Limiting the Prerogatives of Legal Parents: Judicial Skepticism of the American Law Institute's Treatment of De Facto Parents

by
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On September 11, 2005, Haleigh Poutre suffered a traumatic brain injury like that "caused by high speed car wrecks."[1] Only eleven years old, she was rushed to Noble Hospital in Westfield, Massachusetts, with, according to a police report, "both old and new bruises, old and new open cuts, several apparent weeping burns, and . . . a subdural hematoma [or collection of blood on

* This article draws on a more complete examination of the American Law Institute's treatment of de facto parents in Robin Fretwell Wilson, *Undeserved Trust: Reflections on the American Law Institute's Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90, 112 (Robin Fretwell Wilson, ed., Cambridge University Press, 2006) [*hereinafter* Undeserved Trust], and Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103 (2010), and on an empirical study of the impact of the ALI's recommendations in Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?* [*hereinafter Guiding Principles or Obligatory Footnote*]. I am grateful to the Sidney and Walter Siben Distinguished Professorship Lecture and to Professor John Dewitt Gregory for the kind invitation to present an early version of this work. I am indebted to William Bridges, Kristin Burr and Ryan Hrobak for their diligent research assistance. Professor Wilson may be reached at wilsonrf@wlu.edu.

[1] Buffy Spencer, *Expert Testifies About Severity of Brain Injury*, REPUBLICAN, Nov. 7, 2005, at A01.

the surface of the brain]."[2] Doctors would later determine that Haleigh's brain stem "was partly sheared."[3]

Plunged into a coma, less than two weeks later Haleigh would suffer another blow, losing her adoptive mother, Holli Strickland, in a bizarre murder-suicide.[4] Her stepfather (and the father of her half-brother), Jason Strickland, stepped forward to make medical decisions for Haleigh.[5] By this time, Jason had lived with Haleigh for nearly five years.[6] By his own report, Jason "felt in his heart that he was [Haleigh's] father and the children felt that way toward him."[7] Haleigh's biological father's parental rights had been terminated long before.[8] But during Jason's marriage to Haleigh's mother, Jason was "the person who the children call[ed] daddy."[9]

Under Massachusetts law at the time, Jason Strickland's request to make decisions for Haleigh should have been uncontroversial. Borrowing from the *Principles of the Law of Family Dissolution* ("Principles") proposed by the prestigious American Law Institute ("ALI"), Massachusetts courts had awarded parental rights to significant adults in a child's life since 1999. Beginning with *Youmans v. Ramos*,[10] Massachusetts had recognized as de facto parents adults who resided with a child and performed as much caretaking as the child's own parent, with that parent's

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2 Patricia Wen, *Accused Stepfather Fights to Keep Girl Alive; Child in State's Care is on Life Support*, BOSTON GLOBE, Nov. 6, 2005, at A1, *available at* http://www.boston.com/news/local/massachusetts/articles/2005/11/06/accused_stepfather_fights_to_keep_girl_alive (last accessed June 20, 2007).

3 *Accused Abuser Seeks to Keep Victim Alive*, CHICAGO TRIB., Dec. 8, 2005, at 14.

4 Holli Strickland died in a murder-suicide with her own mother. The Massachusetts Department of Social Services took temporary custody of Haleigh and asked that a "do-not-resuscitate" order be filed for her. Jason then moved to block the order as Haleigh's de facto parent. *See infra* notes 17–27 and accompanying text.

5 Patricia Wen, *Bid to End Life Support Was Quick*, BOSTON GLOBE, Feb. 7, 2006, at 1.

6 Hearing on a Motion and Preliminary DNR Hearing before the Honorable James B. Collins, Hampden County Juvenile Court, Sept. 26, 2005 at 22.

7 *Id.* at 12.

8 *Id.* at 13.

9 *Id.* at 10 (quoting Helena Friedman, attorney for Jason Strickland).

10 711 N.E.2d 165 (1999) (adopting the *Principles*' test for de facto parents in Massachusetts). *See also* Appendix C.

blessing. Under the ALI's approach, had he been recognized as Haleigh's de facto parent, Jason would have been entitled to not only visitation but also a share of custody if Jason and Haleigh's mother had divorced, and he would have been entitled to make medical decisions for Haleigh if her mother could not.[11]

Despite clear precedent for naming Jason as Haleigh's de facto father, the Massachusetts Supreme Judicial Court concluded that doing so would be "unthinkable under the circumstances."[12] Together with Holli, Jason had subjected Haleigh to an ominous, escalating pattern of abuse and neglect over a period of more than three years.[13] Long absences from school, un-

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11 *See infra* Part I.

12 *In re* Care and Protection of Sharlene, 840 N.E.2d 918, 926 (Mass. 2006). Sharlene is a pseudonym for Haleigh Poutre.

13 Acknowledging that the Massachusetts Department of Social Services "missed signs of abuse," Commissioner Harry Spence called Haleigh's experience "a classic case of conscientious error," stating that "[w]e did what we were supposed to do. Every one misread the data before us." Patricia Wen, *DSS Sought Early End to Life Support*, BOSTON GLOBE, Jan. 20, 2006, at A1. Haleigh's case file recorded the following incidents and their "resolutions:"

"**9/27/02** Child Abuse/Neglect Report. Allegations of neglect and physical abuse of [Haleigh] Screened Out.

"**10/24/02** Child Abuse/Neglect Report. Screened in for allegations of neglect and physical abuse of [Haleigh]. Reporter saw bruises on child, concerns about how child is disciplined and child out of school for eight days.

"**10/25/02** Child Abuse/Neglect Investigation. Unsupported with no reasonable cause to believe that a condition of neglect or physical abuse exists.

"**1/6/03** Child Abuse/Neglect Report. Initially screened in for neglect because mother is unable to keep child safe from harm then screened out as [CAP] referral made.

"**12/30/03** Child Abuse/Neglect Report.

"**1/13/04** Child Abuse/Neglect Report. Allegations of neglect screened out.

"**2/23/04** Child Abuse/Neglect Report. Screened in on allegations of neglect. Ten year old [Haleigh] missing for two hours and finally located in bathroom at Noble Hospital which is not close to her home.

"**2/23/04** Child Abuse/Neglect Investigation. Unsupported. Child did run away from home but mother acted appropriately.

"**6/11/04** Child Abuse/Neglect Report. Screened in because [Haleigh] had bruises, not in school and does not look as well cared for as other children in the home.

"**6/14/04** Child Abuse/Neglect Investigation. Allegations of physical abuse and neglect unsupported. [Haleigh] reports that she bruised her face diving into a pool. Mother responsive to [Haleigh's] self-abusive behaviors by bringing her to pediatrician and following counselor's recommendations.

explained bruises on Haleigh's face that were chalked up to "diving into a pool," headaches and vomiting from being "left alone at a softball game [where] she was hit in the head with a baseball bat," all culminated in Haleigh being thrown down the stairs, leaving her unconscious.[14] When Haleigh arrived at the

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"**6/18/04** Child Abuse/Neglect Report. Screened in for neglect initially and then screened out. Mother addressing issues with child's therapist, mother agreed to voluntary services, child hospitalized and mother working with therapist to get child placed in residential care.
"**6/25/04** Child Abuse/Neglect Report. Mother's application for voluntary services accepted.
"**7/15/04** Child Abuse/Neglect Report. Screened in for physical abuse and neglect of [Haleigh] by her mother. [Haleigh] has bruises on arm.
"**7/15/04** Child Abuse/Neglect Investigation. Supported for neglect, mother inadequately supervised [Haleigh] in store despite prior history of [Haleigh] stealing in a store.
"**7/16/04** Child Abuse/Neglect Report. Screened in. Case currently open for voluntary services and investigation.
"**8/18/04** Child Abuse/Neglect Report. Screened in for neglect. Child received burns during a bath then screened out because department is currently involved with family and closely monitoring [Haleigh's] care.
"**1/14/05** Child Abuse/Neglect Report. Screened out.
"**4/14/05** Child Abuse/Neglect Report. Screened in due to concerns about the level of supervision provided for [Haleigh] given the extent of her injuries in light of her history.
"**4/14/05** Child Abuse/Neglect Investigation. Allegations of Neglect unsupported.
"**5/11/05** Child Abuse/Neglect Report. Screened in due to allegations of neglect. Mother did not seek medical attention when [Haleigh] complained of a headache and was vomiting. Mother left [Haleigh] alone at softball game and she was hit in the head with a baseball bat.
"**5/11/05** Child Abuse/Neglect Report. Allegation of neglect unsupported. Incident was an accident. Adequate services in place to assist with monitoring.
"**9/11/05** Child Abuse/Neglect Report. Screened in for abuse by unknown perpetrator based upon the child's multiple bruises and fractures in different stages of healing.
"**9/12/05** Child Abuse/Neglect Investigation. Supported. Reasonable cause to believe that a condition of physical abuse and neglect exists. [Haleigh] sustained serious life threatening injuries which were the result of trauma."
In re Care and Protection of Sharlene, *supra* note 12 at 921–23.

[14] Patricia Wen, *Sister, Stepfather to Testify in Poutre Case*, BOSTON GLOBE, Nov. 5, 2008, at B2 (quoting prosecutor Laurel Brandt who recounted the account given by Haleigh's sister, Samantha Poutre, as follows: "she saw her stepfather, Jason Strickland, 'push Haleigh down the stairs' in the autumn of 2005 and that after her violent fall, Haleigh 'did not get up,' that her mother,

hospital a day later, "Haleigh was barely breathing, unresponsive and covered with bruises, sores and scabbed-over burns."[15] "Her teeth were broken, her face was swollen . . . she was extremely thin, [and] her abdomen was sunken."[16] Dr. Christine Barron, a child-abuse specialist, would later say that "many of the wounds were telltale signs of cigarette burns, ligature marks, and severe whippings with a cord or beltlike object."[17] A jury ultimately agreed and convicted Jason of five counts of battering Haleigh. In two instances, Jason struck Haleigh with a "wand, stick, or tube" and hit her "on the head with his hand."[18] In the remaining instances, he permitted Holli to inflict injuries on Haleigh while he stood by.[19] On December 18, 2008, "a judge sentenced [Jason] . . . to 12 to 15 years in state prison for participating in a horrific pattern of child abuse, saying he had deprived [Haleigh] of the 'most precious gift' of a normal childhood."[20]

In the days and weeks immediately after Haleigh's traumatic injury, glimmers of Jason's role began to appear. Given Haleigh's grim prognosis, the Massachusetts Department of Social Services ("DSS") asked the Hampden County Juvenile Court to enter a do-not-resuscitate ("DNR") order in Haleigh's medical record, a move strenuously opposed by Jason. He asked to

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Holli, was near the stairs at the time . . . and that the couple 'tried to wake Haleigh' without success . . . . [Jason] later took Haleigh's unconscious body from the bottom of the basement steps and put her in an empty tub in a first-floor bathroom").

15 Buffy Spencer, *Haleigh Lifeless, 'Freezing Cold,' Nurse Testifies*, REPUBLICAN, Nov. 6, 2008, at A01. (quoting testimony of a registered nurse Joanne Ghazil, who was "on duty at Noble Hospital when Haleigh was brought in").

16 *Accused Abuser Seeks to Keep Victim Alive*, CHICAGO TRIB., Dec. 8, 2005, at 14.

17 Patricia Wen, *Stepfather Convicted in Poutre Abuse Case; Jury Says He Failed to Protect Girl, 11; Wife Is Implicated*, BOSTON GLOBE, Nov. 27, 2008, at A1.

18 Buffy Spencer, *Expert Testifies About Severity of Brain Injury*, REPUBLICAN, Nov. 27, 2008, at http://blog.masslive.com/breakingnews/print.html?entry=/2008/11/jury_finds_jason_strickland_gu.html.

19 The jury concluded that Jason was guilty of "assault and battery on a child with serious bodily injury" because he allowed Holli to strike Haleigh with a bat in his presence and allowed Holli to inflict the brain injury that ultimately plunged Haleigh into a coma. *Id.*

20 Patricia Wen, *Poutre Stepfather Gets 12-15 Years in Prison; Judge Decries Lifelong Effects of Abuse*, BOSTON GLOBE, Dec. 19, 2008, at B1.

make decisions for Haleigh as her de facto father at the DNR hearing but exercised his Fifth Amendment prerogative not to speak.[21] DSS opposed Jason's request.[22]

In turning aside Jason's claim to make medical decisions for Haleigh, the trial judge concluded that he had "not met the specific test" set forth in *Youmans* and that his assertion of the Fifth Amendment warranted "a negative inference."[23] The Massachusetts Supreme Judicial Court affirmed. The court first acknowledged that Massachusetts had embraced the ALI's test for de facto parenthood, which measures chores performed for a child and time spent in residence, not the quality of the adult's relationship with the child.[24] The court concluded, however, that "to recognize [Jason] as a de facto parent, in order that he may participate in medical decision making for [Haleigh] . . . would amount to an illogical and unprincipled perversion of the doctrine."[25] Although Massachusetts' "cases have focused explicitly on the existence of a significant preexisting relationship," that "standard *presumes* that the bond between a child and a de facto parent will be, above all, loving and nurturing."[26] Faced with the ludicrousness of giving Haleigh's abuser parental rights, the court

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21 Hearing on a Motion and Preliminary DNR Hearing before the Honorable James B. Collins, *supra* note 6, at 22, 24, 28 (DSS argued that Jason "was either participating in the infliction of [Haleigh's] injuries or totally ignoring the fact").

22 Obviously, Jason had a conflict of interest. By insisting that Haleigh remain on life support, Jason could avoid a potential murder charge. Wen, *supra* note 2, at A1.

23 Hearing on a Motion and Preliminary DNR Hearing before the Honorable James B. Collins, *supra* note 6, at 28.

24 *In re* Care and Protection of Sharlene, *supra* note 12, at 926 (noting that the court adopted the concept of de facto parenthood proposed by the ALI in 1999 but that it later, in 2003, "noted, without adopting, further refinements to the concept"). *See also* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) and Appendix C.

25 *In re* Care and Protection of Sharlene, *supra* note 12, at 927.

26 *Id.* at 926 (emphasis added). The day after the Court upheld the trial judge's order permitting the removal of Haleigh's ventilator and feeding tube, "Haleigh began to show signs of recovery and the doctors halted plans to let her die." Doctors announced that Haleigh was breathing on her own and responding to commands. *See* Patricia Wen, *The Little Girl They Couldn't See*, BOSTON GLOBE, July 6, 2008, http://www.boston.com/news/local/articles/2008/07/06/the_little_girl_they_couldnt_see/; Buffy Spencer, *Lawyer to Challenge Competency of Girl Stepdad Allegedly Beat*, REPUBLICAN NEWSROOM, July 1, 2008, http://

concluded that the gravaman of a parent-child relationship—a loving, bonded, dependent relationship between the child and that adult—should count.

Haleigh's tragic story certainly does not mean that live-in partners[27] should never receive parental rights. But Haleigh's experience drives home the fact that a thinned-out conception of parenthood measured by chores and time-in-residence will sometimes permit bad risks to remain in a child's life, and not simply preserve good relationships. Although Haleigh's case is unusual because Jason was the only adult decision-maker left in the vacuum created by Holli's death,[28] far more often this thinned-out conception of parenthood would give former live-in partners access to a child "over the opposition of the legal parent,"[29] nearly

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www.masslive.com/news/index.ssf/2008/07/lawyer_plans_to_challenge_comp.html?category=Crime+category=Westfield.

