

Comment,
YOU, ME, AND DAD?: AN UPDATE ON
THE PROGRESSION OF MULTI-PARENT
FAMILIES AND THE GOVERNING HAND
OF A CHILD'S BEST INTEREST

*"The 21st century has been a time of growing diversity in family forms and ways of living. Single parenting, no parenting, living single, living alone, living with friends, and many other non-traditional living arrangements are all on the rise."*¹

I. The Evolution of a Parent

It has been deeply rooted in American culture to uphold the parental rights of a child's biological or adoptive parents.² But with divorce rates at an all-time high, "one out of every two children will spend some time living in a stepfamily."³

Increases in the frequency of "non-marital cohabitation and divorce, along with the prevalence of remarriage and (non-marital) recoupling in the United States, make for family structures that in many cases continue to evolve throughout a child's life."⁴ One study, conducted by the national census, found that about 31% of children below the age of six "had experienced a major change in their family or household structure, in the form of parental divorce, separation, marriage, cohabitation or death."⁵

¹ Bella DePaulo, *One Parent Can Do Just as Good a Job as Two, Women Say*, PSYCHOL. TODAY (Aug. 9, 2017), <https://www.psychologytoday.com/us/blog/living-single/201708/one-parent-can-do-just-good-job-two-women-say>.

² Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127, 128 (2018).

³ Lawrence Schlam, *Standing in Third-Party Custody Disputes in Arizona: Best Interests to Parental Rights-And Shifting the Balance Back Again*, 47 ARIZ. L. REV. 719, 720 (2005).

⁴ *The American Family Today*, PEW RES. CTR. (Dec. 17, 2015), <https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/>. See also Tricia Kazinetz, *You Can't Have One Without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More than Two Individuals*, 24 WIDENER L. REV. 179 (2018) (with new and evolving family structures, states should follow California's lead and allow courts to recognize the legal rights of more than two parents).

⁵ *The American Family Today*, *supra* note 4. See also Stu Marvel, *The Evolution of Plural Parentage: Applying Vulnerability Theory to Polygamy and*

Additional advances in reproductive technology have also created opportunities for more people to become parents, further changing what was once the perceived stereotype of an American family.⁶ As a result, an increasing number of courts are adopting methods to recognize the rights of non-biological/adoptive adults who act as a parent. Some states have even recognized the parental rights of a non-biological same-sex parent.⁷

Many states are recognizing “standing for de facto or psychological parents, including stepparents and the same-sex partners of biological or adoptive parents who are neither biologically nor legally related to the child.”⁸ Often this nonparent is the one who “on a day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological need for a parent.”⁹ It is crucial to keep in mind that the terms like “de facto parent” and “psychological parent” may be used interchangeably.¹⁰

This de facto parent is quite essential to the child’s “development and wellbeing,” and often the bond between the child and the de facto parent will develop into one just as strong as the one with the biological or adoptive parent.¹¹ Although the idea of being granted rights as a de facto parent seems simple, there are some additional factors a court must consider before reaching

Same-Sex Marriage, 64 EMORY L.J. 2047 (2015) (discussing the evolution of marriage, including the push toward legally recognizing polygamous families, will transform the traditional two-parent model of caring for children).

⁶ Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology Is Used to Create Families*, 62 ARK. L. REV. 29, 29 (2009).

⁷ *Non-Biological Parent’s Rights in a Same-Sex Divorce Case*, HG.org LEGAL RESOURCES (2020), <https://www.hg.org/legal-articles/non-biological-parent-s-rights-in-a-same-sex-divorce-case-50032>.

⁸ Gargi Sen & Tiffanie Tam, *Child Custody, Visitation, & Termination of Parental Rights*, 16 GEO. J. GENDER & L. 41, 61 (2015).

⁹ Jennifer Klein Mangnall, *Stepparent Custody Rights After Divorce*, 26 SW. U.L. REV. 399, 416 (1997).

¹⁰ *Psychological Parents*, LAW OFFICES OF PETER VAN AULEN, <https://www.pvalaw.com/psychological-parents.html>. (last visited Sept. 15, 2020).

¹¹ Schlam, *supra* note 3, at 720 (citing Arlene Browand Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nurture*, 32 U. LOUISVILLE J. FAM. L. 33 (1993-94)).

such a decision.¹² One factor is the child's best interest.¹³ To determine a child's best interest, a court may look at,

history of abuse, the ability of each parent to provide a safe and stable life for the child, the ability of the parent to encourage a positive relationship with the other parent, the child's relationship with each parent, the mental and physical health of the child and parents, the child's needs, the parent's ability to address these needs and the parent's ability to communicate with the other.¹⁴

Depending on the jurisdiction, and if the judge rules that a child is of sufficient age and capacity to communicate effectively, a child's own personal preference may even be taken into consideration.¹⁵

This Comment will first examine how parentage is typically established in the United States. Part III will focus on the different approaches used in determining who a parent is, as well as various jurisdictions' respective legislative history and caselaw. Part IV focuses on the recent recognition by multiparent families in some state legislatures. And finally, Part V discusses the standard of a child's best interest and how a right to parentage can vary as a result of it.

II. Parentage: Who Is a Parent?

A. *The Formal Processes Generally Used to Establish Parentage*

The rights of a parent are superior compared to those of other members of the family and even the government.¹⁶ A biological parent's rights will remain intact unless they "relinquish[] them, abandon[] them, or engage[] in conduct justifying their modification or termination."¹⁷

¹² *Non-Biological Parent's Rights in a Same-Sex Divorce Case*, *supra* note 7.

¹³ *Role of Child's Preference in a Child Custody Case*, HG.ORG LEGAL RESOURCES, <https://www.hg.org/legal-articles/role-of-child-s-preference-in-a-child-custody-case-42956> (last visited Sept. 15, 2020).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *In re C.L.J.*, No. M2003-01949-COA-R9-JV, 2013 WL 22519813, at *4 (Tenn. Ct. App. Nov. 7, 2003).

¹⁷ *Id.*

Parentage is defined as the legal relationship between the child and the parent.¹⁸ Courts' approaches to this relationship seek to develop the emotional, social, and economic ties one would expect in a healthy parental relationship.¹⁹ In a typical parentage case, the state court decides who the legal parents of a child are.²⁰

Once parentage is established, the parent has a right to a relationship with the child that could include decision making powers and parenting time.²¹ Some benefits to establishing parentage include the access to child support, health insurance, child custody/visitation, name changes, and even reimbursement of pregnancy/birth expenses.²² The process of establishing parentage may seem simple to some people, but establishing and defining parentage is actually quite complex. For example, depending on the jurisdiction, the "forum law may be properly chosen in one setting, as with child support, but not in another setting, as with childcare."²³ For example, an unwed biological father can be classified as a legal parent for purposes of child support, but not a legal parent with any sort of "childcare rights or adoption veto powers."²⁴

Aiming to clear things up a bit, the 2017 edits to the Uniform Parentage Act set forth that the determination of establishing parentage at birth will now consider three factors: the relationship of the parties, biology, and intent.²⁵

¹⁸ *Paternity or Parentage*, ILLINOIS LEGAL AID ONLINE, <https://www.illinoislegalaid.org/legal-information/paternity-or-parentage> (last visited Sept. 15, 2020).

