals from marrying or adopting, the couple could not legally make Kazmierazak a parent of their child.[114]

On April 7, 1998, soon after the couple ended their relationship, Kazmierazak filed a Petition for Custody of their child.[115] Query responded by filing a motion to dismiss, arguing that because Kazmierazak was not a legal parent of their child, she did not have standing to obtain custody or visitation rights.[116] The trial court agreed that Kazmierazak lacked standing and granted the motion to dismiss.[117] Kazmierazak then appealed to the Fourth District Court of Appeal.[118] This appeal was filed prior to the Supreme Court of Florida's decision in *Von Eiff*.[119]

B. *Kazmierazak's Argument*

Kazmierazak argued that determining a grant of custody turns on the best interests of the child.[120] She claimed that denying her the opportunity to fight for her child based on a statutorily imposed lack of standing "disallows any and all proof of the appellant's relationship to her little girl, treating a loving parent as a total stranger and threatening a five-year-old child with the permanent loss of her primary caretaker."[121]

Kazmierazak's first contention was that Florida law allowed a psychological parent to show that the best interests of the child are served through continuing contact between the child and the psychological parent.[122] She relied on *Wills v. Wills*,[123] wherein a stepmother, given standing as a psychological parent, was able to gain visitation rights over her nonbiological, nonadoptive daughter based on the psychological and

111. Record at 77, Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999) (No. 98-2854).

112. *Id.* at 78.

113. Initial Brief of Appellant at 2, *Kazmierazak* (No. 98-2854).

114. FLA. STAT. §§ 63.042(3), 741.212 (1999).

115. Record at 1–3, *Kazmierazak* (No. 98-2854).

116. *Id.* at 10–12.

117. *Id.* at 24–25.

118. *Id.* at 26–28.

119. *Id.* The notice of appeal was filed on August 11, 1998. *Von Eiff* was not decided until November 12, 1998. Von Eiff v. Azicri, 720 So. 2d 510, 510 (Fla. 1999).

120. Initial Brief of Appellant at 32, *Kazmierazak* (No. 98-2854).

121. *Id.* at 6.

122. *Id.* at 7.

123. 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981).

emotional ties that had developed during the relationship.[124] In that case, Kazmierazak noted, visitation was authorized based on the best interests of the child:

> It seems to us that if an adequate record can be made demonstrating that it is in the child's best interest that such visitation be authorized the trial judge's discretion in the matter is sufficiently broad to allow him to authorize visitation with a non-parent. Certainly this type of visitation, contrary to the wishes of the custodial parent, should be awarded with great circumspection. But if the welfare of the child is promoted by such visitation and there is no other substantial interest adversely affected the trial judge should be allowed that latitude.[125]

Kazmierazak continued by arguing that denying her a hearing to determine whether she possessed a relationship with her daughter worthy of granting custody was a violation of her privacy rights as a parent.[126]

Second, Kazmierazak argued that there was a large body of case precedent that granted standing to persons similarly situated who had shown themselves to be in a parental relationship with a child.[127] She added that this precedent supported her claim to be given the opportunity to establish the same type of relationship.[128]

Kazmierazak's third argument focused on the court's protection of children of lesbian parents.[129] She argued that across the country cases involving lesbian parents had been decided based on the best interests of the child.[130] Kazmierazak reasoned that, similar to these cases, the *Wills*

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124. *Id.*; Initial Brief of Appellant at 8, *Kazmierazak* (No. 98-2854).

125. Initial Brief of Appellant at 8, *Kazmierazak* (No. 98-2854) (quoting Wills v. Wills, 399 So. 2d 1130, 1131 (Fla. 4th Dist. Ct. App. 1981).

126. *Id.* at 11.