Haleigh now lives with severe, permanent retardation. Noel Young, *Coma Girl Comes Back from the Dead to Testify Against the Stepfather Who Nearly Beat Her to Death*, DAILY MAIL, Feb. 29, 2008, *available at* http://www.dailymail.co.uk/news/article-522432/Coma-girl-comes-dead-testify-stepfather-nearly-beat-death.html.

27 This article uses the term "live-in partner" to describe the population of adults on whom the ALI would confer significantly expanded parental rights. The common denominator among this group is their previous status as co-residents of the child's legal parent—nearly always a child's mother—together with their performance of certain "caretaking functions." *See infra* Part I. For reasons explained below, the critique of thinned-out parental rights in this article is limited to heterosexual male cohabitants. Gay and lesbian co-parents and female co-residents, such as stepmothers and girlfriends, are not addressed here since their claims for access to children do not raise the same concerns. For example, unlike male live-in partners, we know very little about child sexual abuse by women who are unrelated to a child by biology or adoption, other than it seems to occur very rarely. *See infra* Part II; *see also* Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 245 n.13 (2002). Nor does this critique extend to adoptive parents since they are legal parents and, as such, are entitled to all the prerogatives of legal parents because they have committed to children in this very important way. Instead, this critique focuses exclusively on heterosexual male live-in partners.

28 Haleigh's biological father's parental rights had been terminated, as had the rights of her biological mother as a result of Haleigh's adoption. *See supra* note 8 and accompanying text.

29 AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03, Reporter's Notes, cmt. b, at 129 (2002) [hereinafter PRINCIPLES] (discussing the use of equitable doctrines to give parental rights to live-in

always a child's mother. Mothers are disproportionately affected by the extension of new parental rights to live-in partners because most non-marital children and children of divorce live with their mothers.[30] Indeed, among divorced and separated couples with children, mothers maintain over five times as many households as fathers.[31]

This article argues that the ALI's thinned-out test for parenthood overrides the judgments of mothers[32] without sufficient consideration for the risks to children. Part I first demonstrates that the existence of a loving relationship, so important to turning aside Jason's claim, is precisely the kind of qualitative test that the drafters of the *Principles* expressly rejected in favor of a more easily administrable test based on chores and time.[33] Part II then marshals significant social science evidence showing that naïve assumptions about human goodness undergird the drafters' recommendations. This evidence shows that the performance of "caretaking" chores, central to the ALI test, will do little to discern how protective live-in partners have been or will be, at least when these partners are heterosexual men.[34]

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partners). The PRINCIPLES define legal parents as biological and adoptive parents. *See id.* § 2.03 cmt. a, at 110.

30 Of the children who live with either their mother or father only, 86% live with a mother. U.S. Census Bureau, America's Families and Living Arrangements: 2012, tbl.C3 (2012), *available at* http://www.census.gov/hhes/families/data/cps2012.htmlhttp://www.census.gov/population/www/socdemo/hh-fam/cps2009.html (last accessed February 9, 2012).

Minority women may have their parental prerogatives overridden more often than white women. *See* Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 287 (2001).

31 U.S. Census Bureau, *supra* note 30, at tbl.C3 *http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html*.

32 Of course, where legal fathers are raising children, thinned-out notions of parenthood also encroach on the father's prerogative to decide who continues to have contact with his children. While this encroachment does not raise all the child protection risks described in Part II, it does assume *a fortiori* that children will be made better off by continuing contact *without* inquiring into whether continuing contact serves a child's best interests *or* why a child's father chose not to voluntarily permit contact. *See infra* Part I.

33 *See infra* Part I.

34 *See infra* Part II.

Part III then surveys how courts in the United States have received the ALI's recommendations about de facto parents.[35] While courts have looked to the *Principles* for guidance on this topic more than any other, they reject the ALI approach twice as often as they accept it. As Part IV shows, even courts that have embraced the idea of parental rights for live-in partners have beefed up the ALI's bare-bones test for de facto parenthood precisely to safeguard the child's welfare and the legal parent's ability to have the last word on who has access to her children.[36] Ultimately, this article concludes that when society takes love and parental judgments into account and not mere time in residence doing chores for a child, we can be more confident that the upside for children of conferring parental rights on live-in partners will be significant and that the inherent risks of such an approach will be greatly reduced.

I. The ALI's Thinned-Out Conception of Parenthood

Considered the most prestigious law reform organization in the United States, the ALI published its long-awaited *Principles,* an 1,183 page volume, in 2002 after eleven years of work and four successive drafts.[37] The ALI's *Restatements of the Law* and other publications have profoundly shaped the evolution of American law.[38] Given the ALI's considerable influence, the *Principles* seemed to hold the promise of a significant effect on many of the important and controversial questions raised by changes in family forms, both within the United States and outside it.[39]

While courts have indeed looked to the *Principles* for guidance on a range of matters, from alimony and property division

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35 *See infra* Part III.

36 *See infra* Part IV.

37 American Law Institute, http://www.ali.org/ (last visited Dec. 1, 2005).

38 Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 347-48 (2005).

39 Robin Fretwell Wilson, *Introduction in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 1, 2-3 (Robin Fretwell Wilson ed., Cambridge Univ. Press 2006).

to child support and domestic partnerships,[40] they have gravitated to the *Principles* for guidance on one topic more than any other: the proposal to confer parental "rights" on live-in partners of a child's legal parent.[41] In the *Principles*, the drafters propose a three-prong test for determining whether a former live-in partner is a de facto parent entitled to a share of custody and other parental rights.[42] This test requires residency, caretaking, and agreement by the child's legal parent, almost always the child's mother.

The first prong, residency, is satisfied when a legal parent's partner lives with the child and the legal parent for as little as two years.[43] The second prong, caretaking, requires the partner perform at least half of the caretaking functions for the child. The third prong, agreement, is met when the child's legal parent agrees to allow the partner to perform an equal share of the child's caretaking.[44] Because agreement may be implied, this prong is satisfied when a mother acquiesces to the partner's behavior—behavior that virtually any mother would welcome in her partner, such as taking the child to the doctor, reading to the child, helping the child get ready for bed, and making dinner for the family.[45]

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40 *See* Guiding Principles or Obligatory Footnote (reporting that across all chapters of the *Principles*, courts reject the ALI's recommendations one-and-a-half times as often as they accept them but that the overwhelming use of the *Principles* is to reach a result the court would have reached otherwise under its own statutes or precedent).

41 *See infra* Part III (reporting results of a new empirical analysis of the *Principles*' impact in cases in which live-in partners and other third parties seek parental rights).

42 The *Principles* borrow this term from case law but significantly enlarge the rights conferred. *See infra* notes XX – XX and accompanying text (discussing work by Professor Jane Murphy).

43 *See infra* Part III. PRINCIPLES, *supra* note 29, § 2.03 cmt. c, at 119; *id.* § 2.03 cmt. c (iv), at 122. The drafters seem unwilling to require additional years or to give clear signals that such additional amounts of time should be required. Instead they note that "[i]n some cases, a period longer than two years *may be* required." The *Principles* also exclude caretakers who are motivated by financial gain rather than "love and loyalty." *Id.* § 2.03 cmt. c (ii), at 120.

44 *Id.* § 2.03 cmt. c, at 119.

45 *Id.* § 2.03 cmt. c (iii), at 121; *id.* § 2.03, illus. 22, at 122.

De facto parents receive standing to press a claim unilaterally.[46] Once recognized as a de facto parent, the live-in partner receives a share of time with the child after the adults' break-up that is proportional to the "caretaking" performed.[47] This test for custody, known as the approximation standard, functions as a time in/time out test. Thus, a person who performs half of the caretaking duties for a child is presumptively entitled to as much as half the time with the child after the adults break up.[48] Because the de facto parent receives the same physical custody rights as the legal parent, this would normally encompass overnight stays and unsupervised weekends, all over the objection of the mother.[49] Finally, the de facto parent may become the legal

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46 *Id*. § 2.04 (1)(c), at 134.

47 *See Id*. § 2.08 (stating that "the proportion of time the child spends with each parent [approximates] the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation," unless an exception applies).

Prior to the *Principles*' adoption, the approximation standard had never been adopted by any U.S. jurisdiction. *See* Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 446, 446 (Robin Fretwell Wilson ed., Cambridge Univ. Press 2006) (arguing that the "PRINCIPLES advocate a radical new approach to determining parenting arrangements after separation"); Mark Hansen, *A Family Law Fight: ALI Report Stirs Hot Debate Over Rights of Unmarried Couples*, 89 A.B.A. J. 20 (2003).

48 *See* PRINCIPLES, *supra* note 29, § 2.08.

49 Supervised visits are reserved for those instances when protecting the child or the child's parent is warranted, for example when the court finds "credible evidence of domestic violence." *Id.* § 2.05, illus. 2., at 149. "Credible information" about abuse may also trigger supervision. "If either parent so requests, or upon receipt of credible information that such conduct has occurred, the court should determine promptly whether a parent who would otherwise be allocated responsibility under a parenting plan has done any of the following: (a) abused, neglected, or abandoned a child . . . (b) inflicted domestic violence, or allowed another to inflict domestic violence . . . If a parent is found to have engaged in any activity specified [above] . . . the court should impose limits that are reasonably calculated to protect the child . . . . The limitations available to the court . . . include . . . the following: (a) an adjustment, including a reduction of the elimination, of the custodial responsibility of a parent; (b) supervision of the custodial time between a parent and the child . . . (f) denial of overnight custodial responsibility . . ."). *Id.* § 2.11(1) – (2).

decisionmaker for the child in certain instances, just as Jason sought to do for Haleigh.[50]

In sum, the *Principles*, if enacted or followed, would not allow mothers to exercise their judgment about who should see their children. The drafters presume that courts guided by the *Principles*—rather than the child's own mother – can best evaluate when continued contact with a live-in partner is in the best interest of a child and when it is not. As a matter of sound policy, it would seem that a convincing case must be made that children *in general* are better off before society would remove them from the exclusive custody of their legal parents—usually their mothers—and place shared responsibility for their well-being in the hands of former live-in partners. The next Part evaluates how well the *Principles* fare by this yardstick.

II. Evaluating the ALI's Proposed Reforms

The drafters of the *Principles* assume that "because caretaking functions involve tasks relating directly to a child's care and upbringing, [these tasks] are likely to have a special bearing on the strength of the quality of the adult's relationship with the child."[51] In their zealousness to provide continuing contact with good father-figures, however, the drafters offer an easily administrable caretaking test that fails to screen out even the worst risks to children. This test rewards behavior that may portend significant risk to children, is likely to increase the risk of child sexual abuse and child physical abuse for some children, and does so without demanding increased investment in these children that might otherwise warrant the increased risk to which these children are exposed.

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50 A de facto parent may be made the legal decisionmaker for a child but is not presumptively entitled to have this role. *See id.* § 2.09, cmt. a ("Decisionmaking responsibility may be allocated to one parent alone, or to two parents jointly. A de facto parent may be allocated decisionmaking responsibility."); *id.* § 2.18 (1) ("The court should allocate responsibility to a legal parent, a parent by estoppel, or a de facto parent as defined in § 2.03, in accordance with the same standards set forth in §§ 2.08 through 2.12."); *id.* § 2.09(2) (giving legal parent and parent by estoppel, but not de facto parent, a presumption of joint decisionmaking responsibility).

51 *Id.* § 2.03 cmt. g, at 125.

The ALI's caretaking test fail to screen out men likely to pose a risk to children, because the activities that constitute "caretaking" encompass many of the same activities that child molesters use to groom their victims as Figure 1 graphically illustrates. Thus, the ALI actually gives some men who pose risks to a child a "gold star" for behaviors that generally should raise significant caution flags.

Figure 1:

ALI Caretaking Functions	Grooming Behaviors[52]
o Grooming	o Bathing
o Washing	o Dressing
o Dressing	o Bathroom Behavior
o Toilet Training	o Attention, Affection
o Playing with child	o Being around child at bedtime
o Bedtime and Wakeup	o Discipline
o Satisfying Nutrition Needs	o Assure child of rightness
o Protecting child's safety	
o Providing transportation	
o Directing development	
o Discipline	
o Arranging for education	
o Helping to develop relations	
o Arranging for health care	
o Providing moral guidance	
o Arranging alternate care for child	

The ALI's test fails to consider the risks to children that flow from significantly enlarging the parental rights of former male live-in partners. Children who spend time with unrelated males outside the presence of their mothers are placed at a significantly higher risk of physical and sexual abuse, as I have explained at length elsewhere.[53] In one of the few longitudinal studies of a general population, David Fergusson and his colleagues followed

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52 DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH (1984); John R. Christiansen & Reed H. Blake, *The Grooming Process in Father-Daughter Incest*, *in* THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT (Anne L. Horton et al. eds., 1990); Jon R. Conte et al., *What Sexual Offenders Tell Us About Prevention Strategies*, 13 CHILD ABUSE & NEGLECT 293 (1989).

53 *See* Wilson, *Trusting Mothers, supra* note *.

1265 children from birth until the age of sixteen.[54] They found that 66.5% of the victims of sexual abuse came from families that "experience[d] at least one change of parents before age 15," compared to 33.5% of children who did not experience abuse.[55] Fergusson reported, moreover, that 60% of children who experienced intercourse as part of the abuse experience had been exposed to parental divorce or separation.[56] In another study, Rebecca Bolen used statistical tools to distinguish the effect of living without both natural parents from other aspects of household composition.[57] When all other variables were held constant, she found "children living with males in the household after separation [of their parents] were more than seven times more likely to be abused" than "children living with only females after separation."[58] In hard numbers, "over half of these children were sexually abused."[59] Bolen's findings suggest that the heightened risk to girls does not result from the breakup of a traditional nuclear family itself,[60] but "[i]nstead, living with a male in the household after separation . . . appeared to be the more impor-

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54 David M. Fergusson et al., *Childhood Sexual Abuse and Psychiatric Disorder in Young Adulthood: 1. Prevalence of Sexual Abuse and Factors Associated with Sexual Abuse,* 35 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1355, 1356 (1996) (following a cohort of children born in Christchurch, New Zealand in 1977 and asking them at age eighteen to provide retrospective reports of molestation experiences during childhood).

55 *Id.* at 1359 tbl.2.

56 *Id.*

57 Leslie Margolin & John L. Craft, *Child Sexual Abuse by Caretakers*, 38 Fam. Rel. 450 (1989) (performing multivariate analyses of data from Diana Russell's survey of 933 adult women in the San Francisco area).

58 *Id.*

59 *Id.* at 163 (reporting that 53% were sexually abused).

60 Some may see the risks to children in fractured and blended families as a deficit of their family form (i.e., whether they have two parents). These statistics would not support such an inference—an intact family does not immunize a child from sexual exploitation. *E.g.*, David Finkelhor, et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 Child Abuse & Neglect 19, 24 ("[T]he presence of both natural parents is certainly not an indicator of *low risk* in any absolute sense."); P.E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 18 (1996) (conceding that "[i]ntact families do not guarantee stability").

tant predictor."[61] Like these studies, a significant body of research indicates that the presence of a stepfather or mother's boyfriend greatly increases the risk of sexual molestation for young girls,[62] although the risk is not limited only to young

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61 Rebecca M. Bolen, *Predicting Risk to Be Sexually Abused: A Comparison of Logistic Regression to Event History Analysis*, 3 CHILD MALTREATMENT 157, 167 (1998). As Bolen observes, "for children living with a male in the household, rates of abuse appeared to be better explained by (a) living with a stepfather or (b) being separated from one's natural mother." *Id.* at 166.