¹⁹ *Establishing Parentage*, CHILD. RTS. COUNCIL, <https://www.crckids.org/child-support/establishing-paternity/> (Sept. 15, 2020).

²⁰ *Parentage*, JUDICIAL BRANCH OF CALIFORNIA, <https://www.courts.ca.gov/selfhelp-parentage.htm?rdeLocaleAttr=en> (Sept. 15, 2020).

²¹ *My Rights and Responsibilities Once Parentage Is Established*, ILLINOIS LEGAL AID ONLINE, <https://www.illinoislegalaid.org/legal-information/my-rights-and-responsibilities-once-parentage-established> (last visited Sept. 15, 2020).

²² *Parentage*, *supra* note 20.

²³ Jeffrey A. Parness, *Choosing Among Imprecise American State Parentage Laws*, 76 LA. L. REV. 481, 519 (2015).

²⁴ *Id.*

²⁵ Merle H. Weiner, *When a Parent Is Not Apparent*, 80 U. PITT. L. REV. 533, 570 (2019).

B. *Relationship of the Parties*

If the parents are married at the time of the child's birth, there is a presumption that those two individuals are the parents of the child.²⁶ This presumption of paternity was developed back when DNA testing was not available to determine the father of a child.²⁷ This marital presumption method of parentage is still used today because "it locks a social father into the role of a legal father and it decreases the chance that outsiders will interfere in the marital relationship by challenging the husband's paternity."²⁸

Though many in the legal community favor the marital presumption for obvious reasons, courts are increasingly recognizing parentage of two unwed individuals in a committed relationship. These individuals who have been involved in a long-term intimate relationship are presumed to be a child's parents should a pregnancy occur.²⁹ This gradual shift has improved the ability to legitimize the rights of more parents without the burden of courts interfering in familial matters.

C. *Biology*

Biology is a very important factor to consider when determining who the parents are of children conceived by sex.³⁰ Though biology is still an important factor to consider when determining parentage, it is not always strong enough to rebut intent or even the relationship of the parties. Usually, parentage that rests on the marital presumption is only rebuttable for a limited period of time.³¹ Typically after two years, depending on the state, the presumption is not rebuttable even if the genetic parent is the challenger.³² In the event that a court is considering rebut-

²⁶ *Parentage*, *supra* note 20. See also Tiffany L. Palmer, *How Many Parents? – Multiparent Families Are Increasingly Recognized by Law and Society*, 40 FAM. ADVOC. 36, 36 (2018) (further discussing how divorce, cohabitation, remarriage, marriage equality, and other instances of societal change are expanding the scope of parentage).

²⁷ Weiner, *supra* note 25, at 550.

²⁸ *Id.* at 550-51.

²⁹ *Id.* at 570-71.

³⁰ *Id.* at 546.

³¹ *Id.*

³² *Id.*

ting the marital presumption or intent, like with most other decisions regarding custody/visitation rights, a child's best interest must still be considered.³³

When the parents are not married, to officially establish parentage one would have to either obtain a court order or sign an official declaration of parentage.³⁴ Using these processes, a father could acknowledge paternity merely by signing either a requisite written admission or a voluntary acknowledgement of paternity.³⁵

Biology has been proven to be "an important consideration when parentage is determined by a voluntary acknowledgement of paternity."³⁶ Conversely, many courts have invalidated voluntary acknowledgments if a supposed father signed it knowing that he was not the biological father.³⁷ A voluntary acknowledgement of paternity requires a biological parent's authorization. If the biological parent does not consent, the putative father must commence a paternity action to establish paternity.³⁸ If a voluntary acknowledgment of paternity "is not challenged within two years, a non-biological parent may become the legal father indefinitely."³⁹

D. *The Intentional Acknowledgement of Paternity*

As the classic American family structure has changed with time, many states have redefined who is entitled to legal parentage.⁴⁰ This definition is no longer constrained to merely include the birth mother or father. Thanks to the 2015 landmark decision in *Obergefell v. Hodges*, more couples are able to raise children together in a family with parents who are married.⁴¹ Interestingly enough, a recent study, from the American Community Survey,

³³ *Id.* at 546-47.

³⁴ *Parentage*, *supra* note 20.

³⁵ *Establishing Parentage*, *supra* note 19.

³⁶ Weiner, *supra* note 25, at 547.

³⁷ *Id.* at 548.

³⁸ *The Rights of Unmarried Fathers*, CHILDREN'S BUREAU- U.S. DEP'T OF HEALTH & HUM. SERV. 3 (Aug. 2017), <https://www.childwelfare.gov/pubPDFs/putative.pdf>.

³⁹ Weiner, *supra* note 25, at 548.

⁴⁰ Parness, *supra* note 23, at 484.

⁴¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

actually found that “married same-sex couples show higher rates of childrearing.”⁴²

The concept of intentional parentage has been expanded by access to and development of reproductive technology. Surrogacy, a form of assisted reproductive technology, has provided an opportunity for people who would never have imagined having their own biological children to become parents.

Although surrogacy has changed the lives of many couples, gay men are still facing unfair burdens since they are not able to meet many of the standards the laws require for establishing parenthood.⁴³ For a same-sex couple to have a child together via a surrogate, there will always be a “non-anonymous third party” present.⁴⁴ A large threat exists for a male same-sex couple that this third party may assert her right to parent the child.⁴⁵ Prior to *Obergefell*, since there was no “alternative mother to assert a competing right and thereby create a tie as is available to heterosexual couples utilizing gestational surrogacy, gay male couples [were] unable to both be declared legal parents under the established rules.”⁴⁶ Courts are now considering the intention of all parties to a surrogacy contract when determining who is the legal parent of the child.⁴⁷

Intent includes the intent “established at the time of birth or soon after for unplanned pregnancies.”⁴⁸ With intent, the relationship of the parties is not limited to marital or marital like ones, but can also include platonic relationships as well.⁴⁹ State laws have easily allowed parentage to be based on the conduct or intent of parties by permitting parentage to be assumed anytime

⁴² Shoshana K. Goldberg & Keith J. Conron, *How Many Same-Sex Couples in the US Are Raising Children?*, UCLA SCH. OF L. WILLIAMS INST. (July 2018), <https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/>.

