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NOTE

WINNING THE BATTLE OR LOSING THE WAR?: THE IMPLICATIONS OF *BOSEMAN V. JARRELL* ON THE SAME-SEX ADOPTION DEBATE IN NORTH CAROLINA

JACINTA JONES*

ABSTRACT

The issue of gay adoption in North Carolina has been discussed and debated for many decades. Like its marital counterpart, this controversy has been both supported and condemned on moral, religious and social backgrounds. Although gay adoption has not been legalized by North Carolina in statutory or case law, the Supreme Court recently handed down a decision that appears to afford gay couples the same rights to legal and physical custody as their heterosexual peers. In *Boseman v. Jarrell*, the North Carolina Supreme Court awarded custody of a child to a non-biological same-sex parent by holding that the biological parent engaged in behavior that conflicted with her constitutional right to parent. Although this decision appears to be a large victory in the battle for recognition of gay adoption within the state, the decision in *Boseman* has actually dealt a huge blow to the argument for its relevancy. I suggest that the Supreme Court's reliance on case law directed to unmarried, heterosexual couples to support the decision in *Boseman* erroneously creates a parallel between the opportunities available for both homosexual and heterosexual couples. Because marriage is virtually available to every straight couple but inaccessible for gay couples, the similarity drawn here loses its functionality. Non-biological parents of children deliberately born into homosexual relationships can never receive full recognition as parents and will be relegated to the same third-party custody analysis as grandparents, without having a legally-recognized constitutional right to parent.

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I. INTRODUCTION

Same-sex marriage adoption is a hot-button topic in the United States today. Although this issue is being discussed on a national platform, a majority of state legislatures are currently in the process of determining whether same-sex adoption should become a part of their legal processes. In conservative states such as North Carolina, the fight to allow same-sex adoption has been an uphill battle. Many same-sex couples have struggled with ways to create a joint co-parenting system when only one partner is a biological parent to the child. This problem raises several constitutional issues to consider when discussing same-sex adoption.

The North Carolina Supreme Court attempted to resolve some of these issues in *Boseman v. Jarrell*.¹ In this case, the Supreme Court chose not to recognize a legal adoptive relationship between a child and the former same-sex partner of the child's biological mother because the adoption did not comply with North Carolina's statutory requirements.² However, the Court in *Boseman* affirmed the custody award under a normal "best interest of the child" analysis.³ The decision in this case provides only three options for biological parents involved in same-sex relationships: 1) the biological parent must deprive their former partner of the opportunity to legally be recognized as a parent to the child that the couple has jointly raised; 2) the biological parent must terminate their parental rights; or 3) or the biological parent must engage in behavior that is deemed to conflict with their constitutional right to parent.⁴ Either way, one of the parents must forego the rights and entitlements that the United States Constitution provides to natural parents.

This case note will explore the structure of North Carolina's laws on adoption and the way that those laws may affect a same-sex couple's decision to start a family. This note will also evaluate the holding of the North Carolina Supreme Court in *Boseman* as well as the case law that the Court relied on in reaching its decision. Finally, the note will explain that although *Boseman* helps to create a remedy for custody disputes amongst same-sex couples, it creates several issues that severely handicap the movement for legislation on same-sex adoption in North Carolina.

1. *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

2. *Id.* at 502.

3. *Id.* at 505.

4. *Id.* at 494.

II. THE CASE

Boseman arises out of a custody dispute between a biological mother and her former same-sex partner.⁵ The plaintiff, Julia Boseman, and the defendant, Melissa Jarrell, began their relationship in the spring of 1999 in Wilmington, North Carolina.⁶ The following year, the couple discussed having a child and they jointly decided that Jarrell would be the one to bear the child.⁷ Subsequently, Jarrell conceived a son via artificial insemination from an anonymous sperm donor and the child was born in October of 2002.⁸ The parties jointly raised the child and held themselves out to the public as his parents.⁹ The parties also gave the child a hyphenated last name consisting of both of their last names.¹⁰ The parents equally participated in the childrearing process and were both described as “hands-on” in their parenting approaches.¹¹ The child called one party “Mom” and the other “Mommy.”¹² Each party testified that “the other is and has been a good parent.”¹³