While "the addition of a stepfather to a girl's family causes her vulnerability to skyrocket," David Finkelhor, SEXUALLY VICTIMIZED CHILDREN 122 (1979), it is overly simplistic to assume that the mother's remarriage or cohabitation is a necessary predicate to victimization. A girl's long-term separation from her father—a risk factor "strongly associated" with childhood victimization—is sometimes, *but not always*, followed by the introduction of unrelated males into the household. Christopher Bagley & Kathleen King, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 90 (1990) (reporting results from several research studies).

62 Obviously, this conclusion is drawn from scientific studies across large groups, and says nothing about risks posed by any individual stepfather or boyfriend.

Nonetheless, a child's exposure to unrelated men in her home plays a crucial role in determining her vulnerability to sexual victimization. In one long-term study, researchers in New Zealand found that children reporting childhood sexual abuse were more likely to live with a stepparent before the age of fifteen. Fergusson, *supra* note 54, at 1359 tbl.2 (reporting results of a longitudinal study of 1265 children born in Christchurch, New Zealand, who were studied from birth until the age of eighteen). Of those children experiencing intercourse, nearly half (45.4 %) were raised in a stepparent household. *See id.* at 1358 tbl.1, 1359 tbl.2.

Similarly, Diana Russell found in a community survey of 933 women in San Francisco that one in six stepdaughters growing up with a stepfather was sexually abused, making these girls over seven times more likely to be sexually victimized than girls living with both biological parents. Diana E. H. Russell, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 372 (1986) (reporting that one in four non-offending mothers suspected the abuse shortly before the child's disclosure) (reporting in a study of 930 women in the San Francisco area, that 2% of respondents reared by biological fathers were sexually abused, while "at least [17 %] of the women in our sample who were reared by a stepfather were sexually abused by him before the age of fourteen"); *cf.* Hilda Parker & Seymore Parker, *Father-Daughter Sexual Abuse: An Emerging Perspective*, 56 AM. J. ORTHOPSYCHIATRY 531, 541 (finding risk of abuse associated with stepfather status to be almost twice as high as for natural fathers). Significantly, the risk of sexual assault by father-substitutes "who are around for short[er] lengths of time . . . may be considerably higher." Russell, *supra* at 268. *See also* Joseph H. Beitchman et al., *A Review of the Short-Term Effects of*

Child Sexual Abuse, 15 CHILD ABUSE & NEGLECT 537, 550 (1991) (observing in a review of forty-two separate publications that "[t]he majority of children who were sexually abused . . . appeared to have come from single or reconstituted families"); Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child Maltreatment: Findings of a 17-Year Prospective Study of Officially Recorded and Self-Reported Child Abuse and Neglect*, 22 CHILD ABUSE & NEGLECT 1065, 1074 (1998) (finding in a longitudinal study of 644 families in upstate New York between 1975 and 1992 that disruption of relationships with biological parents and living in the presence of a stepfather increased girl's risk of sexual abuse); David M. Fergusson et al., *Childhood Sexual Abuse, Adolescent Sexual Behaviors and Sexual Revictimization*, 21 CHILD ABUSE & NEGLECT 789, 797 (1997) (finding in a longitudinal study of 520 New Zealand born young women that child sexual abuse was associated with living with a stepparent before the age of fifteen); David Finkelhor & Larry Baron, HIGH-RISK CHILDREN, IN A SOURCEBOOK ON CHILDREN SEXUAL ABUSE 79 (1986) ("The strongest and most consistent associations across the studies concerned the parents of abused children . . . . Girls who lived with stepfathers were also at increased risk for abuse."); John M. Leventhal, *Epidemiology of Sexual Abuse of Children: Old Problems, New Directions,* 22 CHILD ABUSE & NEGLECT 481, 488 (1998) ("Studies have indicated that . . . girls living with step-fathers are at an increased risk compared to girls living with biological fathers . . . .").

In more than one study, stepfathers actually outnumbered natural fathers as abusers, a telling result given the disproportionately greater number of biological fathers during the study time frames. Vincent De Francis, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS: FINAL REPORT 69 (1969) (finding in a study of 250 sexual abuse cases that the natural father committed the offense in 13% of the cases, whereas in 14% of cases the offense was committed by a stepfather or by the man with whom the child's mother was living); Ellen Gray, UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEX ABUSE, 85 fig 4.10 (1993) (noting in a study of all cases of molestation filed in eight jurisdictions that 23.3% of accused perpetrators were stepfathers and boyfriends, while biological fathers accounted for 13.4%); Jean Giles-Sims & David Finkelhor, *Child Abuse in Stepfamilies*, 33 FAM REL. 407, 408 tbl.1 (1984) (reporting that 30% of abusers in the study were stepfathers, outnumbering natural father abusers, who constituted 28% of the abusers).

Christopher Bagley and Kathleen King estimate that "as many as one in four stepfathers may sexually abuse the female children to whom they have access." Bagley & King, *supra* note 61 at 75-76. The risk of abuse to girls from an ex live-in partner is even greater than these comparisons suggest because these girls "are also more likely than other girls to be victimized by other men." Finkelhor et al., *supra* note 60 at 25. For example, stepdaughters are five times more likely to be abused by a friend of their parents than are girls in traditional nuclear families. *Id*. Thus, stepfathers "are associated with sexual victimization not just because they themselves take advantage of a girl, but because they increase the likelihood of a nonfamily member also doing so." David Finkelhor, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 130 (1984);

girls.[63]

Risks of physical abuse are just as grave for children who live with their mother's live-in-partners. Consider the 2005 study published in *Pediatrics* by Patricia Schnitzer and colleagues. Researchers examined the household composition of all children in Missouri under the age of five who died between January 1, 1992, and December 31, 1999, and compared the household structure for children who died due to inflicted injury with those who died by natural causes.[64] Inflicted injury death includes death resulting from intentional abuse, but not neglect (unlike maltreatment death, which would include both causes of death). Nearly three-fourths (71.2%) of the perpetrators were male and, of those, 34.9% were the child's father or the child's mother's boyfriend.[65] Because very few children in Missouri lived with their mother's boyfriend at this time, "children residing in households with unrelated adults were nearly 50 times as likely to die of inflicted injuries as children residing with two biological parents."[66] This study is not the only one of its kind. There are many more that find similar results.[67]

Haleigh Poutre's experience of extreme violence at the hands of her mother's live-in-partner "has a depressingly familiar

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see also Bagley & King, *supra* note 61 (citing study finding that girls separated from one parent "were also at risk for sexual victimization by more than one adult"). Because the risk of sexual abuse is cumulative, one researcher found that "[v]irtually *half* the girls with stepfathers were victimized by someone." Finkelhor et al., *supra* note 60 at 25.

While these studies differ in scope and the strength of their findings, they agree on one essential: the addition of an unrelated male "to a girl's family causes her vulnerability to skyrocket." Finkelhor, SEXUALLY VICTIMIZED CHILDREN, *supra* note 61 at 122 (making the observation about stepfathers).

63 *See* Wilson, *Undeserved Trust*, *supra* note *, at 107-10 (collecting studies of sexual abuse of boys); Robin Fretwell Wilson, *Fractured Families, Fragile Children: The Sexual Vulnerability of Girls in the Aftermath of Divorce*, 14 CHILD & FAM. L.Q. 1 (2002).

64 Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 11 PEDIATRICS 687 (Nov. 2005).

65 *Id.*

66 *Id.*

67 *See* Wilson, *Trusting Mothers*, *supra* note *, at 1129.

ring to it."[68] In a single story in 2007, the Associated Press reported that

> Six-year-old Oscar-Jimenez Jr. was beaten to death in California, then buried under fertilizer and cement. Two-year-old Devon Shackleford was drowned in an Arizona swimming pool. Jayden Cangro, also two, died after being thrown across a room in Utah. In each case, as in many others every year, the alleged or convicted perpetrator had been the boyfriend of the child's mother – men thrust into father-like roles which they tragically failed to embrace.[69]

Perhaps not surprisingly, courts have expressed deep skepticism in awarding significant parental rights to mothers' live-in-partners on a showing as thinned out as that suggested by the ALI, as the next Part demonstrates.

III. Courts Express Skepticism

An empirical analysis of the *Principles*' impact with judicial decisionmakers from the project's inception in the early 1990's through June 29, 2010, reveals a deep interest in the ALI's recommendations as to custody, dwarfed only by the court's skepticism as to one of those recommendations – namely the proposed treatment of de facto parents.[70] For this empirical study of the *Principles'* impact – the only comprehensive, empirical study of the *Principles'* impact since their adoption in 2000 – we examined

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68 *See* Mackenzie Carpenter, *Child Abuse Often Linked to Unrelated, Live-in Lovers*, POST-GAZETTE, Apr. 26, 2001, *available at* http://old.postgazette.com/regionstate/20010426boyfriend2.asp.

69 David Crary, *Abuse More a Risk in Non-traditional Families*, Associated Press, Nov. 17, 2007, *available at* http://usatoday.30.usatoday.com/news/nation/2007-11-17-childabuse_N.htm.

70 This empirical analysis searched electronic databases in LexisNexis (Lexis) and Westlaw on June 29, 2010 for references to the *Principles*. Recognizing that not every reference to the *Principles* would be in the form of a proper *Bluebook* citation, we deliberately searched for mis-cited instances of the *Principles*, as well as mis-cites to the ALI. This decision was warranted. For example, in *Cullum v. Cullum*, 160 P.3d 231 (Ariz. 2007), the *Principles* are cited as "the American Family Institute's comprehensive study, Principles of the Law of Family Dissolution (1997)." *Id.* at 235. To capture as many permutations of the work's title as possible, we performed five different searches, the search logic for which appear below.

databases in Westlaw and LexisNexis in 2008 and again in 2010 for any court cases referencing the *Principles*.[71]

As of June 29, 2010, 120 cases in total cited to the *Principles*.[72] Of these, 65 cases concerned Chapter 2, which proposes custody and parentage rules — making this the topic cited by courts more than any other portion of the *Principles*.[73] Among the 65 cases, some discuss more than one provision of the *Principles*, yielding 80 discrete treatments of the *Principles*. As Figure

Finding References to the *Principles*
Search Term/Logic
"American Law Institute" & "Principles of the Law of Family Dissolution"
"ALI" & "Principles of the Law of Family Dissolution"
"Principles of the Law of Family Dissolution"
"ALI Principles of Family Dissolution"
"Principles of Family Dissolution"

These searches produced 120 cases on LexisNexis, 122 Cases on Westlaw.

71 This analysis found scant impact with the two groups at which the *Principles* were directed, rulemakers (legislators) and decisionmakers (judges). Although a single state, West Virginia, borrowed from the *Principles* in enacting child custody legislation, no state code section or proposed legislation has referenced the *Principles* since 1990. Even in the custody realm, no legislature appears to have followed West Virginia in adopting the *Principles*' custody proposals and neither has any legislature enacted legislation to effect the *Principles*' parent by estoppel proposals. While this empirical analysis cannot definitively establish that the *Principles* have not had some legislative influence somewhere, if legislatures are borrowing from the *Principles*, they are certainly not tipping their hands.

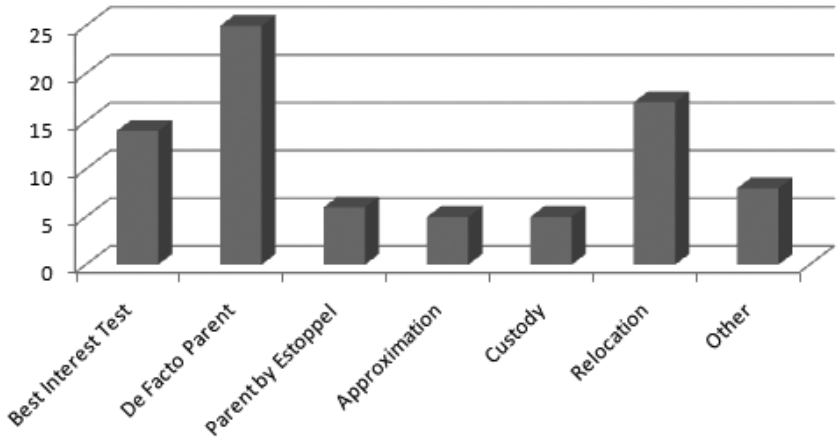
The *Principles* found more success with the courts, yet even this impact is slight and mixed. By 2008, a mere one hundred cases had cited to the *Principles* since 1990 (although the *Principles* were not published until 2002, courts previously cited to draft versions of the *Principles*), less than half the number of cases that cite to two treatises published contemporaneously with the *Principles*. While the cases citing the *Principles* come from twenty-nine states and the U.S. Supreme Court, courts in six New England states account for almost half (48) of those citations. How the courts use the *Principles*' recommendations tells an even starker story. Courts reject the *Principles'* recommendations more often than they accept them, by a ratio of 1.5 to 1. But by far and away, courts use the *Principles* most often to bolster the court's holding in a case that would have come out the same way in the absence of the *Principles* (24% of cases).

72 *See* Appendix A.

73 *See* Appendix A. Other chapters address alimony, property distribution, child support, premarital agreements, domestic partnerships, and the role of fault.

2 shows, while courts look to Chapter 2 for guidance on a range of issues from relocation to the best interest test, a plurality of the cases citing Chapter 2, twenty-five, revolved around de facto parenthood, more than any other topic grappled with in these cases.[74]

Figure 2: ***Chapter 2 Cases by Subject Matter***[75]



What courts do with the ALI's recommendations is especially revealing. Using the coding protocol created for my 2008 co-authored empirical study of the *Principles*, which is reproduced in Figure 3,[76] two students coded the courts' treatments of

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74 *See* Appendix B for cases discussing the Best Interest Test, Parent by Estoppel, Approximation Standard, Custody, Relocation, and other matters.

75 "Other" questions for which courts have cited Chapter 2 of the *Principles* include visitation, visitation modification, reliance on division of caretaking functions rather than the child's wishes, family structure, domestic partners, parenting plans, and interference with visitation rights. *See* Schmitz v. Schmitz, 88 P.3d 1116 (Alaska 2004) (Parenting Plan); Riepe v. Riepe, 91 P.3d 312 (Ariz. Ct. App. 2004) (Domestic Partners); Young v. Hector, 740 So. 2d 1153 (Fla. Dist. Ct. App. 1999) (Caretaking Functions performed by legal mother); Jacobs v. Jacobs, 915 A.2d 409 (Me. 2007) (Family Structure); R.S. v. M.P., 894 N.E.2d 634 (Mass. App. Ct. 2008) (Visitation Modification); McAllister v. McAllister, 779 N.W.2d 652 (N.D. 2010) (Visitation); Sweeney v. Sweeney, 693 N.W.2d 29 (N.D. 2005) (Interference with Visitation Rights); Osmanagic v. Osmanagic, 872 A.2d 897 (Vt. 2005) (Decline to Consider on Appeal).