⁴³ Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 266-67 (2006).

⁴⁴ Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL’Y 353, 357 (2011).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 367.

⁴⁸ Weiner, *supra* note 25, at 570.

⁴⁹ *Id.* at 570-71.

during the course of residing with and supporting the child involved.⁵⁰

Establishing parentage for unwed same-sex parents is especially important to establish a legitimate relationship to the child. Studies have found that “a man’s intention to have a child is associated with a range of father involvement behaviors and attitudes.”⁵¹ Some courts also require parties to prove “that they intended to be the child’s parents, and that they behaved that way.”⁵² The goal behind allowing intent to be a factor in establishing parentage is to “provide stability and certainty” to families.⁵³ A good example of this is the cliché “one-night stand.” If “conception occurs by virtue of a one-night stand, then the father will not be a parent unless he demonstrates his intent to be a parent during the pregnancy or shortly thereafter.”⁵⁴ Intentional parentage is effectively preserving the right to be recognized as a parent to those who will establish a genuine parental bond with a child.

What was formerly characterized as a singular concept of parenthood has advanced and can now “be parsed into three distinct categories: a genetic connection between an adult and child, a gestational connection between an adult and a child, and an intent connection between an adult and child.”⁵⁵ Ultimately this novel standard in determining parenthood has effectively led to the implementation of local legislation.

III. The Functional Approach to Determining Who Is a Parent or Entitled to Rights vis-a-vis a Child

*“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.” – Troxel v. Granville, O’Connor, J.*⁵⁶

⁵⁰ *Id.* at 540.

⁵¹ *Id.* at 555.

⁵² *Parentage, supra* note 20.

⁵³ Weiner, *supra* note 25, at 571.

⁵⁴ *Id.*

⁵⁵ Anderson, *supra* note 6, at 32.

⁵⁶ *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

Though jurisdictions may vary, many are growing to understand the valuable connection a non-biological caregiver may bring to a child. Certain states have adopted common law rights that allow non-biological/adoptive parents visitation, such as a former stepparent or parent's former partner, even over the parent's objection.⁵⁷ Some of the common law rights to visitation are even reserved for a "former family member, like an aunt who stood in loco parentis with the child."⁵⁸

Though the terms have been used interchangeably in the past, it is important to understand that custody and visitation can mean very different things. Generally, visitation can permit an individual access to spend scheduled time with a child.⁵⁹ Specifics such as the frequency of the visits, "where the visits take place, and whether or not the visits need to be supervised by another adult, will all be determined by the court."⁶⁰ Legal custody, conversely, gives parents the right to decide matters that could determine their child's well-being, such as their education, medical needs, or permanent residence.⁶¹

Individuals who stand in loco parentis with a child typically are able to gain a legal protection that is analogous to what would traditionally be expected for a parent. Standing in loco parentis is just one way to be recognized as a de facto parent in many states. A Pennsylvania court held that a third-party caretaker may assume the role of a parent without the formality of a legal adoption, over a biological parent's objection, and have a child placed with them.⁶² The neighboring courts in Delaware rule a bit differently. Since Delaware does not have common law applications of in loco parentis, like Pennsylvania, they do not have to rely on a finding of de facto parentage or in loco paren-

⁵⁷ Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U.L. REV. 769, 779, 782 (2018).

⁵⁸ *Id.* at 782.

⁵⁹ National Network to End Domestic Violence, *Custody- Massachusetts*, WOMANSLAW.ORG (Dec. 11, 2019), <https://www.womenslaw.org/laws/ma/custody/basic-info-and-definitions/what-difference-between-custody-and-visitation> (last visited Sept. 15, 2020).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *In re Involuntary Termination of Parental Rights and Duties Concerning K.M.T.*, No. 1915 EDA 2014, 2015 WL 7572210 at *8 (Pa. Super. Ct. 2015).

tis.⁶³ This is due to the fact that there is no definition for the term “parent” in their requisite statute.⁶⁴

While it is evident that laws and court decisions with respect to parentage have evolved, many scholars are still critical about current approaches to establishing parentage. These critics argue that the current governing laws regarding parenthood are “underinclusive.”⁶⁵ Some laws even fail to “recognize the parentage of people who have engaged in reproductive acts, typically by using artificial reproductive technology (ART), with the intent of forming a family.”⁶⁶ Advocates prefer parental status to be recognized by the intentions of the parents and the best interest of the child.⁶⁷ They argue that this could lead to stability and better structure in the life of a child and that having multiple caregivers could alleviate stress on a single parent and create a stronger network of loved ones for these children.

A. *The Use of the Psychological or De Facto Parent Theories in Caselaw*

Jurisdictions can vary widely on guidelines and requirements for a potential de facto parent. Currently in Kentucky, under common law, non-biological/non-adoptive parents “do not have a legal duty to support or care for their domestic partner’s children, except when they stand in loco parentis.”⁶⁸ The Arkansas Court of Appeals found a biological mother’s former same-sex partner to stand in loco parentis “to [a] child for custody and

⁶³ L.M.S. v. C.M.G., No. CN04-08601, 2006 WL 5668820 at *24 (Del. Fam. Ct. 2006).

⁶⁴ DEL. CODE ANN. tit. 13, § 721 (West 2009) (the appropriate Delaware statute). *See also* In re Involuntary Termination of Parental Rights and Duties Concerning K.M.T., 2015 WL 7572210 at *8 (for reference to Pennsylvania’s guidelines).

⁶⁵ Weiner, *supra* note 25, at 538.

⁶⁶ *Id.* at 539.

⁶⁷ Haim Abraham, *A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER SOC. POL’Y & L. 405, 408 (2017). *See also* Tricia Kazinetz, *You Can’t Have One Without the Other: Why the Legalization of Same Sex Marriage Created a Need for Courts to Have Discretion in Granting Legal Parentage to More than Two Individuals*, 24 WIDENER L. REV. 179, 184 (2018) (given the range of evolving family structures, states should follow California and allow courts to recognize a child as having more than two parents).