127. *Id.* at 11–18. Kazmierazak relied on Florida cases *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996), *Padgett v. Department of Health & Rehabilitative Servs.*, 577 So. 2d 565 (Fla. 1991), *Cone v. Cone*, 62 So. 2d 907 (Fla. 1953), *Spence v. Stewart*, 705 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998), *Simmons v. Pinckney*, 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991), *Golstein v. Golstein*, 442 So. 2d 330 (Fla. 4th Dist. Ct. App. 1983), and *Heffernan v. Goldman*, 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).

128. Initial Brief of Appellant at 13, *Kazmierazak* (No. 98-2854).

129. *Id.* at 18–26.

130. *Id. J.A.L. v. E.P.H.*, 682 A.2d 1314 (Pa. Super. 1996), *Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995), and *A.C. v. C.B.*, 829 P.2d 660 (N.M. App. 1992), are three cases wherein the petitioners were lesbian nonbiological mothers who were granted the opportunity to fight for custody and visitation rights of their children.

decision required the court to hear her case and determine what would best promote her child's welfare.[131]

The fourth argument focused on the family that she and her partner had worked to create and maintain.[132] Kazmierazak argued that the couple intended to make a family with her being the parent of their child.[133] The medical records and family planning records showed that the couple intended to create a family—not that Query had a daughter for whom Kazmierazak would be a caretaker.[134] She argued that these arrangements were sufficient to establish standing as a psychological parent.[135]

Kazmierazak's final argument was one made on behalf of her daughter.[136] She supported her argument with research showing that children able to maintain relationships with both parents were more content.[137] She also stated that Florida law supported the proposition that children and noncustodial parents should partake in "frequent and continuing contact."[138]

When she petitioned for custody and again in her brief, Kazmierazak mentioned that Query may not have been a fit person to care for their daughter alone.[139] However, she offered no proof to validate this contention. Kazmierazak concluded that she deserved an opportunity to establish the bond between her and her daughter.[140] Moreover, she claimed that precedent turned on the best interests of the child and not on the family into which she was born.[141]

C. *Query's Argument*

Query considered Kazmierazak a stranger to the relationship between Query and her biological daughter.[142] Query first argued that in a custody suit between a parent and a third party, the natural parent's rights must be

131. Initial Brief of Appellant at 25, *Kazmierazak* (No. 98-2854).

132. *Id.* at 26–30.

133. *Id.* at 27–28.

134. *Id.* at 27.

135. *Id.* at 26–30.

136. Initial Brief of Appellant at 30–31, *Kazmierazak* (No. 98-2854).

137. *Id.* at 30. Kazmierazak explained that whether children are raised in straight or gay households, they have the same needs for stability and security. *Id.* at 31. Denying children of gay parents relegates them to second-class status. *Id.*

138. *Id.* at 30.

139. Record at 2, Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999) (No. 98-2854); Initial Brief of Appellant at 3, *Kazmierazak* (No. 98-2854).

140. Initial Brief of Appellant at 32, *Kazmierazak* (No. 98-2854).

141. *Id.*

142. Initial Brief of Appellee at 4, 7, *Kazmierazak* (No. 98-2854).

considered.[143] She claimed that although the best interests standard is applied when the dispute arises between two natural parents, this tougher standard applied to her case as she was a natural parent in a custody battle with a third party.[144]

Secondly, Query argued that she should not have to defend her rights to her child against a stranger without a showing of unfitness or abandonment.[145] She stated that because a third party does not have legal or financial obligations toward the child of another, a third party does not have any rights to the child either.[146] Furthermore, she argued that natural parents should not have to fear that their children could be taken away from them by one who is not related by blood or marriage.[147]

Query's third argument focused on the visitation rights of a nonparent.[148] She claimed that visitation rights of a nonparent were established by statute.[149] She therefore contended that because Kazmierazak was not recognized by statute as having any type of relationship with her daughter, Kazmierazak was barred from claiming custody rights.[150]

Finally, Query argued that no cause of action arose in that a stranger sought custody of a child without a compelling state interest defined by statute.[151] Because Kazmierazak was unable to involve state action through a dependency proceeding, an adoption petition, or a dissolution of marriage, Query argued that Kazmierazak was unable to state a cause of action for taking her child.[152]

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143. *Id.* at 4.