76 While many of the coding categories are self-explanatory, such as Concurrence cited *Principles* (Code 3) and *Principles* cited by dissent (Code 7), a few categories deserve elaboration. CODE 1, Adopted *Principles* subsection,

the *Principles* in each of the twenty-five de facto parent cases.[77]

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includes cases that simply adopted a legal rule borrowed from the *Principles*, as well as lower court decisions affirmed as not being an abuse of discretion and which rested on a section of the *Principles*. CODE 2, Adopted *Principles'* rule with some modification, includes cases that borrowed heavily from the *Principles*, but added additional elements to the *Principles'* test, as the Massachusetts Supreme Judicial Court did in *In re Care and Protection of Sharlene.* CODE 5 Used *Principles* as a "pile-on" when the case would have come out the same way anyway, gauges the degree of reliance on the *Principles*. A case is coded as a "5" when the court relied on existing state code sections or case law that was on point and pre-dated the *Principles*, or when it borrowed from the law of a sister jurisdiction and only in passing noted that the borrowed approach was also consonant with the *Principles*. CODE 6, made reference to *Principles*, but otherwise declined to adopt the *Principles'* rule, relies on explicit statement by a court that it is not adopting the *Principles'* approach, or a court's references to the *Principles*' approach while affirming a different approach. Thus, for example, in *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004), two female same-sex partners cohabited in a long-term relationship during which they had a child together via artificial insemination. After their relationship ended, C.E.W. sought and received parental rights and responsibilities for the child as a de facto parent. The Maine Supreme Judicial Court affirmed the lower court's judgment, but decided the case on other grounds, concluding that that the lower court erred, stating, "[a]lthough both opinions cite to the A.L.I.'s Principles, neither adopts its standard, nor do we do so today." *Id.* at ___. CODE 8, Declined to adopt the *Principles'* rule because the question is a legislative one, as well as CODE 9, Flat out rejected the *Principles'* rule, rely on explicit statements by the court. CODE 10, *Principles* argued by a party but not reached by the court for procedural reasons, is best illustrated by the case of *In re Parentage of M.F.*, 170 P.3d 601 (Wash. Ct. App. 2007). In that case, a stepfather attempted to receive residential time with his stepdaughter by being named a de facto parent. The court stated that it had "no reason . . . to either adopt or reject the *Principles*." *Id.* at __. While declining to address the issue further, the court noted that even if Section 2.04(1)(c) of the *Principles* was adopted, the stepfather would not have a cause of action. As Figure 4 shows, no de facto parent cases fell into codes 4, 11, and 12. For examples of non-de facto parent cases that fall into these codes, see *Guiding Principles or Obligatory Footnote*.

77 Two of the three research assistants who worked on this article (WB and MH) independently coded the courts' treatments of the *Principles* using the coding protocol contained in Figure 3. To measure inter-rater reliability, we used Jacob Cohen's calculation of kappa coefficient. *See generally* J. Cohen, *A Coefficient of Agreement for Nominal Scales*, 20 EDUC. & PSYCHOL. MEASUREMENT 37 (1960). We tallied the agreement of the two raters over the twelve coding categories for each of the twenty-five discrete de facto parent cases citing the *Principles*. In three instances, there was initial disagreement among the coders. This yielded a kappa coefficient for our raters of 0.3333. According to Landis and Koch, a kappa value between 0.21 and 0.40 should be interpreted as

Where a given case included more than one treatment of the *Principles*—that is, the case discussed multiple subsections of the *Principles*—each treatment was coded separately.[78]

Figure 3: *Lines of Cases Broken Down by Treatment*

Code	Treatment	Tally	% of Tally
1	Adopted *Principles* subsection	1	4.00
2	Adopted *Principles'* rule with some modification	2	8.00
3	Concurrence cited *Principles*	3	12.00
4	Used *Principles* to inform existing tests	0	0
5	Used *Principles* as a "pile-on" when the case would have come out the same way anyway	6	24.00
6	Made reference to *Principles*, but otherwise declined to adopt the *Principles'* rule	4	16.00
7	*Principles* cited by dissent	5	20.00
8	Declined to adopt the *Principles*' rule because the question is a legislative one	1	4.00
9	Flat out rejected the *Principles'* rule	1	4.00
10	*Principles* argued by a party but not reached by the court for procedural reasons	2	8.00
11	Cited the *Principles* as evidence of a social phenomenon	0	0
12	Cited the *Principles* for a description of the majority rule	0	0
Total		25[79]	100%

To tease out the *Principles'* impact, we also constructed discrete lines of cases using Keycite searches of each case.[80] Under the doctrine of *stare decisis*, a rule can only be adopted once in a

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fair agreement. *See* J.R. Landis & G.G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 671, 671-79 (1977).

78 An example of this occurred in *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999). There, both the majority and the concurring opinions cited the *Principles*. The majority used the *Principles* to bolster the opinion they would have reached regardless of the existence of the *Principles* (Code 5), while the concurrence also referenced the *Principles* (Code 3).

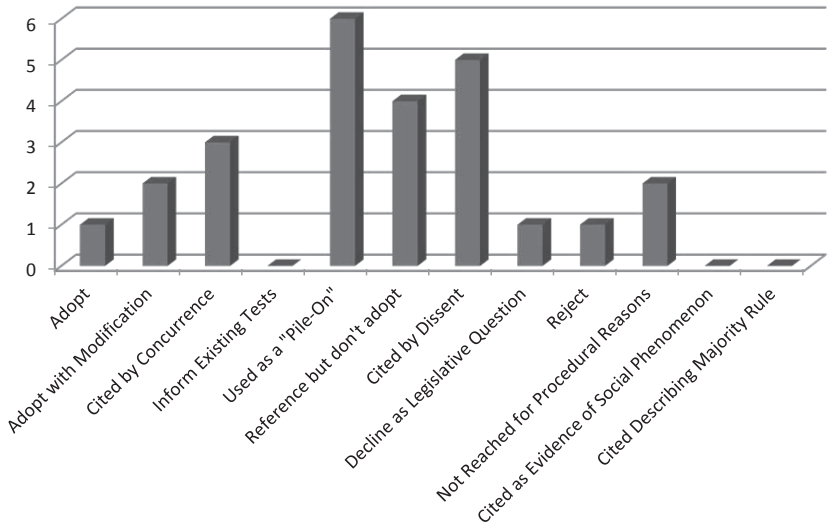
79 Some lines of cases are counted more than once. For example, the majority in E.N.O. v. L.M.M. adopted the *Principles*, but the dissent also cited the *Principles*. *Id.* at 891, 897.

80 Using the Keycite results, we also examined whether an opinion was subsequently withdrawn after a rehearing en banc, legislatively abrogated, or otherwise overturned. We found no negative history for the twenty-five de facto parent cases citing the *Principles*.

given jurisdiction.[81] Thus, subsequent cites to the initial case that announced the rule are as much a function of *stare decisis* as they are of the *Principles*' influence.

Figure 4 shows the treatment by judges of the *Principles*, when analyzed by lines of cases. In one in five cases (20%), the dissent cited the *Principles* (Code 7), while in 12% of the cases, a concurrence cited the *Principles* (Code 3).[82] The remaining citations occur in majority opinions. Some of these cases embrace the *Principles* (Code 1, 4%),[83] while others use the *Principles* as a leaping-off point (Code 2, 8%).[84] Other cases decline to accept the *Principles*' test (Code 6, 16%), decline to adopt the rule suggested the reporters because such questions are best addressed by the legislature (Code 8, 4%), or reject the ALI approach outright (Code 9, 4%).

Figure 4: ***Lines of Cases by Treatment***



81 BLACK'S LAW DICTIONARY 1443 (8th ed. 2004) (defining stare decisis as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation").

82 Instances in which concurrences cited the *Principles* include *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), *Stitham v. Henderson*, 768 A.2d 598 (Me. 2001), and *McAllister v. McAllister*, 779 N.W.2d 652 (N.D. 2010) . *See* Appendix C

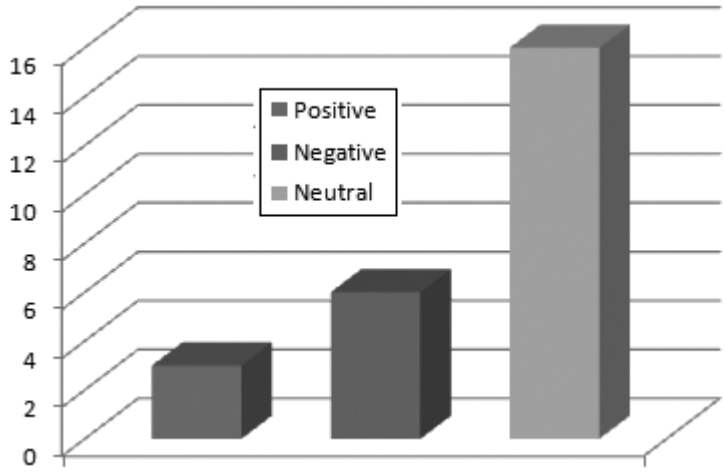
83 *See* Appendix C.

84 *See* Appendix C.

But the overwhelming use of the *Principles* by courts is as a "pile-on" to support an outcome the court would have reached anyway under its own precedent or state law (Code 5, 24% of cases). Thus, in nearly a quarter of cases, the *Principles* serve as an obligatory footnote—used by judges, as Judge Robert Sack once quipped, "like drunks use lampposts, more for support than for illumination."[85]

Grouping the lines of cases into positive treatments (Codes 1, 2, and 4) and negative treatments (Codes 6, 8, and 9) shows the court's deep skepticism of the ALI's treatment of de facto parents. The six negative treatments outstrip the positive treatments by a ratio of 2 to 1, as Figure 5 shows. Cases citing the *Principles* in a more neutral way (Codes 3, 5, 7, 10, 11, and 12) dwarfs the positive and negative treatments alike.

Figure 5: ***Lines of Cases by Coding***



This empirical snapshot suggests that, on the whole, the courts have been tepid, at best, about the ALI's proposal for de facto parenthood. As the next Part shows, an in-depth examination of the decisions citing the *Principles'* test reveals that modern courts still exhibit a preference for the rights of legal parents to raise and care for their children. Indeed, many courts refuse to accept the ALI's test without adding more demanding require-

85 Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

ments to safeguard the welfare of children and preserve the prerogatives of legal parents.

IV. Preserving the Good Without Rewarding the Bad

An important lens for evaluating the success of the ALI test in the marketplace of ideas about parental rights and responsibilities is whether courts are willing to hand-out the full set of parental rights envisioned by the ALI to live-in partners who performed caretaking functions for a child. To capture the degree of the *Principles'* success, we constructed the categories summarized in Figure 6 and contained in Appendix D.

As Figure 6 graphically depicts, a close reading of the de facto parent cases confirms the court's reluctance to follow the ALI test blindly. The single court willing to hand-out the full panoply of parental rights envisioned by the ALI did so in a case, *C.E.W. v. D.E.W.*, in which the parties stipulated to de facto parent status.[86] By contrast, those cases awarding visitation to live-in partners made clear that visitation must serve the child's best interests, a consideration supplanted in the ALI approach by "approximating" past caretaking. Three other courts remanded for a determination of rights.[87] One case concluded that the de facto parents should receive no parental rights,[88] while a host of cases concluded either that a live-in partner failed to carry his burden of proof or that the legal parent should retain the decision about contact with the child.[89] All in all, nearly every court put a significant thumb on the scale for safeguarding children with welfare and harm determinations, and for protecting the prerogatives of legal parents to decide who may, and may not, see their children.[90]

This Part examines these cases in detail.

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86 845 A.2d 1146 (Me. 2004). *See infra* Part IV.A.

87 *See infra* Part IV.B.

88 *See* Appendix D, category 3.

89 *See infra* Part IV.D .

90 *See infra* Part IV.D.

Figure 6.

A. *The Rare Case Awarding Full Rights*

Importantly, the rights awarded in *C.E.W.* resulted from a crucial stipulation in the litigation by both parties, namely that a former same-sex live-in partner was indeed a child's de facto parent. In *C.E.W. v. D.E.W.*,[91] C.E.W. filed a complaint in superior court against her former same-sex partner, D.E.W., the child's biological mother via artificial insemination. C.E.W. sought a declaration of her parental rights and responsibilities for the child and sought to equitably estop D.E.W. from denying her status as a parent. The two women made the decision to have the child together and signed a parenting agreement outlining their intention to maintain equal parental status with regard to the child. The superior court accepted both parties' stipulation that C.E.W. had acted as the child's de facto parent and entered a summary judgment declaring C.E.W. eligible for an award of parental rights and responsibilities.[92]

On appeal, the Supreme Judicial Court of Maine affirmed the lower court's ruling, finding no error of law.[93] Because C.E.W.'s status as a de facto parent was not contested, the court limited itself to "the remedy once de facto parenthood has been established."[94] Not to be misunderstood, the court noted in a footnote that it was not adopting the ALI test.[95] The court stated, however, that when the term "de facto parent" is ultimately "fleshed out by the legislature or courts in the future, it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in child's life"[96]—precisely the kind of qualitative assessment envisioned by Professor Russell Doubash

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91 C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004).

92 *Id.* at 1146–48.

93 *Id.* at 1152.

94 *Id.*

95 *Id.* n.1 (noting that two earlier cases in Maine, *Stitham v. Stitham* and *Rideout v. Riendeau*, "both cite to the ALI Principles, [but] neither adopts it standard, nor do we do so today").

96 *Id.*

was rejected by the ALI. And in sharp contrast to the ALI approach, the live-in partner paid child support for the child.[97]

B. *Visitation Require a Showing of Best Interests*

On the question of the scope of rights de facto parents should receive, the outright adoptions of the ALI test are as instructive as the cases rebuffing the ALI approach. All adoptions of the *Principles* occurred in a single line of Massachusetts cases beginning with *Youmans v. Ramos*.[98] There, Youmans sought custody of his daughter, Tamika E., from Tamika's aunt and permanent guardian, Ramos, with whom Tamika had lived for most of her life. The trial judge vacated Ramos' guardianship and awarded custody of Tamika to Youmans, but granted Ramos visitation rights and telephone contact. Youmans appealed, arguing that the trial judge lacked the authority to order visitation with Ramos in the absence of a statute permitting visitation rights for a nonparent.[99] The Massachusetts Supreme Judicial Court upheld the lower court's ruling, adopting verbatim the ALI's definition and treatment of de facto parents.[100] Crucially, this decision garnered Ramos only visitation, not the full panoply of parental rights contemplated by the *Principles.*

It is true that in the five cases awarding only visitation, in two the live-in partner sought only visitation and not full custody. Nonetheless, in three cases, the parties sought full parental rights but did not receive them. Here, *R.D. v. A.H.* is illustrative. In *R.D. v. A.H.*,[101] the former live in girlfriend—R.D.—of the biological father and the child's de facto parent sought permanent guardianship with custody against the biological father. While the court did not disturb the prior determination that R.D. was the child's de facto parent, it nevertheless rejected her claim for

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97 Email from Mary Bonauto, Civil Rights Project Director, Gay & Lesbian Advocates & Defenders, to Merilys Huhn, Research Assistant to author, Wash. & Lee Sch. of Law (Sept. 8, 2010, 1:59 PM EST) (on file with Hofstra Law Review) (providing summary from memory because she lacked forwarding address for C.E.W. and explaining that the child ultimately resided with the former live-in partner, who financially supported the child).

98 429 Mass. 774 (1999). *See* Appendix C.

99 *Id.* at 774–775.

100 *Id.* at 776.

101 R.D. v. A.H., 912 N.E.2d 958 (Mass. 2009).

full custody because she could not prove that the biological father was an unfit parent. R.D. was given visitation rights only.