⁶⁸ Parness & Timko, *supra* note 57, at 833.

visitation purposes” since there was a well-established “strong bond between child and partner.”⁶⁹

A child will have permanent residence with the parent who holds physical custody, but, depending on where a custody order is carried out, substantial visitation may be allocated to an individual holding rights.⁷⁰ For example, the Supreme Court of Kansas decided that a non-biological mother, who prior to the birth of their children entered into a parenting agreement with her former same-sex partner, was able to establish parentage giving her the access to custody rights akin to the biological mother even when the relationship with the biological mother ceased.⁷¹ Just across state lines, the Missouri Court of Appeals recognized that the former same-sex partner of a biological mother only had a right to pursue a third-party custody claim to the children she helped raise.⁷² The holding in this case overruled the previous decision of *White v. White*, which held that “non-biological parents could not petition for custody.”⁷³

More recently, the Supreme Court of Missouri found that a former stepfather was in fact a de facto parent who was entitled to the sole legal and physical custody of a child after finding that it was not in the best interest of the child to reside with her biological parents.⁷⁴ The outcome of this case was definitely a controversial one and it is surprising that the court did not tie its decision to the claim that the stepfather’s initial acknowledgment of paternity made him the legal father. This recent decision found that the biological parents’ constitutional right on how to raise their child was outweighed by the child’s best interest.⁷⁵ The mother in this case was unable to co-parent with the biological

⁶⁹ Jonathan M. Purver, *Loco Parentis Status*, 28 2d AM. JUR. POF. 545 (2020).

⁷⁰ Mark Strasser, *Custody, Visitation, and Parental Rights Under Scrutiny*, 28 CORNELL J.L. & PUB. POL’Y 289, 326 (2018).

⁷¹ *Frazier v. Goudschaal*, 295 P.3d 542 (Kan. 2013).

⁷² *Missouri Court of Appeals Allows Lesbian Mother to Seek Custody*, NCLR (Aug. 18, 2015), <http://www.nclrights.org/about-us/press-release/missouri-court-of-appeals-allows-lesbian-mother-to-seek-custody/>.

⁷³ *Id.*

⁷⁴ *Bowers v. Bowers*, 543 S.W.3d 608, 610 (Mo. 2018).

⁷⁵ *Id.* at 616. See also Emily B. Gelmann, *What About Susan? Three’s Company, Not a Crowd: The Importance of Allowing Third Party Parent Adoptions When Both Legal Parents Consent*, 30 WIS. J.L. GENDER & SOC’Y 57

father and was continuing to alienate the child from the stepfather, who was the only father figure she knew.⁷⁶

Currently Illinois, Iowa, Michigan, Tennessee, and Utah do not recognize the rights of a de facto parent.⁷⁷ Illinois, being a bit more liberal with its statutory guidelines, follows the notion that a parent who is not granted custody of a child could be entitled to some sort of visitation rights.⁷⁸ A bit more stringent, Utah holds that a former domestic partner does not have any sort of standing to seek visitation under a de facto parent doctrine or a loco parentis status.⁷⁹ Iowa, similar to Utah, still follows the ruling of the *Ash* case which found that there was no statutory or common law basis for an equitable parent doctrine.⁸⁰ The court found an “equitable parent” was someone who lived with and cared for a child but was not the child’s biological parent and had no legal relationship with the child to establish paternity or visitation.⁸¹ The Iowa court in this case perceived these individuals as a “stranger” who over time merely became “smitten with fatherhood.”⁸²

Courts in Michigan have held that former domestic partners lack standing to challenge custody petitions upheld by a biological father.⁸³ Tennessee still holds that former domestic partners of a biological parent are not entitled to visitation regardless of whether they previously provided care and support to the child.⁸⁴ The courts in Tennessee believe that it should be up to the state legislatures to make laws that would allow these parties visitation rights.⁸⁵ They further hold that there is no current constitutional parental right that would even specifically include the right of

(2015) (given the continuing evolution of family structures, courts should have authority to recognize three people as legal parents).

⁷⁶ *Bowers*, 543 S.W.3d at 617.

⁷⁷ *De Facto Parentage Statutes*, MOVEMENT ADVANCEMENT PROJECT (Sept. 2, 2020), https://www.lgbtmap.org/equality-maps/de_facto_parenting_statutes.

⁷⁸ *In re Marriage of Simmons*, 825 N.E.2d 303, 307 (Ill. App. Ct. 2005).

⁷⁹ *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

⁸⁰ *In re Ash*, 507 N.W.2d 400, 405 (Iowa 1993).

⁸¹ *Id.* at 404.

⁸² *Id.*

⁸³ *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995).

⁸⁴ *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999).

⁸⁵ *Id.* at 923.

visitation to a non-biological person.⁸⁶ Given that courts are not legislatures, the lack of uniform legislative action toward the unequal parental presumption has effectively interfered with non-traditional families' rights to mirror privileges typically reserved for the more traditional American family.⁸⁷

Generally a non-biological/non-adoptive caretaker, seeking visitation or custody of a child, may attain in loco parentis status when they place themselves in a "situation of a lawful parent by assuming the obligations incident to the parental relationship."⁸⁸ This individual may assume these obligations without even going through the formal requirements of a legal adoption.⁸⁹ It is not enough for a child to be "taken into a person's household and receive[] support entirely from that person."⁹⁰ The adult must prove that they intended to "assume the rights, duties, and responsibilities of a lawful parent to the child."⁹¹ Consideration could be given to the actions of the adult as well as frequent statements made in reference to the child. Allowing an individual to gain visitation under in loco parentis theory does not change the requirement that the relationship must meet the expectation of the child's best interest.⁹²

As more children are raised in unique blended families, a seemingly new legal approach to parenting has emerged. A de facto parent is someone who can, based on their actions that a parental relationship with a child, can qualify as a parent with rights of visitation/custody to a child, regardless of the consent of the legal parents.⁹³ The recognition of a de facto parent and the

⁸⁶ *Id.*

⁸⁷ Frank J. Bewkes, *Unequal Application of the Marital Presumption of Parentage for Same-Sex Parents*, *CTR. FOR AM. PROGRESS* (Nov. 25, 2019, 9:03 AM), <https://www.americanprogress.org/issues/lgbtq-rights/news/2019/11/25/477923/unequal-application-marital-presumption-parentage-sex-parents/>.

⁸⁸ *Com. ex rel. Morgan v. Smith*, 241 A.2d 531, 533 (Pa. 1968).

⁸⁹ *Id.*

⁹⁰ Purver, *supra* note 69, at 251.

⁹¹ *Kransky v. Glen Alden Coal Co.*, 47 A.2d 645, 647 (Pa. 1946).

⁹² *Egan v. Fridlund-Horne*, 211 P.3d 1213, 1216-17 (Ariz. Ct. App. 2009).

⁹³ Fredric G. Antenberg, *What Do We Mean by De Facto Parents*, *FGALAW.COM*, <https://www.fgalaw.com/what-do-we-mean-by-de-facto-parents.html> (last visited Sept. 15, 2020). *See also* Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 *NEV. L.J.* 743 (2016) (introducing "parentage in praxi," a new doctrine of parental recognition).

accessibility to the rights as one could vary from state to state. Though in most cases a former stepparent can adequately qualify as a de facto parent, a de facto parent does not necessarily have to be someone who was once married to a legal parent. Under California law, a de facto parent, such as foster parents, can have a guaranteed legal interest in the care, custody, and management of a child.⁹⁴

These relationships are very important to the growth and development of a child and the failure to acknowledge them could potentially yield negative psychological consequences for all parties involved.⁹⁵ Many courts now rule that a stepparent has the right to be deemed a legal parent or seek third party childcare orders.⁹⁶ These stepparents can accurately be classified as de facto parents.

