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Article

# *1 SACRIFICING MOTHERHOOD ON THE ALTAR OF POLITICAL CORRECTNESS: DECLARING A LEGAL STRANGER TO BE A PARENT OVER THE OBJECTIONS OF THE CHILD'S BIOLOGICAL PARENT

**Rena** M. **Lindevaldsen** [FNa1]

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## Introduction

Just as a single brush-stroke can dramatically alter a painting, the advent of assisted reproductive technology forever changed the legal landscape of parentage determinations. [FN1] Four decades ago, maternity determinations were typified by the simplicity of the Dr. Seuss classic, Are You My Mother? [FN2] A woman who gave birth to a child was not only unequivocally the child's mother, but could also be the child's only ***2** claimant to motherhood status. [FN3] Since the first successful birth using in vitro fertilization in 1978, [FN4] the door opened for situations where as many as three women can claim to be a child's mother: one woman donates an egg to be implanted into a second woman, the second woman agrees to be the gestational carrier for a third woman, and the third woman agrees to be the intended mother and raise the child. [FN5] Even King Solomon's wisdom is left wanting for a proper maternity determination under those circumstances. [FN6]

Another type of case, although factually less complicated, but no less emotionally charged, is becoming increasingly commonplace in today's courtrooms. Those cases concern two women involved in a same-sex relationship, claiming motherhood status to a child who is biologically related to only one of them. [FN7] Specifically, those cases involve a biological mother who is artificially inseminated with sperm from either a known or an anonymous donor and gives birth to the child while she is involved in a same-sex relationship. When the relationship ends, the partner who has no biological or adoptive relationship with the child seeks custody or visitation with her former partner's child. Courts have adopted various approaches to decide who is the child's mother and, ***3** more particularly, whether the child can have two mothers. [FN8] None of those approaches, however, give proper constitutional deference to the biological mother's preference.

Part I of this Article briefly presents three recent cases where courts were asked to decide the parentage of a child born to a woman while she was in a same-sex relationship. This Part traces parental rights jurisprudence, discussing the fundamental rights of parents to direct the care and religious upbringing of their children. Part II analyzes the different legal approaches adopted throughout the nation concerning the rights of biological parents when faced with claims of parentage by third parties. Part III presents a proposal for the proper analysis of those parentage claims. It explains why any order that grants a third party visitation with, or custody of, a child over the objections of that child's biological or adoptive parent is unconstitutional unless it survives strict scrutiny: the government must have a compelling interest to issue the custody order, which is narrowly tailored to serve

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that interest. [FN9] Practically, unless a parent is unfit, the state lacks a compelling interest to interfere with parental decisions concerning third-party petitions for custody and visitation.

## I. An Overview of the Fundamental Parental Rights Argument

Three recent custody disputes between former same-sex partners highlight the various legal approaches adopted by courts to determine parentage of a child born to one of the women during their relationship. A 2005 Washington Supreme Court decision opened the door for a child to have three parents: the biological mother, the known sperm donor (the biological father), and the mother's former same-sex partner. [FN10] A 2006 Vermont Supreme Court decision declared a woman to be a parent to her former same-sex partner's biological child, [FN11] affirming a trial court order that declared that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." [FN12] A ***4** 2007 Utah Supreme Court decision refused to declare a former same-sex partner to be a parent to her former partner's biological child. [FN13]

In fact, in the past few years, at least fourteen state supreme courts and several intermediate appellate courts have been asked to determine whether a third party can be declared a parent over the objections of the child's biological parent. [FN14] None of those cases properly analyzed the constitutional rights of the biological parent. The analysis in third-party parentage cases should begin, as this Part lays out, with a discussion of the United States Supreme Court's parental rights jurisprudence.