144. *Id.*

145. *Id.* at 4–6.

146. *Id.*

147. Initial Brief of Appellee at 4–6, *Kazmierazak* (No. 98-2854).

148. *Id.* at 6–7.

149. *Id.* "Visitation rights are, with regard to a nonparent, statutory, and the court has no inherent authority to award visitation." Meeks v. Garner, 598 So. 2d 261, 262 (Fla. 1st Dist. Ct. App. 1992). *See also* Music v. Rachford, 654 So. 2d 1234, 1235 (Fla. 1st Dist. Ct. App. 1995). In *Music*, the court refused to grant standing to a lesbian nonbiological mother who had not argued her case under any statutory scheme. *Id.*

150. Initial Brief of Appellee at 4–6, *Kazmierazak* (No. 98-2854).

151. *Id.* at 7–8. The government has the power to intervene in a family only when there is a showing that the welfare of the child is at stake. Beagle v. Beagle, 678 So. 2d 1271, 1275–76 (Fla. 1996).

152. Initial Brief of Appellee at 7–8, *Kazmierazak* (No. 98-2854). The nonparent seeking to take a child out of a detrimental environment has three statutory options. *Id.* The nonparent can file a petition for dependency. FLA. STAT. § 39.404(1) (1999). A grandparent may file for visitation during a divorce. *Id.* § 61.13(2)(b)2.c. The nonparent may petition for adoption proving that the biological parent has abandoned the child. *Id.* § 63.072(1).

Query concluded that Kazmierazak had not even shown that it was in the best interests of their child to give her custody or visitation.[153] As far as claiming rights to their child, Query argued that Kazmierazak was not on equal footing with her, but rather was at the level of a stepparent, grandparent, or sibling.[154] Because custody or visitation is not granted to persons identified by those categories absent a compelling state interest, Query reasoned that custody or visitation should not have been granted to Kazmierazak absent that same showing.[155]

D. *The Decision*

Three months after the notice of appeal was received, the Supreme Court of Florida decided *Von Eiff*.[156] This decision, which defined Florida's constitutional right to privacy in terms of child rearing, shattered any chance Kazmierazak had of claiming rights to her child as a psychological parent. Because she identified herself as a psychological parent, the issue before the Fourth District Court of Appeal was whether a psychological parent has the same rights in terms of child rearing as a biological parent.[157] By definition, a psychological parent can never be on equal footing with a biological parent.[158] The court recognized this fact and noted that *Von Eiff* changed the legally recognized status of psychological parents.[159]

First, the court noted that common law did not recognize a psychological parent.[160] The court also noted that Kazmierazak had not petitioned for custody under a statutory scheme.[161] Second, the court stated, that concerning a custody battle between a nonadoptive, nonbiological parent and a natural, biological parent, the law recognizes the biological parent's constitutionally protected right to privacy.[162] Applying *Von Eiff*, the court equated Kazmierazak's rights to those of a grandparent or a stepparent, instead of equating her rights to those of a natural parent.[163] It is this distinction and categorization that required the court to decide the case based

153. Initial Brief of Appellee at 7–8, *Kazmierazak*, (No. 98-2845).

154. *Id.*

155. *Id.*

156. Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).

157. Kazmierazak v. Query, 736 So. 2d 106, 107–08 (Fla. 4th Dist. Ct. App. 1999).

158. Nitti, *supra* note 19, at 1003.

159. *Kazmierazak*, 736 So. 2d at 110.

160. *Id.* at 107.