The parties later decided to try and enter an adoption decree for Boseman that would make her a legal parent of the child.¹⁴ In 2005, Boseman informed Jarrell that she had “found a way” to adopt the child in Durham County, North Carolina.¹⁵ In June of 2005, the parties petitioned the Durham County District Court to make Boseman an adoptive parent without terminating Jarrell’s relationship as the biological mother.¹⁶ In the adoption petition, the parties asked the court not to comply with the requirements of two North Carolina adoption statutes: N.C. Gen. Stat. § 48-3-606(9) and N.C. Gen. Stat. § 48-1-106(c).¹⁷ N.C. Gen. Stat. § 48-3-609(c) provides, in pertinent part, “every aspect of the legal relationship between the adoptee and the former parent or guardian will be terminated.”¹⁸ N.C. Gen. Stat. § 48-1-106(c) provides, in pertinent part, “a decree of adoption severs the relationship of parent and child between the individual adopted and that individual’s biological or previous parents.”¹⁹ Jarrell’s con-

5. *Id.* at 496-97.

6. *Id.* at 497.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. N.C. GEN. STAT. § 48-3-606(9) (2010).

19. N.C. GEN. STAT. § 48-1-106(c) (2010).

sent to Boseman's adoption was contingent upon the court's agreement not to enforce the two aforementioned statutory requirements.²⁰ The Durham County adoption court agreed to the couple's terms and entered an adoption decree on August 10, 2005.²¹

The parties separated in May of 2006 and Boseman continued to financially provide for the child.²² Jarrell began to limit the child's contact with Boseman after the separation and Boseman filed a complaint in the trial court seeking custody of the child, relying partly on the 2005 adoption decree.²³ Jarrell attacked the validity of the adoption decree in her response arguing that the plaintiff had no grounds to seek custody of the child.²⁴ Without addressing the validity of the adoption decree, the trial court held that Jarrell acted "inconsistent with her paramount parental rights and responsibilities" and that joint legal custody between the parties would be in the best interest of the child.²⁵

Jarrell appealed the decision to the North Carolina Court of Appeals and the Court affirmed the trial court's decision.²⁶ The Court of Appeals held that the challenged adoption decree comported with the "intent and purposes" of both North Carolina adoption law as a whole as well as of the decree itself.²⁷ Upon discretionary review, the North Carolina Supreme Court held that since the decree failed to comply with the statutory requirements, the adoption decree was *void ab initio*.²⁸ Nevertheless, the Court upheld the joint custody award, stating that the Court of Appeals correctly applied a "best interest of the child" analysis since Jarrell "acted inconsistently with her paramount parental status."²⁹

III. BACKGROUND

Boseman created one of the first legally recognized methods of recourse for same-sex couples with children in North Carolina. Prior to the decision in *Boseman*, third parties were only able to receive or share custody of children with their biological parents under a "best interests" analysis.³⁰ Hence, the laws regarding adoption, parenting

20. *Boseman*, 704 S.E.2d at 497.

21. *Id.*

22. *Id.* at 498.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (citing *Boseman v. Jarrell*, 681 S.E.2d 374 (N.C. Ct. App. 2009)).

27. *Id.* at 498 (citing *Boseman*, 681 S.E.2d at 381).

28. *Id.*

29. *Id.*

30. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

and custody in North Carolina have been geared only toward the traditional idea of a family unit.