While the desire for legal rights of these non-biological/adoptive parents is on the rise, it has been met with some hesitation. Some commentators argue that having too many legal parents could instead lead to instability in the life of the child.⁹⁷ The more parties legally involved means there would have to be some sort of agreement on how to reach a decision on many aspects of the child's life. These could include areas "such as the child's education, religious affiliations, and moral values."⁹⁸ Others feel that having a child move from one home to another would confuse the child in a way. The child in this situation would have to "make sense of different values and styles of living between homes."⁹⁹ The more people seeking parental rights, the "less a child belongs to any one parent or set of parents, the less that child may feel like he belongs to someone or something."¹⁰⁰ These are situations courts and legislatures need to keep in mind as they broaden the definition of a legal parent. Although it is

⁹⁴ *In re B.G.*, 523 P.2d 244, 253 (Cal. 1974).

⁹⁵ Jeffrey A. Parness, *Third Party Stepparent Childcare*, 67 *MERCER L. REV.* 383 (2016).

⁹⁶ *Id.* at 383-84.

⁹⁷ Mallory Ullrich, Student Note, *Tri-Parenting on the Rise: Paving the Way for Tri-Parenting Families to Receive Legal Recognition Through Preconception Agreements*, 71 *RUTGERS U.L. REV.* 909, 924 (2019).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 *GA. L. REV.* 649, 682 (2008).

important to the development of a child to have a strong support system, it is also important for the child to understand the formal differences between a parent and a non-parent to prevent any possible confusion.

B. The Legislative Approach to Recognizing Parentage and De Facto Parents

In 2017, the NCCULS, the National Conference of Commissioners on Uniform State Laws, “approved and recommended for enactment in all U.S. states a new Uniform Parentage Act (UPA).”¹⁰¹ The 2017 enactment includes provisions on “de facto parentage, voluntary acknowledgement parentage, and intended parentage of children born of assisted reproduction.”¹⁰² The new provisions of the UPA primarily depend on previously established agreements and parental acts instead of biological relations or formal adoptions.¹⁰³ The current version of the UPA views de facto parents as equals to legal parents, including their rights and responsibilities.¹⁰⁴ A de facto parent’s right vis-a-vis a child is contingent on whether a judge finds a division of custody or visitation in the best interest of a child.¹⁰⁵ Even though the UPA is not a federally recognized piece of legislation, it is gaining a following in multiple state legislatures. As of 2020, four states, California, Rhode Island, Vermont, and Washington, have enacted the 2017 version of the UPA.¹⁰⁶ Colorado, Connecticut,

¹⁰¹ Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws*, 70 MERCER L. REV. 325 (2019) [hereinafter *Faithful Parents*].

¹⁰² *Id.* at 326. See also Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting*, 31 J. AM. ACAD. MATRIM. LAW. 175 (2018) (describing how assisted reproductive technology will soon raise more multi-parent situations, and arguing that the resulting issues should focus on the best interests of the child).

¹⁰³ *Faithful Parents*, *supra* note 101, at 326.

¹⁰⁴ Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U.L. REV. 909, 910 (2019).

¹⁰⁵ *Id.*

¹⁰⁶ *2017 Parentage Act*, UNIFORM LAW COMMISSION (2020), <https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f>.

Kentucky, Maine, Massachusetts, and Pennsylvania, have introduced it to their state's House of Representatives.¹⁰⁷

Although the 2017 UPA also recognizes the marital presumption, it expressly refers to both "male and female spouses who are married to the birth mother at the time of birth; married to the birth mother within 300 days of the marriage's termination; or married to the birth mother after the child's birth as long as the spouses asserted parentage."¹⁰⁸ The de facto parent doctrine is especially beneficial to same-sex partners since it initially sought to eliminate discrimination they may face by establishing a functional parent test that would treat the non-biological parent as a legal parent.¹⁰⁹ Under the marital presumption, individuals are deemed to be a parent if they resided in the household with a child for the first two years of the life of the child and openly held out the child as their own.¹¹⁰ On the other hand, the provision for de facto parents under the 2017 UPA is much less restrictive. A de facto "parenthood encompasses human acts occurring at no particular time or in no particular place."¹¹¹ To meet the requirements of a de facto parent under the 2017 version of the UPA, an individual would still need to prove some sort of residency, child support, and child caretaking, akin to the parental-like acts of a legal parent, carried out by the nonparent.¹¹² Unlike the marital presumption, these acts do not have to begin at birth and can go past the initial two year residency period.¹¹³

Since the implementation of the UPA is up to the individual states, how each state reads its language into its local legislation can vary drastically. As of 2017, Washington and Vermont require de facto parents to prove that they are a consistent caretaker for the child, that they hold the child out as their own, and that they have resided with the child in a common household

¹⁰⁷ *Id.*

¹⁰⁸ *Faithful Parents*, *supra* note 101, at 333.

¹⁰⁹ Strauss, *supra* note 104, at 911.

¹¹⁰ *Faithful Parents*, *supra* note 101, at 334.

¹¹¹ *Id.* at 336

¹¹² UNIF. PARENTAGE ACT § 609 (Unif. Law Comm'n 2017) (providing the full text of the relevant 2017 UPA statute). *See also Faithful Parents*, *supra* note 101, at 356 (offering a brief overview of the UPA requirements).

¹¹³ *Faithful Parents*, *supra* note 101, at 327.

“for a significant period of time.”¹¹⁴ Although the method of proof for these two states is similar, the standard of proof varies.¹¹⁵ In Washington a child may be recognized to have more than two parents only if the “court finds that failure to recognize more than two parents would be detrimental to the child.”¹¹⁶

In Vermont, courts adjudicate a child’s parentage needs to serve the best interests of the child.¹¹⁷ De facto parentage in Delaware has none of the requirements laid out in Washington or Vermont.¹¹⁸ Delaware defines a de facto parent as someone who has the support or consent of the legal parents of a child, has effectuated parental responsibility for the child, and has acted in a parental role for a prolonged period suited to establish a bonded relationship with the child.¹¹⁹

Maine, on the other hand, does not require individuals to hold the child out as their own, but Maine does demand “clear and convincing evidence that the person has fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child’s life.”¹²⁰ Surprisingly within the last decade, South Dakota has enacted legislation that would allow

any person other than the parent of a child to intervene or petition a court of competent jurisdiction for custody or visitation of any child with whom he or she has served as a primary caretaker, has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship.¹²¹

The differences in de facto parentage requirements could potentially yield choice of law issues for families residing in multiple jurisdictions.¹²² This could be especially difficult if one par-

¹¹⁴ *Id.* at 357.