### A. The Original Understanding of Parental Rights

For nearly 100 years, the United States Supreme Court has protected a parent's fundamental, inalienable right to make decisions concerning her child's upbringing. A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests." [FN15] The Supreme Court has explained that because "[t]he child is not the mere creature of the State," [FN16] "[i]t is cardinal that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." [FN17] The Court's parental rights cases, Meyer v. Nebraska, Pierce v. Society of Sisters, Prince v. Massachusetts, and Wisconsin v. Yoder, are the foundation for analyzing any parental rights claim.

In Meyer v. Nebraska, the State made it unlawful to teach a foreign language to a child before she passed the eighth grade. [FN18] When a teacher was prosecuted for teaching German in violation of the statute, he challenged the constitutionality of the law. [FN19] In striking down the statute, the Supreme Court explained:

> ***5** [T]his Court has not attempted to define with exactness the liberty thus guaranteed [under the Fourteenth Amendment] Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [FN20]

Two years later, the Supreme Court again analyzed the scope of the Fourteenth Amendment liberty interest when it overturned an Oregon statute that prohibited parents from enrolling their children in private school.

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[FN21] The Supreme Court reaffirmed in Pierce that the parent's liberty interest in the child was superior to the State's interest in the welfare of the child. [FN22] The Court explained that the statute

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control The child is not the mere creature of the State [and] those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. [FN23]

Nearly two decades later, the Court revisited parental rights in Prince v. Massachusetts. [FN24] In Prince, a woman was prosecuted for taking her niece, over whom she had guardianship, with her to sell religious literature. [FN25] The Court affirmed the convictions, explaining that the state, as parens patriae, may, under certain circumstances, restrict the parent's right. [FN26] The state interest, however, is limited. "The religious training and indoctrination of children may be accomplished in many ***6** ways These and all others except the public proclaiming of religion on the streets remain unaffected by the decision." [FN27]

In 1972, the Court again acknowledged the fundamental right of parents in directing the upbringing of their children, albeit in the context of a free exercise claim. [FN28] In Wisconsin v. Yoder, the Court upheld the right of Amish parents to educate their children at home notwithstanding a state law requiring education in a state-approved school. [FN29] The state's interest in providing universal education was secondary to the parents' rights. [FN30] The Court explained that

> [p]roviding public schools ranks at the very apex of the function of a State. Yet a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . [FN31]

The parents' duty to prepare a child for additional obligations "include [s] the inculcation of moral standards, religious beliefs, and elements of good citizenship." [FN32] Yoder emphasized the limitation on parental powers found in Prince: that a state can override a parent's decision where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." [FN33]

The importance placed upon the relationship between the child and a legal parent also has been emphasized by the higher standard of proof required before the state can substantially interfere with the parent's constitutional rights. [FN34] "[T]he interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to ***7** liberties which derive merely from shifting economic arrangements."' [FN35] "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." [FN36] The State's interest in caring for the child of a natural or adoptive parent is de minimis if that parent is shown to be a fit parent. [FN37]

For more than a quarter of a century after Yoder, the United States Supreme Court remained silent on the issue of parental rights to direct the upbringing of their child. In 2000, the Court explored the scope of parental rights in the context of a third-party visitation statute.

### B. Troxel v. Granville: A Framework for Analyzing Parents' Rights Vis-a-vis Third-Party Visitation Claims

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1. The Washington State Court Proceedings

In 2000, the United States Supreme Court declared Washington's third-party visitation statute unconstitutional because it failed, in the words of the plurality opinion, to "accord at least some special weight to the parent's own determination" concerning visitation. [FN38] The Washington Superior Court's order granting visitation to the grandparents over the objection of the sole biological parent "failed to provide any protection [to the mother's] fundamental constitutional right to make decisions concerning the rearing of her own daughters." [FN39] In Troxel, Tommie Granville and Brad Troxel, who never married, were in a relationship that ended in June 1991. [FN40] During the time they were together, the couple had two children. [FN41] After Tommie ("Granville") and Brad separated, Brad lived with his parents. [FN42] He regularly brought his daughters to his parents' home for weekend visitation. [FN43] In May 1993, ***8** Brad committed suicide. [FN44] At first, the Troxels continued to see Granville's children, but in October 1993, Granville wanted to limit visitation between her children and Brad's parents. [FN45] At that time, the children were two and four years old. [FN46]