The North Carolina legislature has created three types of adoptions for minor children: direct placement, agency placement and stepparent adoption.³¹ Although the three types vary, they all require an initial termination of parental rights before the adoption can become valid.³² The first type of adoption recognized in North Carolina is a direct placement adoption. In a direct placement adoption, a child's parent or guardian "personally selects" the adoptive parent(s)³³ and must give their consent to the adoption.³⁴ A direct placement adoption requires a biological parent or guardian to voluntarily relinquish their parental rights to a third party that they have selected.³⁵ When consenting to a direct placement adoption, the parent or guardian must recognize that the adoption will "terminate the child's legal relationship with the parent."³⁶ Further, statutory law requires that a direct placement adoption decree only be entered if it "effects a complete substitution of families" for the minor child.³⁷ The proposed adoption in *Boseman* is most similar to a direct placement because of Jarrell's voluntary willingness to treat Boseman as a second, adoptive parent of the child.

The second type of adoption is an agency placement adoption. In an agency placement adoption, an agency may take physical custody of a child and begin an adoption process "only by means of a relinquishment pursuant to [N.C.G.S. §§ 48-3-701 to 48-3-707] or by a court order terminating the rights and duties of a parent or guardian of the minor."³⁸ Lastly, the third and final type of adoption recognized in North Carolina is a stepparent adoption. In a stepparent adoption, a minor is adopted by the spouse of the minor's parent.³⁹ The spouse of the parent who is seeking to adopt the child must not already be a legal parent of the child⁴⁰ and the child's legal parents or guardians must consent to the adoption in order for it to take place.⁴¹ Stepparent adoptions are only available to married couples, so this type of adoption was not available in *Boseman*.

31. *Boseman*, 704 S.E.2d at 499.

32. See *Boseman*, 704 S.E.2d at 493 (citing N.C. GEN. STAT. §§ 48-3-606(9), 48-3-203(a), 48-4-102 (2010) (requiring a termination of parental rights for biological parent before adoption may take place)).

33. *Boseman*, 704 S.E.2d at 493 (citing N.C. GEN. STAT. § 48-3-202(a)).

34. *Boseman*, 704 S.E.2d at 493 (citing N.C. GEN. STAT. § 48-3-201(b) (2010)).

35. N.C. GEN. STAT. § 48-3-606(9).

36. *Boseman*, 704 S.E.2d at 493. (citing § 48-3-606(9)).

37. N.C. GEN. STAT. § 48-1-106(a) (2010).

38. *Boseman*, 704 S.E.2d at 493 (citing N.C. GEN. STAT. § 48-3-203(a) (2010)).

39. N.C. GEN. STAT. § 48-4-102 (2010).

40. N.C. GEN. STAT. § 48-1-101(18) (2010).

41. N.C. GEN. STAT. § 48-4-102 (2010).

Although adoption involves creating a legal parent-child relationship that provides the same rights and duties as those given to a biological parent,⁴² a petition for custody does not. When a third party petitions for custody of a child, the third party is not immediately entitled to all of the rights and duties of a parent.⁴³ Because the relationship between a biological or adoptive parent is constitutionally protected,⁴⁴ the interests of a parent involving the well-being of a minor child must prevail over a third party's interests "unless the court finds that the parents are unfit or have neglected the welfare of their children."⁴⁵ North Carolina law also requires that all custody decisions be based upon a "best interest of the child" standard regardless of the status of the person seeking custody.⁴⁶

When parents involved in third-party custody disputes challenged the constitutionality of this statutory requirement, the North Carolina Supreme Court created a second method by which a third party could challenge a biological parent's constitutional right to care for a child.⁴⁷ The Supreme Court of North Carolina concluded that a parent may lose their right to a paramount status in the rearing of their children if they engage in conduct that is inconsistent with the presumption that they will act in the best interest of their child or if the parent "fails to shoulder the responsibilities that are attendant to rearing a child."⁴⁸ The court held that a parent must not initially be deemed unfit before a "best interest" standard may be applied because the "conduct inconsistent with the parent's protected status" does not have to rise to the level meeting the statutory requirement for a termination of parental rights.⁴⁹ Instead, other types of conduct may show inconsistency on a case-by-case basis.⁵⁰

One such case is *Price v. Howard*.⁵¹ In *Price*, the court addressed the issue of a third party's right to custody of a child under a "best interests of the child" analysis when the biological parent has neither terminated their parental rights nor been declared unfit by the courts.⁵² In *Price*, the minor child's mother began a relationship with

42. N.C. GEN. STAT. § 48-1-106(b) (2010).

43. See *Stanley v. Illinois*, 405 U.S. 645 (1972).

44. *Price v. Howard*, 484 S.E.2d 528, 531 (N.C. 1997) (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (holding that the rights of biological parents over the rearing of their children are constitutionally protected)).

