

**AFTER H.S.H.-K.:**

**WHERE ARE WE NOW? WHERE DO WE GO FROM HERE?**

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**I. WHAT IS THE HOLDING OF H.S.H.-K.?**

- A. Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (1984) determines the circumstances under which a non-parent can petition for custody of a minor child.
1. "A person who is not a biological or adoptive parent may not bring an action to obtain custody of a minor unless the biological or adoptive parent is 'unfit or unable to care for the child' or there are compelling reasons for awarding custody to a nonparent." [193 Wis. 2d at 664-665; citing to Barstad and to In re Interest of Z.J.H., 162 Wis. 2d 1002, 471 N.W.2d 202 (1991).]
  2. The showing that a parent is unfit or unable to care for the child is the same showing as that required to terminate parental rights. [193 Wis. 2d at 665.]
  3. A fit and able parent may be denied custody if this result is required by "compelling circumstances." [193 Wis. 2d at 665, citing Barstad.]
    - a. Compelling circumstances include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, and other similar extraordinary circumstances that "drastically" affect the child's welfare. [Barstad v. Frazier, 118 Wis. 2d 549, 568, 348 N.W.2d 479 (1984).]
    - b. A parent's refusal to permit the continuation of the child's parent-like relationship with another adult is not a "compelling circumstance" justifying the denial of custody to the parent under the Barstad rule. [193 Wis. 2d at 665-666.]

- B. A non-parent does not have the right to request visitation pursuant to Wis. Stats. §767.245.
1. The legislature enacted this statute in the context of marital dissolution--even though the statute does not explicitly require an underlying action affecting the marriage as a prerequisite to an action for visitation.
  2. The legislature did not intend the Ch. 767 visitation statute to apply in the absence of the dissolution of a marriage. [193 Wis. 2d at 680.]
- C. Statutory visitation law sets forth a public policy of balancing two competing interests: the parent's liberty interest in rearing the child as s/he thinks best, and the best interest of the child.
1. Our statutes contain three separate visitation statutes. Wis. Stat. §767.245 applies only in the context of marital dissolution. Wis. Stat. §880.155 applies in cases of a parent's death. Wis. Stat. §48.925 applies to step-parent adoptions where biological relatives seek to maintain a relationship with the child.
  2. The legislative history and recent case law scrutinizing and interpreting the visitation statute indicate that court intervention in parental decision-making to order third-party visitation is warranted only if required to protect the child's best interest by "triggering events."
    - a. Despite controversy as to what kind of underlying action is required and confusion as to the appropriate definition of "family," the law of visitation consistently responds to a "concern that state intervention in a parent's determination of how to rear a child, a constitutionally protected liberty interest, must be justified by a triggering event."
    - b. This triggering event "must be more than a claim that a third party's visitation is in the child's best interest." [193 Wis. 2d at 680.]
- D. The court has equitable power to protect the best interest of a child by ordering visitation under circumstances not included in the statutes. [193 Wis. 2d at 682-683.]
1. The legislature did not intend that the enactment of statutorily

granted visitation privileges would constitute the exclusive grant of power to the courts to determine visitation or would act to limit the courts' equitable power to protect children's best interests by ordering visitation. [193 Wis. 2d at 681.]

- a. Courts ordered visitation by non-parents before visitation was regulated by statute.
  - b. Nothing in the legislative history of the various statutes indicates or implies that these visitation provisions are designed to displace or curtail the court's equitable powers.
  - c. Courts retain the authority to order visitation in circumstances not included within the statutes but in conformity with the policy direction set forth in the statutes.
- E. In the context of the dissolution of a "non-traditional adult relationship" [p. 659], a person who has acted as a parent to a child may be entitled to visitation rights under certain circumstances.
1. "[T]he child is as likely to become a victim of turmoil and adult hostility as is a child subject to the dissolution of a marriage. Such a child needs and deserves the protection of the courts as much as a child of a dissolving traditional relationship." [193 Wis. 2d at 659.]
  2. The petitioner must demonstrate a parent-like relationship with the child, by proving four distinct elements of that relationship:
    - a. The parent consented to and fostered the petitioner's establishment of a parent-like relationship with the child.
    - b. The petitioner and the child resided together in the same household.
    - c. The petitioner assumed obligations of parenthood by taking responsibility for the child's care, education and development, including contributing to the child's support, without expectation of financial compensation.
    - d. The petitioner was in a parental role for a length of time sufficient to establish a bonded, dependent relationship that is parental in nature. [193 Wis. 2d at 658-659.]
  3. Additionally, the petitioner must establish the existence of a significant triggering event justifying state intervention in the child's

relationship with the parent, by proving the following:

- a. The parent has interfered substantially with the petitioner's parent-like relationship with the child.
  - b. The petitioner sought court-ordered visitation within a reasonable period of time after the parent's interference. [193 Wis. 2d at 659.]
4. Only after the petitioner meets the two-pronged test set forth in paragraphs 2 and 3 above, can the court hold a hearing to determine whether visitation is in the child's best interest. [193 Wis. 2d at 658-659.]
- E. Public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation on the basis of a co-parenting agreement between a biological parent and another person where visitation is in the child's best interest. To this extent, the Court overrules its prior holding in In re Interest of Z.J.H., 162 Wis. 2d 1002, 471 N.W.2d 202 (1991).