In December 1993, the Troxels filed suit in the Washington Superior Court, seeking visitation with their grandchildren. [FN47] The Washington statute at issue provided that any person could petition the court for visitation, at any time. [FN48] Pursuant to the statute, the court could order third-party visitation whenever it determined that visitation would serve the best interests of the child. [FN49] In 1995, the superior court entered an order granting visitation to the grandparents one weekend per month, one week during the summer, and four hours on both of the grandparents' birthdays. [FN50] The mother appealed. [FN51] During the appeal, Granville married Kelly Wynn. [FN52]

Before addressing the merits of the case, the Washington Court of Appeals remanded the case to the trial court for entry of written findings of fact and conclusions of law. [FN53] On remand, the trial court concluded that visitation with the grandparents was in the best interest of the children because the Troxels "are part of a large, central, loving family" all located in the same area who "can provide opportunities for the children in the areas of cousins and music," and the children would "be benefited from spending quality time" with the grandparents. [FN54] Approximately nine months after the trial court entered its order on remand, Granville's husband formally adopted the children. [FN55]

The Washington Court of Appeals reversed the trial court's visitation order and dismissed the grandparents' petition for visitation, concluding that nonparents lacked standing to seek visitation unless a custody action was already pending. [FN56] The court explained that this limitation on nonparental visitation was "'consistent with the constitutional***9** restrictions on state interference with parents' fundamental liberty interest in the care, custody, and management of their children."' [FN57] The court, however, did not expressly address Granville's federal constitutional challenge to the visitation statute. In a 5-4 opinion, the Washington Supreme Court affirmed on other grounds. [FN58] Contrary to the court of appeals, the Washington Supreme Court held that the plain language of the Washington statute, which gave the grandparents standing to seek visitation, unconstitutionally infringed the fundamental right of parents to rear their children. [FN59]

The court articulated two grounds for its decision on the constitutional issue. [FN60] First, the Constitution requires that "some harm threatens the child's welfare before the state may interfere with a parent's right to rear his or her child." [FN61] The Washington statute, however, did not require any showing of harm. [FN62] Second, the statute swept too broadly insofar as it allowed "'any person' to petition for forced visitation of a child at 'any time' with the only requirement being that the visitation serve the best interest of the child." [FN63] The Washington Supreme Court explained that "[i]t is not within the province of the state to

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make significant decisions concerning the custody of children merely because it could make a 'better' decision Parents have a right to limit visitation of their children with third persons" and, as between judges and parents, "the parents should be the ones to choose whether to expose their children to certain people or ideas." [FN64] The United States Supreme Court granted certiorari and affirmed the judgment of the Washington Supreme Court. [FN65]

2. Plurality Opinion of the United States Supreme Court

Explaining that the liberty interest "of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized" by the Court, the Court agreed that the Washington statute unconstitutionally infringed Granville's "fund-amental parental right." [FN66] The Court traced its parental rights ***10** precedent, including Meyer v. Nebraska, [FN67] Pierce v. Society of Sisters, [FN68] and Wisconsin v. Yoder. [FN69]

The Washington statute infringed Granville's constitutional parental rights because the statute gave a court the discretion to "disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision file[d] a visitation petition, based solely on the judge's determination of the child's best interests." [FN70] The statute contained no requirement that a court accord the parent's decision any presumption of validity whatsoever: if a judge disagreed with the parent's view of the child's best interest, the judge's view necessarily prevailed. [FN71]

The Court explained that the failure of the statute to give any weight to the parent's determination ignored the presumption that parents act in the best interest of their children. [FN72]

> [S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. [FN73]

The problem, the Court explained, "is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to Granville's determination of her daughters' best interests." [FN74] The Washington Superior Court seemingly "presumed the grandparents' request should be granted unless the children would be 'impact[ed] adversely."' [FN75] "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made." [FN76] As a result, the Washington Superior Court failed to provide ***11** any protection to the biological mother's "fundamental constitutional right to make decisions concerning the rearing of her own daughters." [FN77]

Although the Court declared the Washington statute uncon-stitutional as applied to Granville, it did not answer "whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation," nor did it "define the precise scope of the parental due process right in the visitation context." [FN78]

The Court also failed to address what a third party who seeks to be declared a parent, rather than to only obtain visitation, must prove in order to protect the biological parent's fundamental liberty interest.