¹¹⁵ *Id.*

¹¹⁶ WASH. REV. CODE ANN. § 26.26A.460(3) (West 2019). *See also Faithful Parents*, *supra* note 101, at 357 (providing a brief overview of the Washington state standards).

¹¹⁷ VT. STAT. ANN. tit. 15C, § 206 (West 2018). *See also Faithful Parents*, *supra* note 101, at 357 (providing a brief overview of the Vermont standards).

¹¹⁸ *Faithful Parents*, *supra* note 101, at 357.

¹¹⁹ DEL. CODE ANN. tit. 13, § 8-201(c) (West 2013).

¹²⁰ ME. REV. STAT. ANN. tit. 19-A, § 1891(West 2016). *See also Faithful Parents*, *supra* note 101, at 357 (providing a brief overview of the Maine standards).

¹²¹ S.D. CODIFIED LAWS § 25-5-29 (2013).

¹²² *Faithful Parents*, *supra* note 101, at 357-58.

ent lives in a state that does not even recognize de facto parentage.

C. *Third Party Custody Rights*

Although a handful of states do not recognize de facto parentage in their legislation, many courts are moving toward granting custody to third parties such as a stepparent, former partner, or other biological relative. In many instances, it can be difficult to decipher if the courts are granting custody rights because they consider a person to be the legal parent of a child or if it is under a third-party custody statute. These statutes give some rights to people who are not considered parents, but nevertheless should be entitled to custody rights. Giving even limited parental rights to people who pursue action as a parent can make custody or parentage determinations a bit more complex. This is typically seen in same-sex relationships that have dissolved.

In 2017, the Missouri Court of Appeals ruled that a former same-sex partner was able to rebut a biological mother's "parental presumption by demonstrating she had a significant bonded parent-child relationship with Child."¹²³ Although the case was remanded for consideration to be given to the child's best interest, the court ultimately determined that due to the former same-sex partner's intention to act as a parent, she could be entitled to third-party custody rights.¹²⁴

The holdings in the *McGaw v. McGaw* and *K.M.M. v. K.E.W.* cases effectively protect "unmarried parents who do not have a biological connection with their children."¹²⁵ One major take-away from cases like *McGaw* was that couples, as well as former couples, who were married when their children were born, "regardless of the couple's gender, are legally-recognized as parents under Missouri law."¹²⁶ Since the biological mother and former partner intentionally planned to have and raise these children together, the former partner had a parental right to assert a claim for custody or visitation of the children.¹²⁷ Although

¹²³ *K.M.M. v. K.E.W.*, 539 S.W.3d 722, 739 (Mo. Ct. App. 2017).

¹²⁴ *Id.*

¹²⁵ *Missouri Court of Appeals Allows Lesbian Mother to Seek Custody*, *supra* note 72.

¹²⁶ *Id.*

¹²⁷ *McGaw v. McGaw*, 468 S.W.3d 435, 448 (Mo. Ct. App. 2015).

these previous decisions were groundbreaking, not all jurisdictions have consistently ruled this way when it comes to increased time with a non-biological child. In 2017 the Supreme Court of Missouri ruled against grandparents who sought to amend an already established custody and guardianship arrangement.¹²⁸ The court held that the grandparents could not state a proper cause of action for custody and visitation of their grandson.¹²⁹

In 2000, the U.S. Supreme Court ruled that a mother has a constitutional right to determine the direct upbringing of her children.¹³⁰ Although states may have differences in their statutes, it is unconstitutional for a state court to execute a statute that would assign rights to a third party, such as grandparents, that would infringe upon parents' constitutional right to their children.¹³¹

Nevertheless, statutes that determine a "nonparent's" right to custody and visitation are not deemed unconstitutional.¹³² The Supreme Court in *Troxel* left this up to the states to determine on a case by case basis.¹³³

Iowa courts have found that even though a non-biological parent can provide excellent parenting to a child, this alone will "rarely be strong enough to interfere with the natural rights of the parent."¹³⁴ It is not up to the judiciary to violate a biological parent's natural rights and place a child in another home that would offer "more advantages."¹³⁵ Iowa courts have established a test "for overcoming the strong parental preference in guardianship cases."¹³⁶ To overcome the biological parents' natural right to their child, the non-parent would have to prove that custody with the natural parent "is likely to have a seriously disrupting and disturbing effect upon the child's development."¹³⁷ When a child has resided with an individual who has provided for the "child's social, moral, and educational needs for a substantial

¹²⁸ *Hanson v. Carroll*, 527 S.W.3d 849, 850 (Mo. 2017).

¹²⁹ *Id.*

¹³⁰ *Troxel*, 530 U.S. at 65-66.

¹³¹ *Id.* at 75.

¹³² *Consalvi v. Cawood*, 63 S.W.3d 195, 199 (Ky. Ct. App. 2001).

¹³³ *Id.*

¹³⁴ *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998).

¹³⁵ *In re Mann*, 293 N.W.2d 185, 190 (Iowa 1980).

¹³⁶ *In re Guardianship of M.D.*, 797 N.W.2d 121,127 (Iowa Ct. App. 2011).

¹³⁷ *In re Guardianship of Knell*, 537 N.W.2d 778, 782 (Iowa 1995).

period,” it is obvious that the child has formed a sense of attachment to not only their environment but also this non-biological caretaker.¹³⁸ For this reason states have been limiting the parental presumption of “traditionally recognized parents by allowing nonparents to secure court-ordered childcare over the objection of current parents.”¹³⁹ These court orders can recognize the caregiver, also known as the non-biological parent, either as a de facto parent or as a third party who now will be entitled to childcare standing.¹⁴⁰ The burden of proof is on the third party who is seeking the adjustment of custody.¹⁴¹ Courts will consider “the long-range interests as well as the immediate interest of the child,” when determining an adjustment.¹⁴²

IV. The Legal Recognition of Multiparent Families

Within the past few years states have begun to acknowledge the existence of multiparent families. As a result, state legislators have enacted statutes that recognize more than two legal parents. Although similar in the general idea, the legal recognition of multiparent families can be vastly different from de facto parentage.