C. *Many Courts Demand Proof of Harm Missing from the ALI Test*

Just as the outright adoptions are instructive, so are the modifications of the ALI test. As the Introduction chronicled in excruciating detail, the Massachusetts Supreme Judicial Court modified the ALI test to avoid an "unthinkable result" in Haleigh's case.[102] The court clarified that when a child develops a significant preexisting relationship with a live-in partner or other adult, with the parent's assent, it is that relationship that "would allow an inference, when evaluating a child's best interests, that measurable harm would befall the child on disruption of that relationship."[103] Far from dispensing with the best interests test in favor of a time-in-time-out entitlement to shared custody, the court clarified that the child's best interests and welfare remain the driving consideration. Other courts have followed this lead, awarding visitation rights to a live-in partner only when it serves the child's best interest to do so.[104]

Some cases that fail to find that a live-in partner qualified as a de facto parent also emphasize best interests and harm considerations. For example, in *Smith v. Jones*,[105] Smith and Jones began a same-sex relationship in 1995. In 2002, Jones adopted the child in dispute, Liza.[106] After their relationship ended in 2004, Smith and Jones arranged for visitation with both children, but soon Smith filed for joint legal and physical custody.[107] The trial judge denied Smith's petition, finding she did not reach de facto parent status because she lacked four criteria: "intent, time, harm, and best interests."[108] The Appeals Court of Massachusetts affirmed. Although harm may come to Liza from severing her relationship with Smith, that harm would be mitigated by

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102 *In re* Care and Protection of Sharlene, *supra* note 12.

103 *Id.* at 767.

104 *See* Appendix D, Category 5.

105 868 N.E.2d 629 (Mass. App. Ct. 2007).

106 *Id.* at 630.

107 *Id.* at 631.

108 *Id.* at 630 (internal citations omitted).

Liza's relationship with Jones.[109] Further, Smith failed to demonstrate an intent to co-parent Liza while the couple was together because Jones made major decisions about Liza's well being without consulting Smith—for instance, when she made the final decision to adopt Liza and when she failed to authorize Smith to make medical decisions for Liza.[110] As with the modification cases, *Smith* restates the centrality of an affirmative finding that no further contact will harm the child in ways that cannot be compensated for by the legal parent.

D. *Courts Placing a Thumb on the Scale for Mothers' Prerogatives to Decide*

Just as these cases emphasize the welfare-protecting best interest test, so, too, do the cases that outright reject the ALI approach. These cases go a step further, however, and place a thumb on the scale for the mother's prerogative to decide what happens with her child. Consider *Janice M. v. Margaret K.*[111] There, the court flat-out rejected the *Principles*. During the eighteen years in which Janice M. and Margaret K. were in a committed same-sex relationship, Janice M. adopted a daughter, Maya.[112] After breaking up, Janice M. refused to let Margaret K. see Maya.[113] Margaret K. sued for visitation rights, claiming that she qualified as a de facto parent.[114]

The court refused to accept de facto parenthood as a legal status in Maryland, noting that even in jurisdictions that recognize the status, "where visitation or custody is sought over the objection of the [biological] parent . . . the *de facto* parent must establish that the legal parent is either unfit or that exceptional circumstances exist."[115] Exceptional circumstances are not determined by a rigid test; instead all the factors before the court in a given case come into play.[116] The court acknowledged that

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109 *Id.* at 633–34. The court recognized the earlier adoption of the *Principles* regarding de facto parenthood in *E.N.O. Id.* at 631–32.

110 *Id*. at 634–35.

111 948 A.2d 73 (Md. 2008).

112 *Id.* at 74.

113 *Id.* at 76–77.

114 *Id.* at 85–86.

115 *Id.* at 87.

116 *Id.* at 92.

while meeting "the requirements [for] . . . *de facto* parent status [may be] . . . a strong factor to be considered in assessing whether exceptional circumstances exist," it would not be "determinative as a matter of law."[117] Clearly, the court created a higher standard for awarding parental rights over the objection of the legal parent than the ALI's chores and time-in-residence test.

As Figure 6 illustrates, many courts take a hard, in-depth look at the quality of the relationship between the child and the father-figure, requiring that the live-in partner fulfill the child's psychological needs for a parent and be seen by the child as a parent.[118] Some of these courts require a showing entirely absent from the ALI's test. Once a live-in partner meets the de facto parent standard, he must overcome the presumption that the child's biological parent is acting in the child's best interests of the child by denying access. He must also show that ending the child's ongoing relationship with the de facto parent would affirmatively injure the child.

Other courts jealously protect the prerogatives of legal parents to police who receives access to their children, using the doctrine of standing. For example, in *White v. White*,[119] Leslea and Michelle White began a same-sex relationship in 1999, which concluded in 2004 after each had given birth to a child via artificial insemination: Michelle to C.E.W. and Leslea to Z.A.W.[120] Beginning in 2006, Michelle refused to let Leslea and Z.A.W. have any contact with C.E.W., so Leslea filed a petition for a declaration of maternity, custody, and child support. The trial court dismissed Leslea's petition.[121] The Missouri Court of Appeals affirmed because, most significantly, Leslea lacked standing to bring a suit.[122] Because C.E.W. already had an identified natural mother, Leslea could not sue to declare a mother-child relationship under Missouri's Uniform Parentage Act ("MoUPA").[123] Furthermore, although MoUPA was not the sole means of establishing parentage in Missouri, even if Leslea did

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117 *Id.* at 93.

118 These cases primarily appear in Appendix D, Category 7.

119 293 S.W.3d 1.

120 *Id.* at 6.

121 *Id.*

122 *Id.* at 17.

123 *Id.* at 11 (citing MO. REV. STAT. §§ 210.817-210.852 (2000)).

act *in loco parentis* or as a de facto parent while she and Michelle were together, the status terminated when they broke up.[124] Finally, Leslea could not pursue a claim of equitable estoppel because it is a defensive claim, not a basis for standing.[125] Leslea cited the *Principles* for a definition of de facto parenthood, but the court declined to adopt the rule.[126]

E. *Courts That Pass over the ALI Test for Another Approach*

As Figure 6 demonstrates, the greatest bulk of de facto parent cases citing the *Principles* dispatch the claim by a live-in partner or other adult on a different basis than the ALI test—often over the urging of a concurrence or dissent that the ALI test would provide the better decisional tool.[127] This occurred, for

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124 *Id.* at 16.

125 *Id.* at 17.

126 *Id.* at 14–16.

127 In *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), the Rideouts petitioned the district court for visitation with their three grandchildren under the Grandparents Visitation Act, 19-A ME. REV. STAT. §§ 1801-1805 (1998). The district court found that the Rideouts met the statutory requirements to be entitled to visitation rights, but held that the Act was an unconstitutional violation of the Fourteenth Amendment. On appeal, the Supreme Judicial Court of Maine vacated the judgment and remanded with instructions to apply the Act, concluding that the state has a compelling interest in allowing grandparents who have acted as parents to pursue the right to have continued contact with their grandchildren. *Id.* at 294–95. The concurrence cited the *Principles* in support of the court's ruling as evidence of a trend to recognize de facto parenthood and bestow visitation rights upon such figures. *Id.* at 306–07.

Stitham v. Henderson also contained a strong concurrence. 768 A.2d 598 (Me. 2001). There, during the course of Henderson's marriage to Norma, Norma gave birth to a child, K.M.H. The couple subsequently divorced, and Henderson was awarded contact with K.M.H. and ordered to pay child support. After the divorce, Norma married Stitham, and a DNA test showed that Stitham was K.M.H.'s biological father. Norma filed a motion in District Court seeking a declaration that Henderson was not K.M.H.'s biological father, but the court denied the motion on the ground of res judicata. Later, Stitham filed an action in Superior Court against Henderson requesting that Stitham be declared K.M.H.'s biological father. Court-ordered DNA testing showed that Henderson was not K.M.H.'s biological father. Henderson then moved to counterclaim in order to establish his parental rights. Stitham objected and moved for summary judgment, which was granted by the court. On appeal, the Supreme Judicial Court of Maine affirmed the lower court but left it up to the district court in the pending post-divorce action to decide whether Henderson's continued participation in K.M.H.'s life was in K.M.H.'s best interest. *Id.* at

example, in *Smith v. Gordon*.[128] The court declined to adopt the *Principles*, stating that it was the legislature's duty to determine the answers to crucial questions like time limitations concerning de facto parenthood. There, a lesbian couple sought to adopt a child together, A.N.S., but because of Kazakhstani law, only one woman, Smith, was able to legally adopt A.N.S.[129] From A.N.S.'s adoption in March 2003, Smith and Gordon shared child care expenses.[130] Gordon did not seek to adopt A.N.S. before the couple broke up in May of 2004.[131] Smith permitted Gordon to visit A.N.S. until June of 2004, at which time Gordon filed a petition for custody as a legal parent under the Uniform Parentage Act of Delaware ("DUPA"), arguing that she was A.N.S.'s de facto parent under DUPA.[132] The trial court agreed. The Supreme Court of Delaware reversed because although the *Principles* would recognize ex live-in partners as de facto parents, the Delaware legislature knew of the *Principles* when adopting DUPA but did not embrace the concept.[133] The court concluded that "[p]roviding relief in such situations . . . is a public policy decision for the General Assembly to make."[134]

599–600, 603. The concurrence referred to the *Principles*, urging that the district court had the authority to recognize Henderson as K.M.H.'s de facto parent. *Id.* at 605–606.)

128 Smith v. Gordon, 968 A.2d 1 (Del. 2009).

129 *Id.* at 3.

130 *Id.*

131 *Id.*

132 *Id.* at 4 (citing DEL. CODE ANN. tit. 13, §§ 8-101-8-904 (2008).

133 *Id.* at 10–11.

134 *Id.* at 16. Subsequently, the Delaware legislature enacted DEL. CODE ANN tit. 13, § 8-201 (c), which permits individuals to bring parentage actions to be recognized as de facto parents when the adult:

> (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
>
> (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
>
> (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

F. *Courts That Would Circumscribe the ALI Approach*

This is not to say that a close reading yields a uniformly negative approach to the *Principles* test. Some courts appear willing to embrace the test while sharply circumscribing the set of live-in partners who would be eligible. *Killingbeck v. Killingbeck* provides such an example.[135] In *Killingbeck,* the mother of child, Devon, was unsure whether Killingbeck or Rosebrugh was Devon's father. However, Killingbeck signed an acknowledgement of parentage. It was later discovered through genetic testing that Rosenbrugh was Devon's biological father.[136] Rosenbrugh then sought custody of Devon.[137] The trial court or-

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135 Killingbeck v. Killingbeck, 711 N.W.2d 759 (Mich. Ct. App. 2005). Other instances in which the dissenting opinion cited the *Principles* include: Riepe v. Riepe, 91 P.3d 312 (Ariz. Ct. App. 2004) (In *Riepe*, after the death of David Riepe, his son, Cody, who had been living with his father and stepmother, Janet Riepe, went to live with his biological mother, Brandy Jo Riepe. Janet Riepe filed a petition for visitation rights with Cody, which was denied by the lower court, which held that under Arizona law, Janet was required to "prove that Cody's relationship with her was equal to or superior to the relationship he shared with his legal parents." *Id.* at 313. The Court of Appeals of Arizona disagreed with this assessment, stating that Arizona law "authorizes the court to award reasonable visitation under such circumstances if the factors set forth in that provision are otherwise satisfied," and reversed and remanded the case. *Id.* The dissenting opinion cited to the *Principles* and *E.N.O.* when discussing how courts outside of Arizona have defined "parent." *Id.* at 326.); E.N.O. v. L.M.M., 711 N.E.2d 886, 896-97 (Mass. 1999) (criticizing the majority's adoption of the de facto parent standard from the *Principles*); Janice M. v. Margaret K., 948 A.2d 73, 96 (Md. Ct. App. 2008) (citing the *Principles* definition of de facto parenthood); *In re* Marriage of Winczewski, 72 P.3d 1012 (Or. Ct. App. 2003) (In *Winczewski*, the paternal grandparents of two children, A and J, sought custody of the children after their father's death. The trial court granted custody, finding that it was in the children's best interests. *Id.* at 1013–14. On appeal, the Oregon Court of Appeals agreed with the children's mother that the trial court applied an incorrect standard. *Id.* at 1014. However, the court found that the mother had a rebuttable presumption of acting in the children's best interests, and that the grandparents had successfully overcome this presumption. *Id.* at 1029. The lower court decision was affirmed by an equally divided court. *Id.* at 1011. The dissent cited the *Principles* when discussing how other states' courts had granted grandparents who had acted as parental figures the right to seek visitation with the child they had cared for. *Id.* at 1058.)

136 Killingbeck, 711 N.W.2d at 762.

137 *Id.*

dered parenting time for Killingbeck as a de facto parent.[138] On appeal, the Michigan Court of Appeals reversed the order for parenting time, concluding that the doctrines of equitable parenthood and estoppel only applied to children born or conceived during the marriage.[139] Thus, Mr. Killingbeck had no right to parenting time as a de facto parent. However, the court decided that "the acknowledgement of parentage gave Killingbeck status as a parent, eligible to pursue parenting time under the Child Custody Act."[140] Furthermore, the trial court's revocation of the acknowledgement was in error because "[r]evocation of an acknowledgement of parentage, even in cases where there is 'clear and convincing evidence . . . that the man is not the father,' must be warranted by the 'equities of the case,'" which the trial court did not consider.[141] The court remanded with instructions to reconsider the revocation of the acknowledgement of parentage.[142] The dissenting opinion cited the *Principles* and *Youmans* with respect to the definition of de facto parenthood.[143]

While it remains to be seen what ultimately will come of the *Principles*, it is evident that the *Principles* have not significantly increased the chances that live-in partners will receive full parental rights. A significant fraction of courts have sided with mothers, allowing them to decide who receives access to their children. Even those cases that entertain claims by live-in partners find that the live-in-partners cannot meet their burden to qualify as a de facto parent as often as those cases find that they do.[144]

V. Conclusion

The ALI borrows its concept of de facto parents from case law—although it enlarges this concept immensely—in order to respond to compelling, sympathetic cases in which there is a societal interest in continuing contact between a child and a father-

138 *Id.* at 762–63.
139 *Id.* at 765.
140 *Id.* at 765 (citing MICH. COMP. LAWS § 722.21 et seq).
141 *Id.* at 766 (citing MICH. COMP. LAWS § 722.1011(3)).
142 *Id.* at 769.
143 *Id.* at 774.
144 *See* Figure 6; Appendix D, Categories 2 and 5.

figure. Think, for example, of an instance where the mother has died and there is a contest between a long-absent biological dad and a father-figure who has been parenting the child during the majority of the child's lifetime.

But the drafters, without substantiation, simply assumed that continuing contact between a child and a live-in partner—who will almost always be male[145]—will be an unadulterated good. Thus, the *Principles* do not look for a bonded, dependent relationship of a parental nature between the child and the de facto parent in deciding which relationships to preserve. Instead the *Principles* opt instead for an easily administrable test based on chores and time-in-residence that leaves little room for judicial discretion and judgment. Fortunately, the muted response to the *Principles* shows that courts and policy-makers around the country are not blindly following the ALI's lead in abandoning a more nuanced look at adult-child relationships. And for many of the children involved, this is a good thing.

145 *See supra* note 30. While courts utilize the ALI's test for de facto parent status in same-sex partner cases, this child-protection critique offered here is limited only to heterosexual male live-in partners. *See supra* note 27.