3. Justice Souter's Concurring Opinion

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In his brief concurring opinion, Justice Souter articulated a solid description of parental rights that gives parents the exclusive right to determine with whom their children associate. [FN79] He explained that although the Court's cases "have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child," the fundamental parental "right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision."' [FN80]

> The strength of a parent's interest in controlling a child's associates is as obvious as the influence of personal associations on the development of the child's social and moral character. Whether for good or for ill, adults not only influence but may indoctrinate children, and a choice about a child's social [companions] is not essentially different from the designation of the adults who will influence the child in school It would be anomalous, then, to subject a parent to any individual judge's choice of a child's associates from out of the general population merely because the judge might think himself more enlightened than the child's parent. To say the least (and as the Court implied in Pierce), parental choice in such matters is not merely a default rule in the absence of either governmental choice or the ***12** government's designation of an official with the power to choose for whatever reason and in whatever circumstances. [FN81]

4. Justice Thomas's Concurring Opinion

Justice Thomas criticized the opinions of the plurality, Justice Kennedy, and Justice Souter for failing to articulate what level of scrutiny should be applied to claims that implicate the fundamental parental right to direct the upbringing of children. [FN82] Justice Thomas stated he "would apply strict scrutiny to infringements of fundamental rights," which include parental rights. [FN83] He explained that the State of Washington lacked even a legitimate governmental interest "in second-guessing a fit parent's decision regarding visitation with third parties." [FN84]

5. Justice Stevens's Dissenting Opinion

Justice Stevens criticized the Court's decision to grant certiorari and the plurality's broad articulation of the fundamental right of parents to direct the upbringing of their children. [FN85] In his view, "[g]iven the problematic character of the trial court's decision and the uniqueness of the Washington statute, there was no pressing need to review a [s]tate [s]upreme [c]ourt decision that merely requires the state legislature to draft a better statute." [FN86]

With respect to the merits of the case, Justice Stevens explained that "we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a ***13** threshold finding of harm." [FN87] He agreed that it is a sound presumption that parents generally serve the best interests of their children, but noted that "even a fit parent is capable of treating a child like a mere possession." [FN88] Accordingly, the "constitutional protection against arbitrary state interference with parental rights should not be extended to prevent the [s]tates from protecting children against the arbitrary exercise of parental authority that is not in fact motivated by an interest in the welfare of the child." [FN89] Given the "almost infinite variety of family relationships that pervade our ever-changing society," Justice Stevens found it clear that the "Due Process Clause of the Fourteenth Amendment leaves room for [s]tates to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interests of the child." [FN90]

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### 6. Justice Scalia's Dissenting Opinion

In his dissenting opinion, Justice Scalia explained his view that the parental right to direct the upbringing of children is an "unalienable right" but not a constitutionally protected right. [FN91] He believed that while it would be appropriate to argue in

> legislative chambers or in electoral campaigns, that the State has no power to interfere with parents' authority over the rearing of their children, I do not believe that the power which the Constitution confers upon me as a judge entitles me to deny legal effect to laws that (in my view) infringe upon what is (in my view) that unenumerated right. [FN92]

***14** He did not, however, advocate overruling the earlier parental rights cases. Rather, he opposed extension of the parental rights doctrine to new contexts, like the factual situation presented in Troxel. [FN93]