California and Maine were the first two states to implement legislation permitting their states to recognize multiparent families.¹⁴³ Although the Maine statute became effective in July of 2016, there are still no cases that would represent this legislation.¹⁴⁴

The California statute, in contrast, is directly cited in over one hundred cases.¹⁴⁵ This statute explains that a court has discretion to determine if more than two people have claims to par-

¹³⁸ *Id.*

¹³⁹ Parness & Timko, *supra* note 57, at 769.

¹⁴⁰ *Id.*

¹⁴¹ *Knell*, 537 N.W.2d at 781.

¹⁴² *Id.*

¹⁴³ June Carbone & Naomi Cahn, *Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 30 (2017). *See also* Abraham, *supra* note 67, at 408 (examining how legislatures and courts in California, Canada, and the United Kingdom have dealt multi-parent families).

¹⁴⁴ ME. REV. STAT. ANN. tit. 19-A, § 1853 (2015).

¹⁴⁵ CAL. FAM. CODE ANN. § 7612 (West 2020).

entage.¹⁴⁶ As a result, multiple individuals can be classified as parents if the failure to do so would be “detrimental to the child.”¹⁴⁷ This statute further lays out what the court may consider to determine what is detrimental to the child.¹⁴⁸ These statutory specifications include any applicable factor, but are not limited to the harm of removing a child from a stable environment with a suitable parent.¹⁴⁹

In the parentage case of *In re M.C.*, three individuals came before a California appellate court seeking legal recognition as the parents of an infant.¹⁵⁰ The court found a biological mother, a statutorily presumed mother, and the biological father were all presumed parents to prevent any future detriment to the infant.¹⁵¹ Custody was handed to the father based on facts of the case, which found him more equipped to care for the child. This holding likely influenced the enactment of the California statute recognizing multiparent families.¹⁵²

Even though a child in California may have multiple legal parents, this does not mean that each parent is entitled to equal custody or visitation rights. Custody allocation will be based on the best interests of the child and the courts may consider the stability and the level of care each parent can provide. In *Martinez v. Vaziri* although the court recognized the uncle of the infant as a legal parent, the court did not find that he was entitled to custodial rights.¹⁵³ Thus, in the *Vaziri* case primary custody was still left to the biological mother.

¹⁴⁶ *Id.* at § 7612(c).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *In re M.C.*, 123 Cal. Rptr. 3d 856 (2011).

¹⁵¹ Carbone & Cahn, *supra* note 143, at 31.

¹⁵² *Id.* at 30. See also Jason de Jesus, *When It Comes to Parents, Three's No Longer a Crowd: California's Answer to In re M.C.*, 49 LOY. L.A. L. REV. 779 (2016) (examining California's legislation permitting courts to recognize a child as having more than two parents and arguing that recognition of multiple parents can benefit children).

¹⁵³ *Martinez v. Vaziri*, 246 Cal. App. 4th 373, 389, 200 Cal. Rptr. 3d 884, 896 (2016). See also June Carbone & Naomi Cahn, *Custody and Visitation in Families with Three (or More) Parents*, 56 FAM. CT. REV. 399 (2018) (discussing problems that arise in trying to recognize multiple parents and solutions that assign rights to parents rather than trying to maintain equal standing for each of the multiple parents).

Meeting the standards to determine if one is entitled to classification as a legal parent is not simple. A biological father who has not established a relationship with his child may not be able to establish parentage, even as a third parent.¹⁵⁴ Even though the standard for multiparent families—detriment to a child—can be challenging to meet, California courts have been generous in establishing other rights to contact with children. If an individual is not able to be deemed a third parent, that person could still be entitled to a judgment mandating custody or visitation rights.¹⁵⁵

V. A Child's Best Interest

Although multiparent families are unquestionably on the rise, skeptics argue “our current legal regime makes it almost impossible to afford more than two parents full legal recognition.”¹⁵⁶ In the United States it has been well established that legal parents have the constitutional right to determine how their child should be raised, but this right might not always carry the same weight in all cases. In the Wisconsin decision of *In Re Custody H.S.H.-K*, the court held that “while biological and adoptive parents have a constitutional right to rear their children free of unnecessary state interventions, there are cases where the best interest of the child overrides a parent’s right.”¹⁵⁷

All states, as well as territories of the United States, have implemented statutes defining a child’s best interest as well as when this standard should be considered.¹⁵⁸ The ALI Principles, which essentially are summaries of existing state common laws, make “it clear that certain factors may not be considered in making determinations about child custody.”¹⁵⁹ Factors such as “race,

¹⁵⁴ *In re Donovan L.*, 244 Cal. App. 4th 1075, 198 Cal. Rptr. 3d 550 (2016).

¹⁵⁵ *In re J.P.*, 37 Cal. App. 5th 1111 (Cal. App. 6 Dist. 2019).

¹⁵⁶ Ullrich, *supra* note 97, at 914.

¹⁵⁷ Christina Spiezia, *In the Courts: State Views on the Psychological-Parent and De Facto-Parent Doctrines*, 33 CHILDREN’S LEG. RIGHTS J. 402, 405-06 (2013).

¹⁵⁸ *Determining the Best Interests of the Child*, CHILDREN’S BUREAU – U.S. DEP’T OF HEALTH & HUM. SERV. 1 (Mar. 2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best%20interests%20definition.

¹⁵⁹ Kathy T. Graham, *How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations*, 8 DUKE J. GENDER L. & POL’Y 323, 326 (2001).

gender, religious practices, sexual orientation, extramarital sexual conduct and a parent's earning capacity" are not relevant when a court is making a determination about a potential parenting plan.¹⁶⁰

A child's best interest has been defined to encompass the child's "physical, intellectual, moral, and spiritual well-being."¹⁶¹ Custody and visitation rights may be denied to either one of the legal parents if "the best interest of the child will be served."¹⁶² Determination of custody allocation and whether the best interest of the child has actually been served will vary on a case by case basis.¹⁶³ Twenty-two states, and the District of Columbia, enumerate in their statutes specific factors the courts should keep in mind when determining the best interests of a child.¹⁶⁴ These could include, but are not limited to, any emotional ties between the child and another caregiver, the ability of a caregiver to provide a safe home, the mental and physical health of the parent, or the presence of domestic abuse in the home.¹⁶⁵ The statutes of twelve states and the District of Columbia even "require courts to consider the child's best wishes when making a determination of best interests."¹⁶⁶

In Minnesota, the "primary caretaker factor has been significant in third party custody, placement, and access issues."¹⁶⁷ By and large, third party claims rely on their "long and nurturing relationships with a child" to gain custodial rights.¹⁶⁸ One major hurdle that third parties face when it comes to their desire to attain a legal right to a child is the "fundamental due process rights of biological parents to raise their children without undue interference by the courts, the state and other persons."¹⁶⁹ The constitutional protections of a biological parent may even over-

¹⁶⁰ *Id.*

¹⁶¹ 27C C.J.S. *Divorce* § 1072 (2020).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Determining the Best Interests of the Child*, *supra* note 158, at 2.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 3.

