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An unmarried partner with joint legal and physical custody is not a parent and cannot be ordered to pay child support.

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The North Carolina Court of Appeals recently reminded us that custody rights do not make a person a parent. So, while a person may have court-ordered equal custody with the child's biological parent, that fact alone does not mean that person can be ordered to pay child support. In *Green v. Carter,* decided by the court of appeals on March 19, 2024, the court held that "[b]ased on long-established North Carolina law, … [a person] cannot be required to pay child support unless she is the child's mother or father or has agreed formally, in writing, to pay child support." Dissent by Hampson.

The biological mother waived her constitutional right to exclusive custody.

We've seen several cases like this in the context of third-party custody. Female partner Tricosa Green and biological mother Etonya Carter had a romantic relationship. They decided to have a child together. The biological mother became pregnant using an anonymous sperm donor, and both partner and biological mother were identified to friends and family as mothers of the child. They cared for the child together until their romantic relationship ended, at which time the partner filed a custody action seeking joint custody of the child. The trial court held that partner and the child had "a parent-child relationship," and that biological mother had acted in a manner inconsistent with her protected status by holding partner out as the child's co-parent and by allowing the partner to develop this parent-like relationship with the child without indicating that the relationship was not a permanent one. The trial court concluded that biological mom had waived her constitutional right to exclusive custody of the child and found that both parties were fit and proper to exercise joint custody of the child. The trial court ordered a parenting plan which granted an equal number of days of physical custody of the child to both parties.

Biological mother thereafter filed an action for child support against partner, arguing that the partner had acted as a parent to the child since before her birth, that partner stands in loco parentis to the child and agreed in writing to support the child, and that partner "is a parent to [the child] in the same sense as the heterosexual terms 'Mother' and 'Father' are used in GS 50-13.4(b)."

The trial court agreed with the biological mother and ordered partner to pay support. The trial court concluded that "there exists pleading, proof and circumstances that warrant [the] court to hold Mother and Partner equally liable for the support of [the child]" in that partner is "a parent" to the child according to a "gender-neutral interpretation" to the child support statute.

G.S. 50-13.4(b) is "clear and unambiguous" and is not "gender neutral."

The partner appealed and the court of appeals reversed the trial court, concluding that current North Carolina law does not allow the court to order partner to pay support because she is not a mother of the child, and she did not agree in writing to pay child support.

The appellate court began by pointing out that G.S. 50-13.4(b) limits who may be ordered to pay child support and held that the language of that statute is unambiguous. That statute states in part:

"In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child. … In the absence of pleading and proof that the circumstances otherwise warrant, any other person … standing in loco parentis shall be secondarily liable for such support. However, the judge may not order support to be paid by a person who is not the child's parent … absent evidence and a finding that such person … has voluntarily assumed the obligation of support in writing."

The court held that statute uses terms with clear meanings, 'father', 'mother', and 'parent'. According to the court, 'father' means (quoting Webster's Dictionary) the male parent, the one who "begets offspring" by "performing the fertilization function … by which the eggs of the female are made fertile."; and the term 'mother' (again quoting Webster's) means "the person who provides the egg and/or gestates the child and gives birth to the child."

Regarding the term 'parent', that court held that the term means "one that begets or brings forth offspring." Because GS 50-13.4(b) uses the specific terms 'mother' and 'father', the court held that the statute's reference to 'parent' clearly means a person who is an actual mother or father of a child.

The court then quoted *Heatzig v. MacLean*, 181 NC App 451, 458 (2008):

"Conferring parental status outside our statutory framework [is] without legal authority or precedent. A district court in North Carolina is without authority to confer parental status upon a person who is not the biological parent of a child. The sole means of creating the legal relationship of parent and child is pursuant to the provisions of Chapter 48 of the General Statutes (Adoptions)."

The court of appeals explained that when a statute is clear and unambiguous, it must be interpreted according to the ordinary meaning of its terms.

The appellate court then noted that the General Assembly specifically provided for a gender-neutral interpretation of statutes to comply with the decision by the US Supreme Court in *Obergefell v. Hodges*, 576 US 644 (2015), when it adopted GS 12-3(16) regarding the interpretation of the terms "husband and wife" to help ensure that persons in same-sex marriages are afforded the same rights and protections as persons in heterosexual marriages. According to the court, that statute shows that the General Assembly intended a gender-neutral interpretation to apply to married persons only. Noting that the statute makes no reference to the terms parent, mother, or father, the court stated:

"Since the General Assembly has specifically addressed the instances where a gender neutral interpretation may be used, this Court is not free to give the words "mother" and "father" in North Carolina General Statute Section 50-13.4 a gender neutral meaning or application. *See Boseman*, 364 N.C. at 545, 704 S.E.2d at 500. Mother's interpretation would re-write North Carolina General Statute Section 50-13.4, and only the General Assembly has the authority to re-write the statute."