APPENDIX A: All Cases Citing to the *Principles*				
Case:	**Citation**	**Chapter(s):**	**Treatment Subject(s):**	**Page(s):**
A.H. v. M.P.[146]	857 N.E.2d 1061 (Mass. 2006)	2	De Facto Parent, Parent by Estoppel, Best Interests Test	1064, 1069-74
Abbott v. Virusso	862 N.E.2d 52 (Mass. App. Ct. 2007)	2	Best Interests Test, Relocation, Approximation Standard	55-56, 60-61
Blixt v. Blixt	774 N.E.2d 1052 (Mass. 2002)	2	De Facto Parent	1061 & n.15
Bretherton v. Bretherton	805 A.2d 766 (Conn. App. Ct. 2002)	2	Relocation	772-73
C.E.W. v. D.E.W.	2004 ME 43, 845 A.2d 1146	2	De Facto Parent	1152 & n.13
Dupré v. Dupré	857 A.2d 242 (R.I. 2004)	2	Relocation, Best Interests Test	255, 257-59
Eccleston v. Bankosky	780 N.E.2d 1266 (Mass. 2003)	2, 3	De Facto Parent, Child Support	1274-76 nn. 16-17
E.N.O. v. L.M.M.	711 N.E.2d 886 (Mass. 1999)	2	De Facto Parent	891 & n.6, n.10, 893, 896-97
Evans v. McTaggart	88 P.3d 1078 (Alaska 2004)	2	Best Interests Test	1098 & n.53
Hauser v. Hauser	No. CVFA 970401065S,1999 WL 712805 (Conn. Super. Ct. Aug. 27, 1999)	2	Relocation	*1, 2 n.5
Hawkes v. Spence	2005 VT 57, 878 A.2d 273 (Vt. 2005)	2	Relocation	275, 278-82
Hayes v. Gallacher	972 P.2d 1138 (Nev. 1999)	2	Relocation	1140-41

146 Our search results also returned two additional cases, cited works containing the *Principles* in their title, but not the *Principles* themselves. *See* United States v. Batton, 602 F.3d 1191 (10th Cir. 2010) (citing Wilson, *Undeserved Trust*, *supra* note *); Smith v. Smith, 769 N.W.2d 591 (Mich. 2008) (citing Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, in RECONCEIVING THE FAMILY: CRITIQUE OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW ON FAMILY DISSOLUTION, *supra* note *).

APPENDIX A: All Cases Citing to the *Principles*				
Case:	**Citation**	**Chapter(s):**	**Treatment Subject(s):**	**Page(s):**
Heatzig v. MacLean	664 S.E.2d 347 (N.C. Ct. App. 2008)	2	Parent by Estoppel	351
Heide v. Ying Ji	No. 2008-270, 2009 WL 2411561 (Vt. May 29, 2009)	2	Relocation	*2
Hoover v. Hoover	764 A.2d 1192 (Vt. 2000)	2	Relocation	1195-96 n.6, 1202-1208
In re Audrey S.	182 S.W.3d 838 (Tenn. Ct. App. 2005)	2	Best Interests Test	877
In re Care & Prot. of Sharlene	840 N.E.2d 918 (Mass. 2006)	2	De Facto Parent	926
In re Custody of Kali	792 N.E.2d 635 (Mass. 2003)	2	Best Interests Test, Approximation	641 & n.9, 642, 644 n.13
In re E.L.M.C.	100 P.3d 546 (Colo. App. 2004)	2	Best Interests Test	558
In re Farag	No. V-09449/99, 2001 WL 1263324 (N.Y. Fam. Ct. Sept. 28, 2001)	2	Best Interests Test	*1
In re Giorgianna H.	205 S.W.3d 508 (Tenn. Ct. App. 2006)	2	Best Interests Test	523
In re Guardianship of Estelle	875 N.E.2d 515 (Mass. App. Ct. 2007)	2	De Facto Parent	521
In re Guardianship of Victoria R.	2009-NMCA-007, 201 P.3d 169	2	De Facto Parent	175
In re Marr	194 S.W.3d 490 (Tenn. Ct. App. 2005)	2	Best Interests Test	498
In re Marriage of DeLuca	No. A110788, 2006 WL 1349348 (Cal. Ct. App. May 17, 2006)	2	Custody	*8
In re Marriage of Waller	123 P.3d 310 (Or. Ct. App. 2005)	2	Relocation	315 n.6
In re Marriage of Hansen	733 N.W.2d 683 (Iowa 2007)	2	Approximation Standard	695, 697

APPENDIX A: All Cases Citing to the *Principles*				
Case:	**Citation**	**Chapter(s):**	**Treatment Subject(s):**	**Page(s):**
In re Marriage of Winczewski	72 P.3d 1012 (Or. Ct. App. 2003) (Brewer, J., dissenting) (per curiam)	2	De Facto Parent	1058
In re Parentage of L.B.	122 P.3d 161 (Wash. 2005) (en banc)	2	De Facto Parent, Parent by Estoppel	170 n.15, 175 n.23, 176-77 nn.24-25
In re Parentage of M.F.	170 P.3d 601 (Wash. Ct. App. 2007)	2	De Facto Parent	605 & n.23
In re R.A.	891 A.2d 564 (N.H. 2005)	2	Custody	580
Ireland v. Ireland	717 A.2d 676 (Conn. 1998)	2	Relocation	682 & n.5, 696 n.1
J.F. v. J.F.	894 N.E.2d 617 (Mass. App. Ct. 2008)	2	Custody	626-27
Jacobs v. Jacobs	2007 ME 14, 915 A.2d 409	2	Family Structure	411
Janice M. v. Margaret K.	948 A.2d 73 (Md. 2008)	2	De Facto Parent, Parent by Estoppel	74 n.1, 85, 91 n.12, 92 n.13, 95 & n.2, 96 & n.3, 101 n.5
Killingbeck v. Killingbeck	711 N.W.2d 759 (Mich. Ct. App. 2005) (Cooper, P.J., dissenting)	2	De Facto Parent	773 n.28
Malenko v. Handrahan	2009 ME 96, 979 A.2d 1269	2	Relocation	1275
Mason v. Coleman	850 N.E.2d 513 (Mass. 2006)	2	Best Interests Test, Relocation	518-19 & n.10
McAllister v. McAllister	2010 ND 40, 779 N.W.2d 652 (Crothers, J., concurring)	2	Visitation, De Facto Parent	666
McGuinness v. McGuinness	970 P.2d 1074 (Nev. 1998)	2	Relocation	1080 n.1
Miller-Jenkins v. Miller-Jenkins	2006 VT 78, 912 A.2d 951	2	De Facto Parent, Parent by Estoppel	972
Nighswander v. Sudick	No. FA 97393793, 2000 WL 157905 (Conn. Super. Ct. Jan. 26, 2000)	2	Relocation	*6

APPENDIX A: All Cases Citing to the *Principles*				
Case:	**Citation**	**Chapter(s):**	**Treatment Subject(s):**	**Page(s):**
Osmanagic v. Osmanagic	2005 VT 37, 872 A.2d 897	2	Declined to consider on appeal	899
Osterkamp v. Stiles	235 P.3d 178 (Alaska 2010)	2	De Facto Parent	187
Prenaveau v. Prenaveau	912 N.E.2d 489 (Mass. App. Ct. 2009)	2	Approximation Standard	494 n.7
R.D. v. A.H.	912 N.E.2d 958 (Mass. 2009)	2	De Facto Parent	963
R.S. v. M.P.	894 N.E.2d 634 (Mass. App. Ct. 2008)	2	Visitation Modification	639 n.9
Rideout v. Riendeau	2000 ME 198, 761 A.2d 291	2	De Facto Parent	302, 307
Riepe v. Riepe	91 P.3d 312 (Ariz. Ct. App. 2004) (Barker, J., dissenting)	2, 6	De Facto Parent, Domestic Partners	326, 337 n.19
Rogers v. Parrish	2007 VT 35, 923 A.2d 607	2	Relocation	612, 617, 621-22
Rubano v. DiCenzo	759 A.2d 959 (R.I. 2000)	2	De Facto Parent, Parent by Estoppel	974-75
Schmitz v. Schmitz	88 P.3d 1116 (Alaska 2004)	2	Parenting Plan	1123
Smith v. Gordon	968 A.2d 1 (Del. 2009)	2	De Facto Parent	10 & nn.59-60, 11 & nn.61-65,, 16 & n.103
Smith v. Jones	868 N.E.2d 629 (Mass. App. Ct. 2007)	2	De Facto Parent, Best Interests Test	631-33, 634 & n.8, 635 & n.9
Smith v. Smith	769 N.W.2d 591 (Mich. 2008)	2	Custody	593
Stitham v. Henderson	2001 ME 52, 768 A.2d 598 (Saufley, J., concurring)	2	De Facto Parent	605, 606 & n.16
Sweeney v. Sweeney	2005 ND 47, 693 N.W.2d 29	2	Interference with Visitation Rights	38
Thomas v. Arnold	No. FA980546116S, 2002 WL 983343 (Conn. Super. Ct. Apr. 19, 2002)	2	Relocation	*11

APPENDIX A: All Cases Citing to the *Principles*				
Case:	**Citation**	**Chapter(s):**	**Treatment Subject(s):**	**Page(s):**
Troxel v. Granville	530 U.S. 57 (2000)	2	Best Interests Test	101
White v. Moody	171 S.W.3d 187 (Tenn. Ct. App. 2004)	2	Best Interests Test	193
White v. White	293 S.W.3d 1 (Mo. Ct. App. 2009)	2	De Facto Parent	14
Woods v. Ryan	2005 ND 92, 696 N.W.2d 508	2	Custody	518-19
Youmans v. Ramos	711 N.E.2d 165 (Mass. 1999)	2	De Facto Parent, Best Interests Test	167 n.3, 170, n.15, 172 n.20
Young v. Hector	740 So. 2d 1153 (Fla. Dist. Ct. App. 1998)	2	Approximation Standard, Caretaking Functions	1172, 1173 n.6
Zalot v. Bianchi	No. 2005-411, 2006 WL 5866285 (Vt. May 25, 2006)	2	Relocation	*2-3
Acker v. Acker	904 So.2d 384 (Fla. 2005)	5	Compensatory Spousal Payments	393-94
Ashby v. Ashby	2010 UT 7, 227 P.3d 246	5	Compensatory Spousal Payments	255-56
Austin v. Austin	819 N.E.2d 623 (Mass. App. Ct. 2004)	7	Marital Agreements	627-28
Blanchard v. Blanchard	97-2305 (La. 1/ 20/99) 731 So.2d 175	4	Division of Property Upon Dissolution	181
Boemio v. Boemio	994 A.2d 911 (Md. 2010)	5	Compensatory Spousal Payments	921 & n.10
Braun v. Braun	865 N.E.2d 814 (Mass. App. Ct. 2007)	5	Compensatory Spousal Payments	822 & n.19, 823
Brooks v. Piela	814 N.E.2d 365 (Mass. App. Ct. 2004)	3	Child Support	368 n.5, 369 n.8
Clark v. Clark	779 A.2d 42 (Vt. 2001)	3	Child Support	53-54
Cohan v. Feuer	810 N.E.2d 1222 (Mass. 2004)	5	Compensatory Spousal Payments	1226, 1228
Cullum v. Cullum	160 P.3d 231 (Ariz. Ct. App. 2007)	5	Compensatory Spousal Payments	235

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Damone v. Damone	782 A.2d 1208 (Vt. 2001)	4	Division of Property Upon Dissolution	1210 n.1
Dep't of Human Res. v. Offutt	459 S.E.2d 597 (Ga. Ct. App. 1995)	3	Child Support	599
Doucette v. Washburn	2001 ME 38, 766 A.2d 578	4	Division of Property Upon Dissolution	584 n.11
Erickson v. Erickson	1999-NMCA-056, 978 P.2d 347	3	Child Support	352-54
Eyster v. Pechenik	887 N.E.2d 272 (Mass. App. Ct 2008)	7	Marital Agreements	280-82
Franke v. Franke	2004 WI 8, 674 N.W.2d 832	7	Marital Agreements	843 n.21
Garcia v. Mayer	1996-NMCA-061, 920 P.2d 522	4	Division of Property Upon Dissolution	525
Hartman v. Thew	61 P.3d 548 (Haw. Ct. App. 2002)	3	Child Support	551 n.2
Hobbs v. Bates	No. 51463-6-I, 2004 WL 1465949, (Wash. Ct. App. June 28, 2004)	6	Domestic Partners	*1, *8-9
Holleyman v. Holleyman	2003 OK 48, 78 P.3d 921	3, 7	Marital Agreements, Child Support	931 n.13, 936 n.43
Holman v. Holman	84 S.W.3d 903 (Ky. 2002)	4	Division of Property Upon Dissolution	906 & n.9, 907 n.10, 912
In re Clark	910 A.2d 1198 (N.H. 2006)	3	Child Support	1201
In re Marriage of Bonds	5 P.3d 815 (Cal. 2000)	7	Marital Agreements	830-31
J.S. v. C.C.	912 N.E.2d 933 (Mass. 2009)	3	Child Support	941 n.13
Ketterle v. Ketterle	814 N.E.2d 385 (Mass. App. Ct. 2004)	3	Child Support	391-92
Kittredge v. Kittredge	803 N.E.2d 306 (Mass. 2004)	4	Division of Property Upon Dissolution	314, 317
Krize v. Krize	145 P.3d 481 (Alaska 2006)	4	Division of Property Upon Dissolution	487 n.23

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L.M. v. R.L.R.	888 N.E.2d 934 (Mass. 2008)	3	Child Support	939 & n.13
LaBrecque v. Parsons	910 N.E.2d 947 (Mass. App. Ct. 2009)	3	Child Support	951 n.7
Mani v. Mani	869 A.2d 904 (N.J. 2005)	5	Compensatory Spousal Payments	909, 916
Martin v. Martin	913 A.2d 451 (Conn. App. Ct. 2007)	3	Child Support	458 n.6
McCleary v. McCleary	822 A.2d 460 (Md. Ct. Spec. App. 2002)	4	Division of Property Upon Dissolution	468 & n.3
M.M.G. v. Graham	152 P.3d 1005 (Wash. 2007)	3	Child Support	1010 n.4
M.M.G. v. Graham	99 P.3d 1248 (Wash. Ct. App. 2004)	3	Child Support	1253 n.2
Neidlinger v. Neidlinger	52 S.W.3d 513 (Ky. 2001)	4	Division of Property Upon Dissolution	524 n.6
People v. Martinez	70 P.3d 474 (Colo. 2003) (en banc)	3	Child Support	479
Pierce v. Pierce	916 N.E.2d 330 (Mass. 2009)	5	Compensatory Spousal Payments	340
Pursley v. Pursley	144 S.W.3d 820 (Ky. 2004)	7	Marital Agreements	824 n.13
Rosenberg v. Merida	697 N.E.2d 987 (Mass. 1998)	3	Child Support	992 n.8
Salten v. Ackerman	836 N.E.2d 323 (Mass. App. Ct. 2005)	4	Division of Property Upon Dissolution	328 n.7
Shepherd v. Haralovich	170 P.3d 643 (Alaska 2007)	3	Child Support	648 & n.14
Simonds v. Simonds	886 A.2d 158 (Md. Ct. Spec. App. 2005)	5	Compensatory Spousal Payments	175
Slorby v. Slorby	2009 ND 11, 760 N.W.2d 89	5	Compensatory Spousal Payments	96
Smith v. Francisco	737 A.2d 1000 (Del. 1999)	3	Child Support	1006 n.22
Standhardt v. County of Maricopa	77 P.3d 451 (Ariz. Ct. App. 2003)	6	Domestic Partners	463 n.17