### 7. Justice Kennedy's Dissenting Opinion

Believing that the Washington Supreme Court erred in concluding that the best interests of the child standard is never appropriate in third-party visitation cases, Justice Kennedy would have vacated the decision and remanded the case to the state court for further proceedings: [FN94]

> I acknowledge the distinct possibility that visitation cases may arise where, considering the absence of other protection for the parent under state laws and procedures, the best interests of the child standard would give insufficient protection to the parent's constitutional right to raise the child without undue intervention by the State; but it is quite a different matter to say, as I understand the Supreme Court of Washington to have said, that a harm to the child standard is required in every instance. [FN95]

Although parents have the right to determine, "without undue interference by the State, how best to raise, nurture, and educate the child courts must use considerable restraint, including careful adherence to the incremental instruction given by the precise facts of particular cases, as they seek to give further and more precise definition to the right." [FN96]

Justice Kennedy explained that the plurality's conclusion that the Constitution forbids application of the best interest of the child standard in any third-party visitation proceeding "rest[s] upon assumptions the Constitution does not require." [FN97] Justice Kennedy further explained:

> My principal concern is that the holding seems to proceed from the assumption that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate and established relationship ***15** with the child. That idea, in turn, appears influenced by the concept that the conventional nuclear family ought to establish the visitation standard for every domestic relations case. As we all know, this is simply not the structure or prevailing condition in many households. [FN98]

Justice Kennedy's dissent suggests that in third-party visitation cases, parents who have not always served as the child's primary caregivers do not have an absolute parental veto when "a third party, by acting in a caregiving role over a significant period of time, has developed a relationship with a child." [FN99] Under those circumstances, "'arbitrarily depriving the child of the relationship could cause severe psychological harm to the child."' [FN100] He suggested that in creating their visitation laws, "[s]tates may be entitled to consider that certain relationships are such that to avoid the risk of harm, a best interests standard can be employed by their domestic relations courts in some circumstances." [FN101] He did not, however, provide any further insight into

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when the relaxed standard is appropriate. Nor did he suggest that the best interest standard should be applied when the parent has always been the child's primary caregiver.

Justice Kennedy concluded his dissenting opinion by articulating several competing policy considerations that should be considered in determining the constitutionality of applying the best interest standard to a third-party visitation petition. For example, “a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a de facto parent may be another.” [FN102] Another competing concern is the disruption caused to a single parent when faced with visitation demands by a third party. A single parent struggling to raise a child could have all hopes and plans for the child's future destroyed through the expense of attorney's fees necessary to defend against third-party visitation claims. [FN103] “[I]n some instances the best interests of the child ***16** standard may provide insufficient protection to the parent-child relationship.” [FN104]

## II. The Constitutional Quagmire of Declaring Legal Strangers To Be Parents

As is frequently the case with United States Supreme Court opinions, Troxel left many questions unanswered. Troxel identifies two legal concerns: (1) in the context of third-party visitation cases, the best interest standard provides insufficient protection to the parents' fundamental rights, and therefore, (2) some “special weight” must be given to the parent's determination. [FN105] Troxel does not provide a framework for addressing third-party claims to parentage rather than visitation. Nor does Troxel provide ample guidance for the states to determine how much deference is required under the “special weight” standard to adequately protect a parent's fundamental rights. [FN106] Finally, because the plurality opinion did not address Justice Kennedy's suggestion in his dissent that some third parties could be considered de facto parents, we have no guidance on who, if anyone, can constitutionally be treated as de facto parents and what legal standard should apply when they seek a judicial declaration of parentage.