45. *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

46. N.C. GEN. STAT. § 50-13.2(a) (2010).

47. *Price*, 484 S.E.2d at 535.

48. *Id.*

49. *Id.* (see N.C. GEN. STAT. § 7A-289.32 (repealed 1999)).

50. *Price*, 484 S.E.2d at 534-35.

51. *Id.* at 528.

52. *Id.*

the plaintiff who was not her child's father.⁵³ The couple held the plaintiff out to be the father of the child from birth and the plaintiff had primary physical custody of the child for several years after the couple's separation.⁵⁴ During the custody dispute, the North Carolina Supreme Court held that the defendant acted inconsistently with her paramount right to parent because she "created the existing family unit that includes the plaintiff and the child, but not herself."⁵⁵ "Knowing that the child was her natural child, but not plaintiff's, she represented to the child and to others that plaintiff was the child's natural father."⁵⁶ The Court reversed the appellate court's decision and remanded the case for a determination of whether the defendant's conduct was inconsistent with her paramount right to parent.⁵⁷

The North Carolina Court of Appeals revisited the issue regarding conduct inconsistent with the paramount right to parent in *Mason v. Dwinell*.⁵⁸ In *Mason*, the court evaluated a custody dispute between a same-sex couple who entered into a "parenting agreement" regarding the joint childrearing duties after their decision to have a child.⁵⁹ The Court of Appeals used the parenting agreement not as a legally binding document, but as "a manifestation of Dwinell's [defendant's] intent to create a permanent family unit involving two parents and a child that would continue even if the relationship between Dwinell and Mason [plaintiff] did not."⁶⁰ In its decision, the Court of Appeals explained that when a legal parent of a child decides to bring a third party into their child's life, mainly with the intention to provide that child with a second parent, the legal parent's right to destroy the relationship between the child and the third party is understandably reduced.⁶¹

The Court further explained that although the defendant could no longer automatically modify the relationship between the child and the plaintiff, the plaintiff was not automatically entitled to the same rights and duties as a legal parent.⁶² The decision merely meant that the court could apply a "best interest" analysis in determining custody

53. *Id.* at 529.

54. *Id.*

55. *Id.* at 537.

56. *Id.*

57. *Id.*

58. *Mason v. Dwinell*, 660 S.E.2d 58 (N.C. Ct. App. 2008).

59. *Id.*

60. *Id.* at 68.

61. *Id.* at 69 (citing *Middleton v. Johnson*, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006) ("When a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced.")).

62. *Id.* at 68.

and visitation.⁶³ Finally, the Court of Appeals held “[c]ourts do not violate a parent’s constitutionally protected interest by respecting the parent-child relationships that the legal parent - in accordance with her constitutional rights - voluntarily chose to create.”⁶⁴

Despite the fact that *Mason* dealt with a same-sex partnership, the Court of Appeals treated the legal analysis for the same-sex couple in the same manner as the heterosexual couple received in *Price*. The Court stated that the couple’s same-sex status was “immaterial” to the court’s determination⁶⁵ and that the case dealt only with constitutional issues as they applied to “all custody disputes between legal parents and third parties.”⁶⁶

The standards applied in *Price*, *Mason*, and *Boseman* have several consequences for the same-sex adoption debate. First, the standards in these cases create a small victory for same-sex couples by creating an avenue for members of same-sex couples to equally be recognized as the parents of their children in some aspects. In addition, *Boseman* and its predecessors handicap the argument for same-sex adoption by providing an outlet for the recognition of same-sex couples as equal parents without requiring the North Carolina legislature or courts to create same-sex adoption within the state.