¹⁶⁷ Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D.L. REV. 1227, 1263 (2007).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1229.

ride the longstanding discretion given to a child's best interest.¹⁷⁰ For example, if a non-marital father sought to prevent another man from seeking paternal rights to his child, he would merely need to establish both a biological link to the child as well as an unwavering relationship.¹⁷¹ According to the U.S. Supreme Court in *Lehr v. Robertson*, "when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause."¹⁷² A father's constitutional right to his child will not be upheld until he takes the actual initiative to establish a connection with his child.¹⁷³

Proper termination of these parental rights will require courts to consider "all of the relevant surrounding circumstances."¹⁷⁴ However, an involuntary termination of parental rights is a high standard and a child's best interest does not carry much weight. Courts in Illinois have held that a child's best interest in a custody matter should not be considered when a father's paternal interest has been improperly terminated.¹⁷⁵ The father in *Doe* was under the impression that his child had died during birth.¹⁷⁶ Once the father realized his child was alive and had been given up for adoption without his consent, fifty-seven days had passed since the child's birth.¹⁷⁷ Even though it took three years for the case to reach a final verdict, the court held that the birth mother and adoptive parents were at fault.¹⁷⁸ The adoptive parents should have "relinquished the baby" once the father sought rights.¹⁷⁹ The adoptive parents knew "that a real father was out

¹⁷⁰ *Id.* at 1227.

¹⁷¹ Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology "Plus" Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 48 (2004).

¹⁷² *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979).

¹⁷³ Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1499 (2018).

¹⁷⁴ *In re Adoption of Baby Girl P.*, 242 P.3d 1168, 1173 (Kan. 2010).

¹⁷⁵ *Pet. of Doe*, 159 Ill. 2d 347, 350 (Ill. 1994).

¹⁷⁶ *Id.* at 349.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 350-51.

¹⁷⁹ *Id.* at 351.

there who had been denied knowledge of his baby's existence."¹⁸⁰ Illinois law appropriately requires a "good-faith effort to notify the natural parents of the adoption proceedings."¹⁸¹ The rationale for this law is to protect the biological parents, such as the father in this case, in their right to their child with no consideration required for the child's best interest. If the courts of Illinois were to rule any other way, "few parents would be secure in the custody of their own children."¹⁸² In some circumstances, a child's best interest could unfairly prejudice a parent. According to the court in this case, if a child's best interest was the only determining factor for parental custody rights "anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children."¹⁸³

In 2018, while the Kansas Supreme Court mentioned a child's best interests, the lower courts did not consider them when it evaluated a custody dispute.¹⁸⁴ Biological fathers can effectively void an adoption so long as they "attempt to enlist" a binding authority to establish their "rights and support obligations through the paternity action."¹⁸⁵ The lower courts in this case initially placed a newborn child in the care of a prospective adoptive family.¹⁸⁶ The biological mother forfeited her own parental rights shortly after giving birth and the biological father was contacted to do the same.¹⁸⁷ Upon learning that this child could be his, the biological father filed a motion to establish paternity.¹⁸⁸ Once the test confirmed the "genetic markers," the father refused to forfeit his rights and instead demanded the child be placed in his care.¹⁸⁹ It is noteworthy that the court emphasized the biological father's desire to maintain a paternal relationship with the child. The court never considered the fact that the child was being raised in a stable and loving environment. It instead placed the majority of the focus on a biological father's

¹⁸⁰ *Id.*

¹⁸¹ *Doe*, 159 Ill. 2d at 351.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Matter of Adoption of C.L.*, 427 P.3d 951 (Kan. 2018).

¹⁸⁵ *Id.* at 961.

¹⁸⁶ *Id.* at 953.

¹⁸⁷ *Id.* at 953-54.

¹⁸⁸ *Id.* at 955.

¹⁸⁹ *Id.* at 955.

commitment, to “filing a paternity action seeking custody and asserting his rights through the court system immediately after learning” about the birth of his child.¹⁹⁰ Courts in Kansas have described these events as “the actions of a father who is attempting to maintain a relationship with his child, not the actions of a father who is neglecting his child.”¹⁹¹ It is interesting to note that the court in *C.L.* further stressed that holding otherwise would hinder a biological father’s right to custody merely for the sake of increasing adoptions.¹⁹²

A court’s determination of the best interest of a child extends to all parents, including: those in same-sex relationships, unmarried parents who cohabit, and adoptive parents. As the traditional framework of an American family has evolved, there has been an increase in people who genuinely care about the children in their lives. Many courts are now looking more closely to the relationship a child has with these caretakers, regardless of whether they are in fact their biological/adoptive parent. To potentially establish constitutional rights for these third parties, as a child’s legal parent, they would still need to meet the requirement of actual intent for parenthood.¹⁹³

VI. Conclusion

The nature of the American family has changed within the last hundred years. De facto parentage, third party custody rights, and multiparent families are on the rise. Jurisdictions vary on how they allocate specific rights to the third parties. For de facto parentage courts will typically look at if the individual assumed on a daily basis the role of a parent. This will include fulfilling the child’s physical and psychological needs for a period of time. In regard to custody rights to a third party, the courts may look at the long-lasting relationship between the adult and the child. Third parties will have to overcome the constitutional rights of a biological parent. As the demand grows for additional parentage rights, many states are now moving to maintain the rights of multiparent families. These statutes ensure rights to the

¹⁹⁰ *Adoption of C.L.*, 427 P.3d at 962.

¹⁹¹ *In re Adoption of Baby Girl P.*, 242 P.3d at 1175.

¹⁹² *Adoption of C.L.*, 427 P.3d at 962-63.

¹⁹³ Higdon, *supra* note 173, at 1533.

non-legal parent if the contrary would be detrimental to the child.

Though it could vary for each household, children are now able to legally gain a stronger support system that goes past the constrictions of genetics. Emergence of reproductive technology, the legalization of gay marriage, and the rise of blended families have provided children with parentage that goes beyond biological ties. Legislation has allowed these caregivers to seek not only visitation rights, once a relationship strains, but also legal decision-making rights to a non-biological/non-adoptive child. Children are in turn raised with support systems that they would not otherwise have. As more states move toward ensuring the validity of a third party's legal right to a child, a national movement toward protecting their interests may arise. The main focus to adequate child rearing should always be maintaining the safety and comfort of said child. Separating a child from someone they were raised with and with whom they built a strong connection could lead to negative behavior and psychological effects on the child. Granting third parties legal parentage rights will ensure that children are in turn raised with support systems that they need to thrive.

Iris Siadatifard