These unanswered questions have led to conflicting results in the various states. On the one hand, at least sixteen states grant rights to de facto parents, psychological parents, or people who stand in loco parentis to the child, over the objection of the child's biological or adoptive parent. These states include: Arizona, Arkansas, California, Colorado, Indiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin. [FN107] None of these states, however, have adequately examined ***17** the parent's constitutional rights. On the other hand, twelve states have refused to declare a third party a de facto parent for visitation or parentage purposes. These states include: Florida, Georgia, Illinois, Iowa, Michigan, New Hampshire, New York, Ohio, Tennessee, Texas, Utah, and Virginia. [FN108] One state, North Carolina, has contradictory ***18** rulings from its intermediate appellate court. [FN109] Another state, Maryland, has concluded that a person considered a de facto parent is not necessarily treated as a parent. [FN110] Instead, the established relationship with the child is one factor in determining whether exceptional circumstances exist to justify applying the best interest analysis rather than a test that affords more protection to the biological parent's fundamental constitutional rights. [FN111] Of the twelve states, not one of them adequately addresses the constitutional argument in their case law.

### A. Understanding the Legal Labels of Parentage

Before exploring the various approaches taken to determine whether a third party is a parent, several common labels used by courts in discussing parentage should be explained. They include “in loco parentis,” “psychological parenthood,” “de facto parenthood,” and “parens patriae.” Although courts sometimes in-

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terchange and confuse the labels, it is important to understand the differences.

In Loco Parentis. The doctrine of in loco parentis is applied when someone who is not a legal parent nevertheless assumes the role of a parent in a child's life. Black's Law Dictionary defines it as "[o]f, relating to, or acting as a temporary guardian or caretaker of a child, taking on ***19** all or some of the responsibilities of a parent." [FN112] "[A person] attains in loco parentis status by assuming the 'status and obligations of a parent without formal adoption."' [FN113] In essence, the third party is a surrogate parent. "While an individual stands in loco parentis to a child, he or she has the 'same rights, duties, and liabilities as a parent."' [FN114] While states vary slightly with respect to the definition of in loco parentis, there are substantial differences with respect to when, if ever, that status terminates.

In particular, states disagree whether the in loco parentis doctrine contemplates perpetuating these parent-like rights and obligations after a legal parent has ended the in loco parentis relationship and, if it does, what legal standard should apply to custody disputes arising from that relationship. In a recent detailed discussion, the Utah Supreme Court explained that "a legal parent may freely terminate the in loco parentis status by removing her child from the relationship [with the] surrogate parent." [FN115] Thus, once the legal parent terminates her relationship with the third party, the third party ceases to stand in loco parentis and, therefore, has no claim to parentage rights. At that point, even if the third party once stood in loco parentis, he or she stands as a legal stranger to the child.

The courts in Pennsylvania have reached a contrary result. In Jones v. Jones, two women lived together in a same-sex relationship starting in 1988. [FN116] After they decided to have children by artificial insemination, Ellen Boring Jones ("Boring"), "was impregnated by an anonymous sperm donor, and gave birth to twin boys on December 3, 1996." [FN117] The two women lived together as a family until January 2001, when Boring left Patricia Jones ("Jones"), taking the children with her. [FN118] Since neither woman contested that Jones stood in loco parentis to the children, the Pennsylvania Superior Court determined (1) what the appropriate test would be to apply when a party standing in loco parentis to children not biologically related to her seeks custody of those ***20** children over the objections of the biological parent, and (2) whether the award of primary custody to Jones was appropriate. [FN119]

Boring, the biological mother, argued that because there was no finding that she was unfit, the trial court erred in applying a best interest analysis to determine custody. [FN120] The appellate court affirmed the trial court's determination, explaining that the "trial judge recognized that there was a presumption that primary custody should go to the biological parent rather than one in loco parentis." [FN121] The person standing in loco parentis, however, can be awarded custody if she "establish[es] by clear and convincing evidence that it is in the best interests of the child[] to maintain that [parental] relationship." [FN122] "The burden of proof is not evenly balanced, as the parents have a prima facie right to custody, which will be forfeited only if convincing reasons appear that the child's best interest will be served by an award to the third party." [FN123] The most "convincing reason" relied upon by the court in granting primary custody to Jones under its best interest analysis was that Jones had demonstrated an inability on the part of Boring to foster a good relationship between the child and Jones. [FN124] The Pennsylvania decision to afford the former partner parentage rights after her relationship with the biological mother ended stands in stark contrast to Utah's determination that the former partner loses her parentage status once her relationship ends with the biological parent.