## II. OTHER STATES' RESPONSES TO THE ISSUES RAISED IN H.S.H.-K.

- A. Other states have responded to the issues raised where a child has developed a parent-child relationship with an unrelated adult (hereinafter referred to as a "non-biological parent") in a variety of ways.
1. The doctrine of equitable parenthood (see paragraph B below).
  2. The doctrine of equitable estoppel (see paragraph C below).
  3. The doctrine of in loco parentis (see paragraph D below).
- B. **Equitable parenthood** doctrine holds that a non-biological parent may be considered the natural parent for legal purposes under certain conditions.
1. Elements that must be proved to establish equitable parenthood:
    - a. The non-biological parent and the child mutually acknowledge the existence of the parent-child relationship OR the biological parent has cooperated in the development of such a relationship over a period of time.
    - b. The non-biological parent desires to have the rights afforded

to a parent.

- c. The non-biological parent is willing to take on financial responsibility for the child.
2. Case law to date has involved married men who were not the biological fathers of their wives' children, where the husband, wife, and child resided in the same household and the child regarded the husband as a father. See, e.g., Atkinson v. Atkinson, 160 Mich. App. 601, 408 N.W.2d 516 (1987). See also Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).
  3. Nothing in the doctrine makes it dependent on marriage between the biological parent and the non-biological parent.
- C. **Equitable estoppel** involves "action or non-action which induces reliance by another to his (sic) detriment." In re Paternity of D.L.H., 142 Wis. 2d 606, 615-616, 419 N.W.2d 283, 287 (1987).
1. In Wisconsin, this doctrine has been used to recognize the legal status of an otherwise legally unrecognized non-biological parent in the context of a paternity proceeding. D.L.H., supra.
    - a. This case appears to hold that where a biological parent is equitably estopped from challenging the parental rights claimed by a non-biological parent, the non-biological parent is accorded the status of equitable parent.
    - b. The court in D.L.H. specifically declined to address the question of whether the non-biological parent in such a case is entitled to be given the status of a natural parent in a divorce proceeding. [142 Wis. 2d at 617.]
  2. Other state courts have used the doctrine to maintain an ongoing parent-child relationship despite the absence of a formal legal or blood relationship. See Sabol v. Bowling, No. CF-27, 024 (Ca. Super. Ct., Los Angeles County, 1-30-1989); Carney v. Dianna, No. 89, 191, 039-CE 99, 949 (Baltimore City Cir. Ct., 1-11-1990).
- D. **In loco parentis** means "in place of a parent," and a person in loco parentis has assumed the status and obligations of a parent without formal legal acknowledgment of the relationship.
1. This theory supports the contention that an adult and child who are not related to one another by blood or adoption may reside together

in a family-like relationship and may develop the same kind of long-lasting, deep emotional bond that commonly exists between parent and child.

2. This theory has been used to support step-parents' rights to a continuing relationship with the children they have parented, even in the absence of a statute that authorizes such continuing contact. See, e.g., Duren v. Duren, 854 P.2d 1352 (Colo. Ct. App. 1992), Hickenbottom v. Hickenbottom, 239 Neb. 579, 477 N.W.2d 8 (1991); Spells v. Spells, 250 Pa. Super. Ct. 168, 378 A.2d 879 (1977).
  - a. In these and other similar cases, the non-biological parent was at some point married to the biological parent, but marriage does not appear to be an essential element of the case law.
  - b. Rather, the cases turn on the ability of the non-biological parent's ability to establish that s/he has assumed the role of parent with the child.
3. Other cases have applied in loco parentis theory to award parental rights or enforce parental obligations in situations where there was no marriage between the biological parent and the non-biological parent. See, e.g., In re Hirenia C., 22 Cal. Rptr. 2d 443 (Cal. Ct. App. 1993); In re Robin N., 9 Cal. Rptr. 2d 512 (Cal. Ct. App. 1992); A.C. v. C.B., 829 P. 2d. 660 (N.M. Ct. App. 1992); In the Matter of Karin T. v. Michael T., 484 N.Y.S. 2d 780 (N.Y. Family Court 1985).
4. See also the following cases in which visitation rights were denied to a person claiming status as a non-biological parent because the petitioner had not proved that continued contact was in the best interest of the child or had failed to establish some other court-required element, but where the court stated that in an appropriate case it would award visitation rights to a non-biological parent: Kulla v. McNulty, 472 S.W.2d 175 (Minn. Ct. App. 1991); In re Marriage of Gayden, 280 Ca. Rptr. 862 (Ca. Ct. App. 1991).