IV. ANALYSIS

Although the decision in *Boseman* wins a small battle in recognizing the rights of third parties to seek custody of children born into same-sex relationships with a biological parent, the decision represents a present-day defeat in the war to recognize same-sex adoption in North Carolina. First, *Boseman* allows same-sex couples to co-parent a child raised by both people in terms of custody and visitation, but it bars the non-biological parent from becoming a legal parent without the termination of parental rights by the biological parent. Secondly, the North Carolina legislatures now do not have a pressing need to allow same-sex adoption within the state because a same-sex parent may be able to seek joint physical and legal custody under this decision. As a result, *Boseman* has created yet another setback for the same-sex adoption debate while at first glance appearing to be a major step forward.

63. *Id.*

64. *Id.* at 73.

65. *Id.* at 60.

66. *Id.* at 73.

A. *Winning the Battle: Recognition of Same-Sex Couples as Co-parents*

The most positive aspect of the decision in *Boseman* is that it legally recognizes co-parenting in the context of a same-sex relationship or domestic partnership. North Carolina currently does not recognize same-sex marriage or adoption, so many couples are left without legal recourse in their attempts to start families. As a result, many same-sex couples are resorting to “parenting agreements” like the agreement found in *Mason*.⁶⁷ Parenting agreements such as the one found in *Mason* and the void adoption decree in *Boseman* attempt to create a legal contract between a biological parent and their domestic partner in the absence of a state-created adoption order. The agreements set forth several important decisions regarding custody and participation of the non-biological parent in childrearing and legal decisions involving the child’s welfare.⁶⁸ While the adoption decree in *Boseman* was a legal attempt at recognition by the state of North Carolina, which was inevitably held void, it still represented an attempt to have both parents recognized equally as the legal parents of the child born into the relationship.⁶⁹ In spite of North Carolina’s reluctance to recognize a proper adoption method for same-sex couples, the *Boseman* Court’s holding allows a non-biological parent in a same-sex relationship to establish a right to remain in the child’s life upon the termination of the relationship with the child’s biological parent through custody and visitation.

B. *Losing the War: Bypassing the Argument for Same-Sex Adoption*

Despite the potential right to custody and visitation under a “best interest” analysis as provided in *Boseman*, non-biological parents in same-sex relationships are still barred from establishing permanent legal parent-child relationships with children absent a termination of the biological parent’s parental rights. The Supreme Court’s willingness to award joint legal custody to a same-sex couple that has co-parented a child during the child’s lifetime provides no reason for the North Carolina legislature to seriously consider the issue of same-sex adoption at this time. Due to the structure of North Carolina’s adoption statutes and the inability of same-sex couples to legally marry in the state, same-sex couples will continue to face the dilemma of having only one legal parent for any children born or adopted into their relationships. Additionally, *Boseman* creates no true safeguards for non-

67. See *Id.* at 60-61.

68. *Id.*

69. See *Boseman*, 704 S.E.2d at 497.

biological parents in same-sex relationships because the “best interest” analysis is not even considered until the relationship has been terminated. Finally, *Boseman* continues to only promote a traditional view of the heterosexual family unit by ultimately allowing unmarried heterosexual couples the possibility of completing an adoption that is not available to their homosexual counterparts.