161. *Id.*

162. *Id.*

163. *See id.* at 110. The court stated that "in light of *Von Eiff*, [it could not] construe these cases as holding a psychological parent is entitled to parental status equivalent to the biological parent." *Kazmierazak*, 736 So. 2d at 110.

on whether Query's decisions would cause demonstrable harm to their child. Because Query had a right to privacy in making parental decisions, Kazmierazak first would have to prove that living with the biological mother would cause her daughter demonstrable harm.[164] Only after Kazmierazak proved this would she have met the standing requirement permitting her to request custody and prove that placing their daughter in her custody would be in the child's best interests.[165] Specifically, it would have to be Kazmierazak's burden in proving that Query was an unfit mother that granted her standing.[166] Due to the *Von Eiff* decision, proof of her role as a psychological parent would no longer suffice.[167]

However, as the court noted, Kazmierazak did not argue that leaving their daughter in the custody of Query would cause her to suffer demonstrable harm.[168] She only argued that it was in the child's best interests to keep a connection with her psychological mother.[169] Because the child's best interests falls short of the compelling interest required before the state can invade the privacy of a biological parent, the court was compelled to rule in favor of Query.[170]

The court examined the cases Kazmierazak relied upon to support her position.[171] The court pointed out that each case was decided before *Von Eiff*, and, therefore, did not address the issue of standing.[172] The court also noted that the cases Kazmierazak relied upon were decided without meeting the threshold requirement of demonstrable harm to the child.[173] Because *Von Eiff* changed the standard, Kazmierazak was left without authority to contradict Query's right to privacy.[174] Therefore, she had not met the more arduous standing requirement to argue for her rights as a mother.

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164. *See id.* at 109.

165. *See id.*

166. *See id.*

167. *Id.* at 110.

168. *Kazmierazak*, 736 So. 2d at 107. The court felt that this argument was not pushed to the forefront of the case to make an argument of demonstrable harm. *See id.* at 109. Harm to the child was mentioned by Kazmierazak in a footnote of her brief. *Id.* However, it was not incorporated as a main argument for relief. *Id.*

169. *Id.* at 107.

170. *Kazmierazak*, 736 So. 2d at 110.

171. *Id.* at 108–09.

172. *Id.*

173. *Id.*

174. *See* Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).

V. THE MISIDENTIFICATION OF LESBIAN OTHER MOTHERS

The error in this case is not in the decision, but rather in the labeling of Kazmierazak as a third party, as a stranger, and even as psychological parent. Grandparents, stepparents, foster parents, and anybody who assumes the role of a parent can be classified as a psychological parent. They are all third parties to the nuclear family that at some point in time existed. In situations like these, the biological or adoptive parents should be given that extra layer of protection from the state constitution to guard their families from outside individuals.

Contrary to this, in a lesbian relationship that utilizes donor insemination, there is no third party. The other mother is not thought of as a third party until the couple separates. The intention of the two women from the first moment of family planning is to have two parents. The fact that they are two women is only a legal problem when the nonbiological mother wants to continue the relationship with her child.[175]

The cases Kazmierazak relied upon were distinguishable from her case. However, the difference was not that the cases were decided before the right to privacy in parental decisionmaking was clarified. The distinguishing factor was that Kazmierazak's situation was one where no other remedy was available.[176]

In *Wills v. Wills*,[177] the court awarded visitation rights to the psychological mother of a twelve-year-old girl.[178] The father and mother adopted the child when she was only three years old just prior to the mother's death.[179] When the girl was four years old, her father remarried, and the new couple raised the child together for seven years until the time they were divorced.[180] The court held that the psychological bond that had developed between the psychological mother and the daughter was strong

175. Because of the right to privacy afforded by both the *United States Constitution* and the Florida Constitution, the state cannot interfere with the right of a woman to procreate. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I., § 23; Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942). The state then uses the same constitutional right to privacy to deny the other mother in that lesbian relationship from maintaining the relationship that the state allowed her to create. *See* Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999).

176. Because she is statutorily precluded from creating the legal relationship, the lesbian other mother is treated as a third party.

177. 339 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981).

178. *Id.* at 1131.