The court of appeals also pointed out that adopting the 'gender-neutral' interpretation of GS 50-13.4(b) argued by mother would result in treating the child of a same-sex couple differently than a child in a heterosexual relationship under the same circumstances, citing cases wherein the court has held that romantic partners and step-parents in heterosexual relationships cannot be liable for support unless they have agreed in writing to support the child, despite having close relationships with the child and custodial rights. *See Duffey v. Duffey*, 113 NC App 382 (1994)(step-father only liable for support because he had agreed in a separation agreement to support the children), and *Moyer v. Moyer*, 122 NC App 723 (1996) (step-father was not liable for support because he had not agreed in writing to support the child).

Partner as a 'de facto' parent or a person acting in loco parentis??

The appellate court also rejected mother's argument that as a "de facto parent," partner is a "mother" as that term is used in GS 50-13.4(b). The dissent filed in the court of appeals agrees with mother, arguing that case law such as *Price v. Howard*, 346 NC 68 (1997) and *Mason v. Dwinnell*, 190 NC App 209 (2008) supports the conclusion that "a person who is in a domestic or intimate relationship with the biological parent – but is not a biological parent may, in fact be "transformed into a parent": a de facto parent."

The majority disagreed, stating "mother cites no legal authority for this argument, and we can find no such authority." *See Seyboth v. Seyboth*, 147 NC App 63 (2001)(step-parent is not a parent despite acting in loco parentis to the child) and *Estroff v. Chaterjee,* 190 NC App 61 (2008)(holding

that NC has not adopted theories of de facto parentage or parentage by estoppel), and *Heatzig*, cited above holding that adoption is the only legal mechanism for creating a parent-child relationship.

The majority opinion goes on to state that "there is no basis for holding a person primarily responsible for child support based only on custodial rights or standing in loco parentis to a child. … At best, standing in loco parentis may support secondary liability for child support [if that person has agreed in writing to pay support]."

Without addressing but seeming to assume that partner in this case stands in loco parentis to the child, the court rejected mother's argument that partner agreed in writing to support the child when she signed the required paperwork for mother's invitro fertilization to become pregnant and when she added the child as a beneficiary to her medical insurance. The appellate court held that neither document referenced child support.

What about the next to last sentence in *Price v. Howard*?

At the end of the opinion in *Price v. Howard*, the case wherein the supreme court set out the analysis to apply in custody cases involving situations like the one in *Green* where a biological parent has allowed a third party to develop a parent-like relationship with a child, the supreme court stated:

"It is clear that the duty of support should accompany the right to custody in cases such as this one."

Price v. Howard, 346 NC 68, 84 (1997).

The dissent argues that this statement is support for the premise that persons like partner in *Green* acquire parental status and are responsible for child support.

The majority disagrees, pointing out that the court in *Price* also stated:

"Although support of a child ordinarily is a parental obligation, other persons standing *in loco parentis* may also acquire a duty to support the child."

The majority therefore interprets the statement as simply applying the unambiguous language of GS 50-13.4(b), which limits support obligations of persons standing in loco parentis to only those who have agreed in writing to support the child.

This is an issue of public policy for the General Assembly.

In concluding the opinion, the majority states:

"The trial court's attempt to impose one obligation of a mother or father – child support – upon Partner, to go along with the benefit of joint custody already conferred upon her is understandable. It may seem only fair for Mother and Partner to share the responsibility of financial support for [the child] along with the benefits of joint physical and legal custody. It may seem just as fair to require a stepfather or male partner who stands in *loco parentis* to his partner's child to pay child support, especially if he also shares custody with the child's natural or legal parent. But here, North Carolina's statutes and established case law allow Partner to act as a parent to [the child] under Section 50-13.2 without paying child support under Section 50-13.4. *See* N.C. Gen. Stat. § 50-13.2 (stating custody may be awarded to "such person, agency, organization or institution as will best promote the interest and welfare of the child"); *see also* N.C. Gen. Stat. § 50-13.4 ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child.").

We fully appreciate the difficult issues created by IVF and other forms of assisted reproductive technology, but only the General Assembly has the authority to amend our statutes to address these issues. [citing the Honorable Beth S. Dixon, For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology, 43 CAMPBELL L. REV. 21 (2021)]. Protection of the children born into these situations, whether to a same-sex couple or a heterosexual couple, is a complex policy issue, but this Court does not have the role of creating new law or adopting new policies for our state."

This entry was tagged with the following terms: child support, de facto parent, in loco parentis, in vitro fertilization, parentage, same-sex partners.

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