Same-sex couples in North Carolina are unable to adopt children as a single unit under any type of adoption within the state. The three types of adoption, as created by the North Carolina General Assembly, would all require the termination of the biological parent’s rights before their significant other would be able to legally adopt the child.⁷⁰ As a result, one-half of every same-sex couple in North Carolina will be left out of the legal parenting process since they cannot become a legal parent without an initial termination of parental rights.⁷¹ Further, a biological parent in a same-sex couple or domestic partnership will have to face the possibility that his or her decision to include her significant other in the life of his or her child as a second parent could constitute conduct inconsistent with his or her paramount parental rights.⁷²

Similarly, *Boseman* fails to offer permanent legal protection for both parties in same-sex relationships because the custody issues do not surface, if at all, until the termination of the relationship. Both heterosexual and same-sex couples with children tend not to face custody and visitation issues until the parties involved in the relationship separate or divorce. In fact, the custody disputes in *Price*, *Mason*, and *Boseman* all occurred upon the separation of each couple.⁷³ Co-parenting tends not to present any real problems while couples are happily involved with each other. Unfortunately for unmarried couples, the non-biological parents are not legally recognized as parents for purposes of the United States Constitution or North Carolina state law.⁷⁴ Therefore, until the court steps in and enters a joint legal custody award for both parties, only the biological parents will be able to enjoy the rights to parenting the child.⁷⁵ Likewise, while a non-biological parent may be required to uphold financial and legal responsibilities in regards to the child for the purposes of custody (for example, child support),⁷⁶ the same parent will be unable to enjoy the constitutionally protected interest in raising and caring for that same

70. N.C. GEN. STAT. § 48-1-106(c) (2010).

71. See *Mason*, 660 S.E.2d at 70.

72. See *Boseman*, 704 S.E.2d at 505.

73. See *Boseman*, 704 S.E.2d at 494; *Price*, 484 S.E.2d at 531; *Mason*, 660 S.E.2d at 58.

74. *Mason*, 660 S.E.2d at 73.

75. *Price*, 484 S.E.2d at 531.

76. *Id.* at 537.

child.⁷⁷ This paradox seemingly creates an issue of fairness in the dissolution of a relationship between a same-sex couple who have maintained a successful co-parenting relationship up until the date of separation. The potential for the separation of a minor child from one of the only parents he or she has known totally flies in the face of the North Carolina General Assembly's purpose to promote the best interests and welfare of the state's children.⁷⁸ Hence, non-biological parents may either be forced to remain in relationships in order to avoid custodial conflict or risk losing their ability to effectively co-parent and be allowed to make decisions along with the biological parent.

Finally, *Boseman* fails to recognize a major difference between same-sex and unmarried, heterosexual couples as it pertains to available alternatives for adoption. Unlike their same-sex counterpart, an unmarried, heterosexual couple will have the potential opportunity to take advantage of North Carolina's stepparent adoption statute. Under this statute, the heterosexual couple could avoid all questions surrounding a constitutional right to parent by marrying and obtaining consent to the adoption from the other biological parent.⁷⁹ Obtaining a stepparent adoption may be a daunting task for heterosexual couples, but it still creates the availability of constitutionally protected parental interests in both parents involved in the relationship.⁸⁰ Same-sex couples, on the other hand, are not given this luxury. In order for same-sex couples to take advantage of a stepparent adoption, same-sex marriage would have to be legally recognized in the state as well. Unless and until same-sex marriage legislation is passed by the General Assembly, same-sex couples will be prohibited from using this method of adoption.

V. CONCLUSION

Even though *Boseman* appears to make strides in the recognition of co-parenting issues and opportunities for same-sex couples, the decision and its predecessors have also stalled the same-sex adoption debate once again. The *Boseman* decision can be viewed as an alternative to legalizing same-sex adoption because legal custody would allow both parties to make important decisions about childrearing equally. However, only one party to the relationship will be able to enjoy a constitutionally protected parental interest in any children

77. *Id.*

78. N.C. GEN. STAT. § 50-13.2(a) (2010).

79. N.C. GEN. STAT. § 48-4-102 (2010).

80. N.C. GEN. STAT. § 48-1-106(b) (2010).

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born or adopted into the relationship.⁸¹ In this respect, celebrating the small victory found in *Boseman's* “best interest” analysis without first requiring a finding of unfitness within the biological parent may also be conceding a major defeat in the overall battle to legalize same-sex adoption in North Carolina.

81. *Price*, 484 S.E.2d at 79.