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T.F. v. B.L.	813 N.E.2d 1244 (Mass. 2004)	3	Child Support	1253 n.13, 1257 n.4
Terwilliger v. Terwilliger	64 S.W.3d 816 (Ky. 2002)	4	Division of Property Upon Dissolution	825 n.18
United States v. Costigan	No. 00-9-B-H, slip op. (D. Me. June 16, 2000)	6	Domestic Partners	12 n.13
Warren v. Warren	866 A.2d 97 (Me. 2005)	4	Division of Property Upon Dissolution	102
Washburn v. Washburn	2000 WL 33675353 (Me. June 27, 2000)	4	Division of Property Upon Dissolution	¶ 5
Weber v. Weber	1999 ND 11, 589 N.W.2d 358	4	Division of Property Upon Dissolution	360
Weber v. Weber	548 N.W.2d 781 (N.D. 1996)	4	Division of Property Upon Dissolution	783
Weinstein v. Weinstein	911 A.2d 1077 (Conn. 2007)	3	Child Support	1082
Wendt v. Wendt	No. FA96 0149562 S, 1998 WL 161165 (Conn. Super. Ct. Mar. 31, 1998)	4	Division of Property Upon Dissolution	*32, *54, *74, *85, *115, *181

Appendix B: Discrete Chapter 2 Treatments of the *Principles*			
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A.H. v. M.P.	857 N.E.2d 1061 (Mass. 2006)	De Facto Parent	1064, 1070-71, 1073
A.H. v. M.P.	857 N.E.2d 1061 (Mass. 2006)	Parent by Estoppel	1064, 1070 n.13, 1073
A.H. v. M.P.	857 N.E.2d 1061 (Mass. 2006)	Best Interests Test	1071
Abbott v. Virusso	862 N.E.2d 52 (Mass. App. Ct. 2007)	Best Interests Test	56
Abbott v. Virusso	862 N.E.2d 52 (Mass. App. Ct. 2007)	Relocation	56
Abbott v. Virusso	862 N.E.2d 52 (Mass. App. Ct. 2007)	Approximation Standard	55
Blixt v. Blixt	774 N.E.2d 1052 (Mass. 2002)	De Facto Parent	1061 & n.15
Bretherton v. Bretherton	805 A.2d 766 (Conn. App. Ct. 2002)	Relocation	772-73
C.E.W. v. D.E.W.	2004 ME 43, 845 A.2d 1146	De Facto Parent	1152
Dupré v. Dupré	857 A.2d 242 (R.I. 2004)	Relocation	255, 258
Dupré v. Dupré	857 A.2d 242 (R.I. 2004)	Best Interests Test	255, 257
Eccleston v. Bankosky	780 N.E.2d 1266 (Mass. 2003)	De Facto Parent	1271, 1275 n.17
E.N.O. v. L.M.M.	711 N.E.2d 886 (Mass. 1999)	De Facto Parent	891-93, 897
Evans v. McTaggart	88 P.3d 1078 (Alaska 2004)	Best Interests Test	1098 & n.53
Hauser v. Hauser	No. CVFA 970401065S, 1999 WL 712805 (Conn. Super. Ct. Aug. 27, 1999)	Relocation	*1-2
Hawkes v. Spence	2005 VT 57, 878 A.2d 273	Relocation	275, 278-82
Hayes v. Gallacher	972 P.2d 1138 (Nev. 1999)	Relocation	1140-41
Heatzig v. MacLean	664 S.E.2d 347 (N.C. Ct. App. 2008)	Parent by Estoppel	351
Heide v. Ying Ji	No. 2008-270, 2009 WL 2411561 (Vt. May 29, 2009)	Relocation	*2
Hoover v. Hoover	764 A.2d 1192 (Vt. 2000)	Relocation	1195 n.6, 1202-03 & n.6, 1204 & n.7, 1205-06 & n.8, 1207
In re Audrey S.	182 S.W.3d 838 (Tenn. Ct. App. 2005)	Best Interests Test	877
In re Sharlene	840 N.E.2d 918 (Mass. 2006)	De Facto Parent	926
In re Custody of Kali	792 N.E.2d 635 (Mass. 2003)	Best Interests Test	644
In re Custody of Kali	792 N.E.2d 635 (Mass. 2003)	Approximation Standard	641 n.9
In re E.L.M.C.	100 P.3d 546 (Colo. App. 2004)	Best Interests Test	558

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Case:	**Citation**	**Treatment Subject:**	**Page(s):**
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In re Giorgianna H.	205 S.W.3d 508 (Tenn. Ct. App. 2006)	Best Interests Test	523
In re Guardianship of Estelle	875 N.E.2d 515 (Mass. App. Ct. 2007)	De Facto Parent	521
In re Guardianship of Victoria R.	2009-NMCA-007, 201 P.3d 169	De Facto Parent	175
In re Marr	194 S.W.3d 490 (Tenn. Ct. App. 2005)	Best Interests Test	498
In re Marriage of DeLuca	No. A110788, 2006 WL 1349348 (Cal. Ct. App. May 17, 2006)	Custody	*8
In re Marriage of Waller	123 P.3d 310 (Or. Ct. App. 2005)	Relocation	315 n.6
In re Marriage of Hansen	733 N.W.2d 683 (Iowa 2007)	Approximation Standard	695, 697
In re Marriage of Winczewski	72 P.3d 1012 (Or. Ct. App. 2003) (per curiam)	De Facto Parent	1058
In re Parentage of L.B.	122 P.3d 161 (Wash. 2005)	De Facto Parent	176-77 nn.24-25
In re Parentage of L.B.	122 P.3d 161 (Wash. 2005)	Parent by Estoppel	176 n.24, 177 n. 25
In re Parentage of M.F.	170 P.3d 601 (Wash. Ct. App. 2007)	De Facto Parent	605
In re R.A.	891 A.2d 564 (N.H. 2005)	Custody	580
Ireland v. Ireland	717 A.2d 676 (Conn. 1998)	Relocation	682 & n.5, 696 & n.1
J.F. v. J.F.	894 N.E.2d 617 (Mass. App. Ct. 2008)	Custody	626-27
Jacobs v. Jacobs	2007 ME 14, 915 A.2d 409	Family Structure	411
Janice M. v. Margaret K.	948 A.2d 73 (Md. 2008)	De Facto Parent	74, 85
Janice M. v. Margaret K.	948 A.2d 73 (Md. 2008)	Parent by Estoppel	92 n.13
Killingbeck v. Killingbeck	711 N.W.2d 759 (Mich. Ct. App. 2005)	De Facto Parent	774
Malenko v. Handrahan	2009 ME 96, 979 A.2d 1269	Relocation	1275
Mason v. Coleman	850 N.E.2d 513 (Mass. 2006)	Best Interests Test	518
Mason v. Coleman	850 N.E.2d 513 (Mass. 2006)	Relocation	519
McAllister v. McAllister	2010 ND 40, 779 N.W.2d 652	De Facto Parent	666

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McGuinness v. McGuinness	970 P.2d 1074 (Nev. 1998)	Relocation	1080 n.1
Miller-Jenkins v. Miller-Jenkins	2006 VT 78, 912 A.2d 951	De Facto Parent	972
Miller-Jenkins v. Miller-Jenkins	2006 VT 78, 912 A.2d 951 (Vt. 2006)	Parent by Estoppel	972
Nighswander v. Sudick	No. FA 97393793, 2000 WL 157905 (Conn. Super. Ct. Jan. 26, 2000)	Relocation	*6
Osmanagic v. Osmanagic	2005 VT 37, 872 A.2d 897	Declined to consider on appeal	899
Osterkamp v. Stiles	235 P.3d 178 (Alaska 2010)	De Facto Parent	189 & n.41
Prenaveau v. Prenaveau	912 N.E.2d 489 (Mass. App. Ct. 2009)	Approximation Standard	494 n.7
R.D. v. A.H.	912 N.E.2d 958 (Mass. 2009)	De Facto Parent	963
R.S. v. M.P.	894 N.E.2d 634 (Mass. App. Ct. 2008)	Visitation Modification	639 n.9
Rideout v. Riendeau	2000 ME 198, 761 A.2d 291	De Facto Parent	302, 307
Riepe v. Riepe	91 P.3d 312 (Ariz. Ct. App. 2004)	De Facto Parent	326
Rogers v. Parrish	2007 VT 35, 923 A.2d 607	Relocation	612, 617, 622
Rubano v. DiCenzo	759 A.2d 959 (R.I. 2000)	De Facto Parent	974-75
Rubano v. DiCenzo	759 A.2d 959 (R.I. 2000)	Parent by Estoppel	974-75
Schmitz v. Schmitz	88 P.3d 1116 (Alaska 2004)	Parenting Plan	1123
Smith v. Gordon	968 A.2d 1 (Del. 2009)	De Facto Parent	10 & nn.59-65, 11 & nn. 9-10
Smith v. Jones	868 N.E.2d 629 (Mass. App. Ct. 2007)	De Facto Parent	631-32, 634 & nn. 6-8, 635 & nn. 9-10
Smith v. Jones	868 N.E.2d 629 (Mass. App. Ct. 2007)	Best Interests Test	633
Smith v. Smith	No. M2003-02259-COA-R3-CV, 2006 WL 163201 (Tenn. Ct. App. Jan. 23, 2006)	Custody	7
Stitham v. Henderson	2001 ME 52, 768 A.2d 598	De Facto Parent	605 & n.15, 606 & n.16
Sweeney v. Sweeney	2005 ND 47, 693 N.W.2d 29	Interference with Visitation Rights	38

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Case:	**Citation**	**Treatment Subject:**	**Page(s):**
Thomas v. Arnold	No. FA980546116S, 2002 WL 983343 (Conn. Super. Ct. Apr. 19, 2002)	Relocation	*11
Troxel v. Granville	530 U.S. 57 (2000) (Kennedy, J., dissenting)	Best Interests Test	101
White v. Moody	171 S.W.3d 187 (Tenn. Ct. App. 2004)	Best Interests Test	193
White v. White	293 S.W.3d 1 (Mo. Ct. App. 2009)	De Facto Parent	14
Woods v. Ryan	2005 ND 92, 696 N.W.2d 508	Custody	518-19
Youmans v. Ramos	711 N.E.2d 165 (Mass. 1999)	De Facto Parent	167 n.3, 171, 172-73 & n.20
Youmans v. Ramos	711 N.E.2d 165 (Mass. 1999)	Best Interests Test	172–73 & n.20
Young v. Hector	740 So. 2d 1153 (Fla. Dist. Ct. App. 1999)	Approximation Standard	1172 n.3
Young v. Hector	740 So. 2d 1153 (Fla. Dist. Ct. App. 1999)	Caretaking Functions	1172 n.2
Zalot v. Bianchi	No. F598-7-95, 2006 WL 5866285 (Vt. May 25, 2006)	Relocation	*2-3

APPENDIX C: DE FACTO PARENT CASES

Appendix C: De Facto Parent Cases			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
1	Adopt the *Principles*' subsection	Eccleston v. Bankosky, 780 N.E.2d 1266 (Mass. 2003) (de facto parent requires agreement). Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999) (de facto parent, award of visitation serves child welfare). E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (de facto parent, temporary visitation in best interests of child). Smith v. Jones, 868 N.E.2d 629 (Mass. App. Ct. 2007) (failure to adopt child relevant to agreement to be de facto parent; allows consideration).	4/1
2	Adopt the *Principles*' with some modification	*In re* Care & Prot. Sharlene, 840 N.E.2d 918 (Mass. 2006) (modifies Youmans v. Ramos, 711 N.E.2d 165) (Mass. 1999) and requires that the relationship between the child and adult be "loving and nuturing"). A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006) (de facto parent is threshold showing before best interests test for visitation). Smith v. Jones, 868 N.E.2d 629 (Mass. App. Ct. 2007) (allows consideration of best interests and harm to child apart from de facto parent status). *In re* Guardianship of Estelle, 875 N.E.2d 515 (Mass. App. Ct. 2007) (for visitation by guardians, need de facto parent status and showing of child's welfare). *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (en banc) (de facto parent in full legal parity; best interests must be shown).	5/2
3	Concurrence cites to the *Principles*	Stitham v. Henderson, 2001 ME 52, P 25-26, 768 A.2d 598, 605-606 & n.16 (Saufley, J., concurring) (de facto parent gets continuing contact if in child's best interests). Rideout v. Riendeau, 2000 ME 198, P 40, 761 A.2d 291, 306-07 (Wathen, C.J., concurring) (urging that de facto parents may receive visitation). McAllister v. McAllister, 2010 ND 40, P 35, 779 N.W.2d 652, 666 (Crothers, J., concurring) (de facto parent).	3/3
4	Use the *Principles* to inform their existing tests		0/0
5	Use the *Principles* as a "pile-on" when the case would have come out this way anyway	Osterkamp v. Stiles, 235 P.3d 178 (Alaska 2010) (custody case referring to de facto parent). Rideout v. Riendeau, 2000 ME 198, 761 A.2d 291 (grandparent visitation case, refers to de facto parent). Eccleston v. Bankosky, 780 N.E.2d 1266 (Mass. 2003) (not deciding if de facto parent owes child support, support owed for other reasons). Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002) (de facto parent definition cited in grandparent visitation case). Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (same-sex partner visitation, refers to de facto parent). Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 912 A.2d 951 (de facto parent/ parent by estoppel, same-sex partner visitation in accordance with other cases and ALI).	6/6

Appendix C: De Facto Parent Cases			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
6	Make reference to the *Principles*, but otherwise decline to adopt the rule from the *Principles*	C.E.W. v. D.E.W., 2004 ME 43, P14, 845 A.2d 1146 (declines to adopt the ALI's de facto parent standard but concludes that the adult must have "fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life" and be in best interests). R.D. v. A.H. 912 N.E.2d 958 (Mass 2009) (de facto parent seeks custody but custody belongs to legal parent unless unfit). White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (same-sex partner argues de facto parent, court says no authority for this). *In re* Guardianship of Victoria R., 2009-NMCA-007, 201 P.3d 169, 177 (refers to de facto parent but finds that psychological parent may rebut presumption that biological parent acts in best interests of child and may establish extraordinary circumstances warranting the overriding of parental wishes if the child will suffer a "significant degree of depression").	4/4
7	*Principles* cited by dissent	Riepe v. Riepe, 91 P.3d 312, 326, 337 n.19 (Ariz. Ct. App. 2004) (Barker, J., dissenting) (de facto parent). Janice M. v. Margaret K., 948 A.2d 73, 95 & n.2, 96 & n.3, 101 & n.5 (Md. 2008) (Raker, J., dissenting) (de facto parent). E.N.O. v. L.M.M., 711 N.E.2d 886, 896-97 (Mass. 1999) (Fried, J., dissenting) (de facto parent). Killingbeck v. Killingbeck, 711 N.W.2d 759, 773 n.28 (Mich. Ct. App. 2005) (Cooper, P.J., dissenting) (de facto parent). *In re* Marriage of Winczewski, 72 P.3d 1012, 1058 (Or. Ct. App. 2003) (Brewer, J., dissenting) (per curiam) (de facto parent).	5/5
8	Decline to adopt the *Principles* because it is a legislative question	Smith v. Gordon, 968 A.2d 1, 14 (Del. 2009) (declining to recognize de facto parent, legislature to decide crucial questions like time limit).	1/1
9	Flat out rejects the *Principles*	Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (de facto parent status for visitation short-circuits requirement to show unfitness and exceptional circumstances).	1/1
10	*Principles* argued by a party but not reached by the court for procedural reasons	A.H. v. M.P., 857 N.E.2d 1061, 1070-73 (Mass. 2006) (not deciding if de facto parent requires two years). *In re* Parentage of M.F., 170 P.3d 601, 605 (Wash. Ct. App. 2007) (action for de facto parent would be barred for lack of timeliness).	2/2
11	Cite the *Principles* as evidence of a social phenomenon		0/0
12	Cite the *Principles* for a description of the majority rule		0/0

Appendix D: Summary of Rights Sought and Granted

What was Sought	The Result	Status of DFP
1. Determined that the live-in partner or third party is a DFP entitled to full rights		
In *C.E.W. v. D.E.W.*, the mother's former same-sex partner sought a declaration of parental rights and responsibilities for the child and to prevent the partner from denying her parental status while the mother argued that the court should limit the award to reasonable rights of contact. 2004 ME 43, P 5, 845 A.2d 1146, 1157.	The Supreme Judicial Court of Maine found that the partner was the child's DFP because the parties stipulated to this status, therefore entitling her to be considered for an award of parental rights and responsibilities. *Id.*	Former same-sex partner stipulated to be DFP shared a residential schedule with the child's mother[147] but the mother remained the primary custodial parent.[148]
2. Determined that the live-in partner or third party is a DFP who receives less than full rights		
In *Youmans v. Ramos*, the trial court granted visitation to maternal aunt without receiving a petition from her after the father sought to terminate the guardianship held by the aunt and the aunt sought to retain custody. The father then sought to terminate the visitation right in the Supreme Judicial Court of Massachusetts. 711 N.E.2d 165, 167 (Mass. 1999).	The Supreme Judicial Court reinstated the aunt's visitation after the court found her to be the child's DFP. *Id.*	Aunt is found to be DFP and awarded visitation. *Id.*
In *E.N.O. v. L.M.M.*, the birth mother's former same-sex partner sought specific performance of the couple's agreement to allow her to adopt the child (including joint custody and visitation) as well as a temporary visitation order, pending trial. 711 N.E.2d 886, 889 (Mass. 1999).	The Supreme Judicial Court of Massachusetts reinstated the partner's temporary visitation as the child's DFP. *Id.* at 893.	Former same-sex partner found to be DFP and awarded temporary visitation short term but biological mother left the court's jurisdiction so no permanent order is entered. *Id.* at 892-94. The majority cites the *Principles* for definition of DFP. *Id.* at 891. The dissent cites the *Principles* to criticize the lack of limits on de facto parenthood. *Id.* at 896 (Fried, J., dissenting).