179. *Id.*

180. *Id.*

enough to grant visitation even though there was no legally recognized relationship.[181]

In *Simmons v. Pinkey*,[182] the child was a fourteen-year-old girl who had been living with her foster mother for thirteen years.[183] When she was less than two years old, her father killed her biological mother and was sent to prison.[184] The court denied the father custody of his daughter, and instead ruled that she should remain in the custody of her foster mother.[185]

In *Heffernan v. Goldstein*,[186] the court granted custody of the two children to the stepmother against the natural mother after the death of the children's father.[187] The children had been living with their father since their mother and father divorced eleven years earlier.[188] The court did this despite the fact that the father and stepmother had only been married six months when the father died.[189] The court weighed heavily the children's request to remain with their stepmother.[190]

Kazmierazak's argument cannot be supported by the authority she cited. First, the nonbiological parents in the cited cases were not barred from creating a legal relationship with their children. Because they were heterosexual, they were able to marry the biological parent or adopt the children.[191] Although adoption and marriage are both options that require the consent of the natural parents, these actions were legal options for the people involved in the cited cases.[192]

Second, in *Wills* and *Heffernan*, the nonparent had created the *in loco parentis* relationship with the child through marriage.[193] Statutory law permitting couples of the opposite sex to marry formed this relationship. In addition, it and provided a legal opportunity for these parents to be afforded rights to their stepchildren.[194]

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181. *Id.*
182. 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991).
183. *Id.* at 523.
184. *Id.*
185. *Id.* at 524–25.
186. 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).
187. *Id.* at 523.
188. *Id.*
189. *Id.*
190. *Id.*
191. FLA. STAT. §§ 63.042(3), 741.212 (1999).
192. *See* FLA. STAT. §§ 63.042(3), 741.212.
193. Wills v. Wills, 399 So. 2d 1130 (Fla. 4th Dist. Ct. App. 1981); Heffernan v. Goldman, 256 So. 2d 522 (Fla. 4th Dist. Ct. App. 1971).
194. *See* FLA. STAT. § 741.212 (1999).

Third, and most importantly, the psychological parents in these cases had taken the place, or filled in, for the natural parent.[195] At no time did any of them claim to be the real parent. Each knew that they were a replacement for the already existing and absent parent. These de facto parents represented the true definition of a psychological parent.[196] They had fulfilled the child's psychological and physical needs for a parent."[197]

Distinguishing these cases from the present situation, it is clear that Kazmierazak is not a psychological parent. She did not take the place of an already existing parent. Her daughter knew only two parents from birth. Kazmierazak planned for the child, coached her partner through lamaze, watched the birth of her daughter, and cared for her for seven years. It was not as if she began dating a woman who already had a daughter or made the choice to care for a child that was not hers. Kazmierazak was denied her daughter because the couple was biologically unable to create a child together. The previous choice to have Query as the birth mother now keeps her from continuing the parent-child relationship. Furthermore, Kazmierazak and Query's daughter did not have psychological or physical needs for a parent, because she had two parents present in the home.

Currently in Florida, a legal title does not exist that defines Kazmierazak's relationship to her daughter. Although she is her mother, she cannot be recognized as such because she and her daughter do not share biological ties. Although the only title she can give herself is that of psychological parent, this grossly under classifies the relationship and is no longer recognized as a threshold determination of standing.

This narrow fact pattern, where two women plan for and raise a family together, must be examined differently than the biological versus psychological parent battles. It must also be examined differently than from a situation where both of the parents have biological or adoptive ties to the child. Essentially, in lesbian planned parenting situations such as that which existed between Kazmierazak and Query, there should be a threshold standing requirement. This requirement should fall between the compelling interest of a person's right to privacy and the best interests of the child analysis.