### **III. THE CURRENT LEGAL STATUS OF "FAMILIES IN FACT" IN WISCONSIN: IS HALF A LOAF BETTER THAN NONE?**

- A. The Supreme Court's reliance on the courts' common law equity powers affords some protection to the child's liberty interest in maintaining a relationship with a person acting as a parent and buttresses the courts'

historic authority to act in the best interest of the child. The Court's approach here, since it relies on a common law analysis, can be used in other states as well.

- B. The Supreme Court defines the competing interests at stake here as the child's best interest balanced against the parent's liberty interest in rearing the child as s/he sees fit.
  - 1. This analysis does not deal with the issue of the liberty interest of the person acting as a parent in maintaining the parent-child relationship.
  - 2. In essence, by ignoring such a claim the Court sends a message that it declines to recognize such an interest.
  
- C. The Supreme Court in dicta distinguishes between the courts' common law equity power to order visitation, a power that is not pre-empted by statute, and the status of custody and adoption disputes, which the Court goes out of its way to declare to be pre-empted by statutory authority.
  - 1. In stating that the statutory procedures for adoption and custody are exclusive, the Court expresses its unwillingness to preserve family-type rights and relationship interests that are not protected by statute.
  - 2. The Court thus appears to limit the extent to which it is willing to accord recognition to the status of non-biological parents, irrespective of the needs and best interest of the child, the abilities of the biological or adoptive parent, or other circumstances of the family in fact.
  
- D. The Court explicitly stated that the facts of this case--where two women decided together to have a child and actively parented the child together for a significant period of time, where the legal parent specifically and deliberately cooperated in the creation of a parenting bond between the child and her partner, where the legal parent because of a falling out with the partner acted contrary to the child's best interest by seeking to truncate the child's parental relationship with her ex-partner, and where there is no evidence that the partner ever acted contrary to the child's best interest--does not constitute "compelling circumstances" under Barstad v. Frazier which would permit the grant of custody to a non-parent.
  - 1. This lack of willingness to flesh out the concept of "compelling circumstances" appears to give the parent's authority over the child legal priority over the child's best interest.

2. The language of Barstad v. Frazier would permit a different result, one more protective of children, and it is disappointing that this Court chose to restrict Barstad rather than applying it to this case.
3. Query: Are there circumstances other than those specifically outlined in Barstad that the Court would find compelling?

NOTE: In H.S.H.-K., the Court was not faced with an allegation that the parent had acted in ways inconsistent with the child's best interest, but not rising to the level of unfitness or unsuitability, except with respect to the denial of the parent-like relationship the child had with the other adult. Had such an allegation been made, perhaps the "compelling circumstances" threshold would have been reached.

- E. The Court did not take the opportunity to interpret the meaning of the word "family" within the context of the Wisconsin Family Code.
1. The Court noted that "[t]he absence of a definition of family makes the question of whether a family is 'dissolving' or 'intact' virtually impossible to resolve." [193 Wis. 2d at 679.]
  2. The Court footnoted its earlier observation that "[t]he legislature has failed to provide any definition for 'family' under Ch. 767 or for that matter under any chapter of the Family Code." Watts v. Watts, 137 Wis. 2d 506, 515-516, 405 N.W.2d 303 (1987), cited in footnote 25, 193 Wis. 2d at 679.
  3. The Court noted (in the same footnote cited in paragraph 2 above) that the United States Supreme Court has held that biology is not the only determinant of familial relationships and cites Smith v. Organization of Foster Families, 431 U.S. 816, 842-844 (1977), for the proposition that "the importance of the familial relationship, to the individuals involved and to society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in 'promoting a way of life' through the instruction of children" [citing Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972)].
    - a. Yet this discussion was relegated to a footnote and the Court did not follow the U.S. Supreme Court's example in interpreting "family" to encompass relationships other than biological and adoptive ones.

- b. Failure to move forward in this area, as other courts have done, deprives children from families in fact of the significant legal protections of Ch. 767.
- F. The Court ignored recent Wisconsin case law approving the use of the doctrine of equitable estoppel in a case where the non-biological parent's reliance on biological parent's actions in fostering a parent-child relationship between the non-biological parent and the child: D.L.H., supra. [See paragraph II.C. above.]
  - 1. What is the current status of the holding in D.L.H. that "[t]he ultimate and overriding consideration must be the best interests of the child"? [D.L.H., 142 Wis. 2d at 618.]
  - 2. Is there justification for applying different requirements for a husband who is a non-biological parent as opposed to someone who is not married to the biological parent, with respect to the legal burden of proof borne by the non-biological parent to establish his/her claim? Can such differentiation withstand constitutional scrutiny?

#### IV. CONCLUSION

- A. "When a non-traditional adult relationship is dissolving, the child is as likely to become a victim of turmoil and adult hostility as is a child subject to the dissolution of a marriage. **Such a child needs and deserves the protection of the courts as much as a child of a dissolving relationship.**" [193 Wis. 2d at 659. Emphasis supplied.]
- B. The child may **deserve** such protection--but s/he does not have it in Wisconsin, at least not yet.