147 E-mail from Kenneth P. Altshuler, Partner, Childs, Rundlett, Fifield, Shumway & Altshuler (Aug. 27, 2010, 09:00 EST) (on file with author).

148 E-mail from Mary Bonauto, Civil Rights Project Director, Gay & Lesbian Advocates & Defenders (Aug. 27, 2010, 07:11 EST) (on file with author).

What was Sought	The Result	Status of DFP
In *Rubano v. DiCezno*, the biological mother's former same-sex domestic partner sought only DFP status and to enforce her permanent visitation agreement with the biological mother. 759 A.2d 959, 962-63 (R.I. 2000).	The Supreme Court of Rhode Island found that the partner was the child's DFP and that the family court could enforce parties' agreement to allow her visitation. *Id.* at 971.	Former same-sex partner recognized as DFP and visitation agreement enforced. *Id.* at 968.
In *R.D. v. A.H.*, 912 N.E.2d 958 (Mass. 2009), the former live in girlfriend of the father and the child's DFP sought permanent guardianship with custody against the biological father, but the trial court awarded sole physical and legal custody to the father.	The Supreme Judicial Court of Massachusetts found that the DFP was not entitled to permanent guardianship with custody against the biological father because the father was not an unfit parent.	Former live-in girlfriend is a DFP but is only entitled to visitation.
3. Remanded for determination of rights		
In the case *In re Guardianship of Estelle*, the father sought sole guardianship after trial court granted co-guardianship with the child's maternal aunt and uncle. 875 N.E.2d 515, 515-16 (Mass. App. Ct. 2007).	The Appellate Court of Massachusetts remanded to determine whether father was fit. *Id.* at 516. If he was not, the aunt and uncle would presumably retain legal guardianship. If he was fit, the father would receive custody and the court would have to determine if the aunt and uncle were DFPs and had "continuing rights." *Id.* at 520.	Upon remand, father found to be unfit, received only visitation, and was ordered to pay child support while aunt and uncle retained legal and physical custody.[149]
In the case *In re Parentage of L.B.*, the former same-sex partner of the biological mother sought to establish co-parentage of the child (and sought all the rights and responsibilities of legal parentage available in Washington). 122 P.3d 161, 164-65 (Wash. 2005) (en banc).	The Supreme Court of Washington found that the partner could petition for DFP status upon remand but could not receive visitation under Washington's unconstitutional third party visitation statute. *Id.* at 163.	Remands to determine whether the former same-sex partner met test for DFP. *Id.* at 179.
In *Stitham v. Henderson*, the mother's former husband sought to reverse the declaration that the biological father is the biological father under the doctrine of res judicata	The Supreme Judicial Court of Maine found that the former husband was the child's DFP, but could not equitably estop the biological father from seeking to be declared the	Former husband recognized as DFP but remands to consider what rights to be granted. *Id.* P 17, 768 A.2d at 603. The concurrence cites the *Principles*, urging the court to recognize the

149 Telephone Interview with Mark Zarrow, Partner, Lian, Zarrow, Eynon & Shea (Sept. 2, 2010); Telephone Interview with Roxann Tetreau, Partner, Eden, Rafterty, Tetreau & Erlich (Sept. 2, 2010).

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because the divorce settlement declared the former husband to be the father. The former husband also pursued a counterclaim of equitable parental rights. 2001 ME 52 P 1-3, 6, 768 A.2d 598, 599-600.	biological father and that the former husband was not entitled to a jury trial on equitable parental rights. *Id.* P 9, 16-17, 768 A.2d at 601, 603. The Supreme Judicial Court left it to the district court in the pending post-divorce action to consider if the former husband's continued participation in the child's life was in her best interest. *Id.* P 18, 768 A.2d at 603-04.	former husband as de facto parent. *Id.* P25, 768 A.2d at 605-06 (Saufley, J., concurring).
4. DFP entitled to no rights		
In *Killingbeck v. Killingbeck*, the mother and biological father sought to terminate the alleged father's parental rights but the circuit court awarded the alleged father separate parenting time with the child. 711 N.W.2d 759, 762-63 (Mich. Ct. App. 2005).	The Court of Appeals of Michigan found that the alleged father was not entitled to parenting time as DFP, but remanded to consider whether vacating the revocation of the acknowledgement of parentage would grant him parental rights. *Id.* at 769.	Alleged father is a DFP but has no rights to custody. *Id.* at 765-68. The dissent cites the *Principles* for the definition of de facto parenthood. *Id.* at 773 n.28 (Cooper, P.J., dissenting).
5. Determined that the live-in partner or third party is not a DFP		
In *Smith v. Jones*, the adoptive mother's former same-sex partner sought to be declared the child's DFP and requested joint legal and physical custody. 868 N.E.2d 629, 630-31 (Mass. App. Ct. 2007).	The Appeals Court of Massachusetts found that the partner did not satisfy the criteria of being a DFP and awarded no visitation or custody. Id. at 631-33.	Court rejects DFP status. Id. at 632-33.
In the case *In re Care and Protection of Sharlene*, the stepfather sought to be declared the child's DFP and participate in medical decision-making. 840 N.E.2d 918, 920 (Mass. 2006).	The Supreme Judicial Court of Massachusetts found that the stepfather was not the child's DFP and had no right to participate in medical decisions affecting the child. Id.	Court rejects DFP status. Id.
In *A.H. v. M.P.*, the biological mother's former same-sex partner sought parental rights of custody and visitation. 857 N.E.2d 1061, 1064 (Mass. 2006).	The Supreme Judicial Court of Massachusetts found that the partner was not a DFP and denied visitation and custody. Id. at 1069-70, 1076.	Court rejects DFP status. Id. at 1070-73.
In *Osterkamp v. Stiles*, the former foster father sought custody and visitation after	The Supreme Court of Alaska found that the former foster father was not	Court rejects DFP status and the former foster father may not receive

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his former domestic partner and the legal parent of the child began to limit his visitation. 235 P.3d 178, 182 (Alaska 2010).	the child's psychological parent and not entitled to visitation because it would result in the "continued exposure to the toxic relationship" between the former domestic partners. *Id.* at 190.	parental rights otherwise. *Id.* at 187.
6. The live-in partner or third party receives parental rights on some other basis		
In *McAllister v. McAllister*, the former stepfather was awarded reasonable visitation, including invitation to school events and progress reports, in the divorce judgment as the child's psychological parent. He sought decision-making responsibility and primary residential responsibility, which the district court gave to the mother. 2010 ND 40 P 1, 779 N.W.2d 652, 654.	The Supreme Court of North Dakota held that he was entitled to visitation and communication rights as the child's psychological parent, but not decision-making rights. *Id.* P 27, 779 N.W.2d at 662.	Stepfather gets the rights of psychological parent, which included visitation and communication, but not decision-making rights. *Id.*, 779 N.W.2d at 662. The concurrence cites the *Principles* for the idea that legislatures, not courts, should devise grants of third party visitation. 779 N.W.2d at 666 (Crothers, J., concurring).
In *Miller-Jenkins v. Miller-Jenkins*, the biological mother appealed the family court holding that former same-sex civil union partner was the legal parent of the child and thus entitled to visitation pending resolution of the dispute over custody and visitation. 2006 VT 78, P 1, 912 A.2d 951, 955-56.	The Supreme Court of Vermont found that the former same-sex partner was a legal parent of the child and entitled to temporary visitation, pending the resolution of the dispute over custody and visitation. *Id.* P 2, 912 A.2d at 956.	Former same-sex partner found to be actual parent; cites the *Principles* to support the idea of parental rights by former same-sex partners. *Id.* P 61, 912 A.2d at 972.
In the case *In re Victoria R.*, the child's adult caregivers sought legal recognition of their relationship with the child under the Kinship Guardianship Act and were awarded all legal rights and duties of a parent except the right to consent to the child's adoption by the trial court. The mother was awarded substantial visitation, which she appealed in the Court of Appeals of New Mexico. 2009-NMCA-07, P 3, 201 P.3d 169, 170.	The Court of Appeals found that the adult caregivers satisfied the extraordinary circumstances required to sustain their appointment as guardians. *Id.* P 16, 201 P.3d at 177.	Cited the *Principles* to support idea of parental rights by child's caregivers but rights awarded under more exacting test. *Id.* P 14, 201 P.3d at 175.
In the case *In re Marriage of Winczewski*, the child's grandparents sought custody, which the trial court awarded under the best interests of the child standard. The mother	The Court of Appeals awarded custody to the grandparents under Oregon statute, Or. Rev. Stat. § 109.119 (2001), after finding that mother was unfit and that the	The grandparents receive visitation as grandparents. *Id.* at 1039. The dissent cites the *Principles* to support visitation rights for caretakers. *Id.* at 1058 (Brewer, J., dissenting).

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challenged this standard upon appeal to the Court of Appeals of Oregon. 72 P.3d 1012, 1012 (Or. Ct. App. 2003) (per curiam).	grandparent visitation statute was constitutional. *Id.* at 1029, 1039.	
In *Riepe v. Riepe*, the widowed stepmother sought in loco parentis visitation under Ariz. Rev. Stat. § 25-415(C) (2000). 91 P.3d 312, 314 (Or. Ct. App. 2004).	The Court of Appeals of Arizona found that the widowed stepmother was entitled to pursue in loco parentis visitation on remand while mother remained sole parent with attendant rights and responsibilities. *Id.* at 315.	Stepmother may receive visitation for acting in loco parentis. *Id.* The dissent cites the *Principles* for example of courts awarding rights to DFPs. *Id.* at 326 (Barker, J., dissenting).
In *Blixt v. Blixt*, the maternal grandfather sought visitation under grandparent visitation statute. 774 N.E.2d 1052, 1055 (Mass. 2002).	The Supreme Judicial Court of Massachusetts remanded to consider whether grandparents could rebut a presumption that the parent's decision not to allow visitation was valid. *Id.* at 1056.	Grandparents may receive visitation on a basis other than being DFPs; cites the *Principles* to support visitation rights by grandparents (pile-on). *Id.* at 1061 n.15.
In *Rideout v. Riendeau*, 761 A.2d 291 (Me. 2000), the child's grandparents petitioned for visitation under the Grandparents Visitation Act, which required a "sufficient existing relationship between the grandparent and the child." 19-A ME. REV. STAT. § 1803(1)B (1998); 2000 ME 198, P 2, 16 n.10, 761 A.2d 291, 294, 298 n.10.	The Supreme Judicial Court of Maine found the Grandparents Visitation Act to be constitutional but remanded to consider whether visitation was appropriate under the facts. *Id.* P 2, 761 A.2d at 294.	Grandparents receive visitation but not because of DFP statutes, as suggested by concurrence. *Id.* P 40, 761 A.2d at 306-07 (Wathen, C.J., concurring).
7. The court rejects the idea of entitlement by live-in partners or third parties		
In *White v. White*, the mother's former same-sex partner sought a declaration of maternity, joint legal and physical custody, and child support. 293 S.W.3d 1, 6 (Mo. Ct. App. 2009).	The Missouri Court of Appeals found that the partner was not entitled to pursue a claim of joint legal and physical custody because she lacked standing and failed to state a claim upon which relief could be granted. *Id.* at 11.	Court declined to adopt test for DFP. *Id.* at 15.
In *Janice M. v. Margaret K.*, the adoptive mother's former domestic partner sought custody of or visitation with the child. The trial court granted only visitation as a DFP, which the adoptive mother appealed. 948 A.2d 73, 75 (Md. 2008).	The Court of Appeals of Maryland found that the partner was not entitled to visitation as a DFP because MD did not recognize DFP status, but remanded to consider whether exceptional circumstances existed to award visitation otherwise. *Id.* at 87, 93.	Former domestic partner not DFP. Id. at 74, 87. The dissent cites the Principles arguing for recognition of de facto parenthood on the same level as a legal parenthood. *Id.* at 95 & n.2, 96 & n.3 (Raker, J., dissenting).
In *Smith v. Gordon*, the adoptive mother's former	The Supreme Court of Delaware found that the	Former same-sex partner not DFP. *Id.* at 16.

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same-sex partner sought custody and visitation as the child's DFP. The trial court granted joint legal and physical custody, which the adoptive mother appealed. 968 A.2d 1, 4 (Del. 2009).	partner did not have standing to pursue custody and that Delaware does not recognize DFP status. *Id.* at 14-15.	
In the case *In re Parentage of M.F.*, the former stepfather sought to be declared DFP of the child and asked for residential parenting time with her. 170 P.3d 601, 602 (Wash. Ct. App. 2007).	The Court of Appeals of Washington found that the former stepfather not entitled to residential time with the child because Washington did not recognize a common law cause of action of de facto parenthood and he failed to satisfy statutory requirements for modification of the parenting plan. *Id.* at 603, 607.	Former stepfather not DFP. *Id.* at 605.
8. The court did not reach the issue of whether live-in partner or third party was a DFP		
In *Eccleston v. Bankosky*, the child's court-appointed guardian sought post-minority child support from the child's father as the child's DFP. 780 N.E.2d 1266, 1271 (Mass. 2003).	The Supreme Judicial Court of Massachusetts did not reach the issue of whether to order the father to pay child support to court-appointed guardian because she is the child's DFP, but did order it under Mass. Gen. Laws ch. 215, § 6 (2002). *Id.* at 1274-75.	Court did not reach the question whether guardian is DFP. *Id.* at 1275 n.17.