The biological parent's right to privacy must, in a custody battle with a psychological parent, continue to be a pretext to determining with whom a child belongs. Concerning two biological or adoptive parents, the best interests of the child standard is a favorable way to determine custody disputes. However, between a lesbian couple, the biological mother's right to privacy should not be a barricade to the other mother's chance to continue

195. Simmons v. Pinkey, 587 So. 2d 522 (Fla. 4th Dist. Ct. App. 1991); *Wills*, 399 So. 2d at 1131; *Heffernan*, 256 So. 2d at 523.

196. *See* Nitti, *supra* note 19, at 1003.

197. *See id.*

in parenting her child. The other mother in a lesbian custody battle should be required to prove her relationship to her child before progressing to the best interests of the child analysis. However, legal decisions based on a mother's sexual preference preempt her from proving that relationship.[198] Because the Florida Legislature bars a lesbian mother from becoming a legal part of her family, the courts should provide her alternatives.

VI. THE NEED FOR CHANGE

At least one jurisdiction has permitted parents to show that continuing a relationship would be in the child's best interests after a threshold showing of a parent-like relationship.[199] *Holtzman v. Knott*,[200] is a case which stands on all fours with the Kazmierazak and Query's situation.[201] In that case, the lesbian couple chose to have a child by donor insemination, raised their son together, and separated when he was five years old.[202] The trial court reluctantly decided against granting Holtzman custody or visitation rights.[203] The court reasoned:

> [T]his [is] a case where a family member ought to have the right to visit and keep an eye on the welfare of a minor child with whom she has developed a parent-like relationship. Unfortunately because the law does not recognize the alternative type of relationship which existed in this case, this court can not offer the relief Holtzman seeks.[204]

The Supreme Court of Wisconsin analyzed the case beyond the statutory hurdles.[205] It developed a test enabling a nonparent to prove first that a parent-like relationship with the child exists and then that a "significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent."[206] The court held that the four elements required to prove a parent-like relationship were:

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198. *See* Kazmierazak v. Query, 736 So. 2d 106 (Fla. 4th Dist. Ct. App. 1999); Music v. Rachford, 654 So. 2d 1234 (Fla. 1st Dist. Ct. App. 1995).

199. Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995).

200. *Id.* at 419.

201. *Id.*

202. *Id.* at 421–22.

203. *Id.* at 422–23.

204. *Holtzman*, 533 N.W.2d at 422–23.

205. *Id.* at 424–25.

206. *Id.* at 421.

> (1) that the biological or adoptive parent consented to, and fostered, the [nonparent's] formation and establishment of a parent-like relationship with the child;
> (2) that the [nonparent] and the child lived together in the same household;
> (3) that the [nonparent] assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and
> (4) that the [nonparent] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[207]

The court further held that the two elements required to prove a significant triggering event which would justify the state interfering in the relationship between the child and the natural parent were that the biological or adoptive parent "has interfered substantially with the [nonparent's] parent-like relationship with the child and that the [nonparent] sought court ordered visitations within a reasonable time" after the parent's interference.[208] The court reasoned that after this showing, the nonparent may then proceed in persuading the court as to the best interests of the child.[209]

The test created in *Holtzman* has since been adopted by New Jersey.[210] In March 1999, the Superior Court of New Jersey, in *V.C. v. M.J.B.*,[211] used the test to determine that the lesbian nonbiological mother was entitled to visitation rights.[212]

Because Florida law treats all nonbiological and nonadoptive parents as "third parties" who have to show demonstrable harm to the child in order to cut through the protective right to privacy layer surrounding the natural parent,[213] this test, in its original form, is inapplicable in Florida. However, with some alteration, but without chipping away at the biological mother's right to privacy, this test can be formatted to address those in the same position as Kazmierazak and Query.

The altered test would have to require proof of a committed relationship between two homosexuals who planned a family through donor insemination. There would need to be proof that prior to the baby's birth, the couple prepared together for his or her arrival. Most importantly, the

207. *Id.*
208. *Id.*
209. *Holtzman*, 533 N.W.2d at 421.
210. V.C. v. M.J.B., 725 A.2d 13 (N.J. Super. Ct. App. Div. 1999).
211. *Id.* at 13.
212. *Id.*
213. Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998).

nonbiological parent would have to prove that she is the only other person the child considers a parent beside the biological mother. The revised test for Florida could require that, in order for a lesbian nonbiological mother to be awarded visitation of the biological child of her former partner, she must first prove: 1) that she and the biological mother planned and prepared for the birth of the child together;[214] 2) that the biological mother took specific steps to recognize her as the other parent of their child, consenting to and fostering her formation and establishment of a parental relationship with the child;[215] 3) that she lived with and was a member of the household with the biological mother and the child, assuming the characterization of a family;[216] 4) that she assumed the parental obligations by taking significant responsibility for the child's care, education, and development, including contributing towards the child's support, without expectation of financial compensation;[217] 5) that she maintained her parental role from the prebirth stage, building a bonded, dependant relationship with her child, and attempted to continue in that role after the couple separated;[218] and 6) that the child has always known the biological and nonbiological mother to be her only two parents.[219]

Applying this test as a threshold standing requirement would not conflict with the existing statutory law forbidding adoption and marriage by homosexuals.[220] Neither would it open the door to all persons, not biologically related, seeking custody or visitation rights.[221] The bond between a biological parent and a child should be afforded special protection. The right to privacy in child rearing is a protection for the natural parent that should not be violated absent an interest of the highest

214. The act of planning for the child separates the lesbian other mother from all other situations where a person takes the place of another, already existing parent.

215. This is similar to the first element of the *Holtzman* test. *See Holtzman*, 533 N.W.2d at 421.

216. See the second element of the *Holtzman* test. *Id.* at 421. This is another way of distinguishing the lesbian other mother from those that are not part of the nuclear family who try to gain rights to the child, for example, a grandparent. *See id.*

217. *See id.* See the third element of the *Holtzman* test. *Id.* at 421.

218. *See Holtzman*, 533 N.W.2d at 421. This is more stringent than the fourth element of the *Holtzman* test. *Id.*

219. This final element is added to reinforce the importance of the plan by the two women to create a family from the beginning with two parents, both of them women. *Id.*

220. This test would not challenge sections 63.042(3) and 741.212 of the *Florida Statutes*. Instead, the test challenges the court system to look beyond legislation to find the best result instead of being irrevocably bound by it.

221. The fear that this test would create a slippery slope, leading to a deterioration of the right to privacy, is without merit. This test is specially designed for the limited cases of lesbian nonbiological mothers who have been left without any legal options because of the *Von Eiff* decision.

degree. This standing requirement should continue to apply to psychological parents. However, similar to a married couple who plans an adoption or a married couple who partakes in donor insemination, the decision by a lesbian couple to raise the child is a two-part team effort from the first time the topic is discussed. The nonbiological parent in this situation creates a stronger relationship than the title "psychological parent" affords. This established relationship should not only be granted the opportunity to continue after a showing of unfitness of, or abandonment by, the natural parent.

VII. CONCLUSION

It is easy to conclude that lesbian mothers who fight for custody of their children are a minority, and, therefore, will never make a deep enough impact in family custody battle for which they would deserve a special standing requirement. However, as the nontraditional family continues to grow, the law will be forced to grow with it. The result of this special requirement affects the child of this broken partnership more than it does the mothers. Children in nontraditional families are as entitled to remain in contact with their parents after a separation as are children whose mother and father get divorced. The law functions to protect children from being pawns in their parents' games of hate. The lack of legal recognition of the lesbian nonbiological parent in Florida means that the battle is over before she enters the courtroom.

Although this battle may be between the two parents, or even between the nonbiological parent and the law, the effect is most strongly felt by the child. Unfortunately, the only thing the child understands is that her mother has been taken away.

Stacy A. Warman