***21** Psychological Parenthood. In a 2005 decision that involved a custody dispute between former same-sex partners, the Washington Supreme Court aptly described the term "psychological parent" as:

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> [A] term created primarily by social scientists but commonly used in legal opinions and commentaries to describe a parent-like relationship which is "based on [the] day-to-day interaction, companionship, and shared experiences" of the child and adult. As such, it may define a biological parent, stepparent, or other person unrelated to the child. In Washington, psychological parents may have claims and standing above other third parties, but those interests typically yield in the face of the rights and interests of a child's legal parents. [FN125]

De Facto Parenthood. A de facto parent is a person who is not a parent, but is treated as if she were a parent. Black's Law Dictionary defines "de facto" as "[a]ctual; existing in fact; having effect even though not formally or legally recognized." [FN126] Courts and legislatures have adopted various tests to determine who is a de facto parent.

For example, in Kentucky a de facto custodian is statutorily defined as:

> [A] person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older . [FN127]

In B.F. v. T.D., the Kentucky Supreme Court affirmed a trial court's conclusion that the adoptive mother's former domestic partner could not establish by clear and convincing evidence that she was the primary caregiver, even though she was involved in caring for the child, because the adoptive parent "took care of almost all of the daily needs of the child." [FN128] Therefore, the former domestic partner was not a de facto parent.

***22** In contrast, the Wisconsin Supreme Court adopted a multi-tier test to determine when a third party has standing as a de facto parent to petition for visitation. [FN129] That test considers the caregiving roles of each party, but does not rely exclusively on a determination of who was a primary caregiver. The Wisconsin Supreme Court held that a "court may determine whether visitation [to a third party] is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." [FN130]

> To [establish] the existence of . . . [a] parent-like relationship with the child, [a] petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.
>
> To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference. [FN131]

Several courts have adopted a similar approach. [FN132]

California has adopted a different approach to determine parentage of a child born by artificial insemination to a woman in a same-sex relationship. In Elisa B. v. Superior Court, the Supreme Court of California confronted the question of whether a former same-sex partner should be treated as a parent to her former partner's child

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in order for ***23** the state to impose upon her a child support obligation. [FN133] Applying the paternity presumption, the court concluded that it could. [FN134]

The court began its analysis with the statutory presumption that "a man is presumed to be the natural father of a child if '[h]e receive[d] the child into his home and openly holds out the child as his natural child."' [FN135] Citing prior decisions of the California Court of Appeals, the Supreme Court of California concluded that the paternity presumption should apply equally to women even though any determination that a woman is a mother is a maternity, not paternity, determination. [FN136] The court ultimately concluded that Elisa, who had "no genetic [or adoptive] connection to the twins," is a presumed parent and that it "is not 'an appropriate action' in which to rebut the presumption of presumed parenthood." [FN137] Thus, in California, a person who receives a child into her home and holds the child out as her own is a parent to another person's child. In fact, in another case, a California court recently remanded a case to the lower court to determine whether a woman was a parent to her former partner's biological child even though the relationship ended and she had only seen the child twice since the child was three months old. [FN138]

Parens Patriae. Black's Law Dictionary explains that parens patriae literally means "parent of his or her country," and refers ***24** traditionally to the role of the state "as a sovereign [and] in its capacity as provider of protection to those unable to care for themselves." [FN139]

The Supreme Judicial Court of Maine held that "[w]hen exercising its parens patriae power, the court puts itself in the position of a 'wise, affectionate, and careful parent' and makes determinations for the child's welfare, focusing on 'what is best for the interest of the child' and not on the needs or desires of the parents." [FN140] This allows a court to exercise its equitable powers, rather than allowing parents to decide what is best for their children. A decision from the Washington Supreme Court reveals how, in the exercise of their parens patriae power to decide what is best for a child, courts have created remedies outside the statutory scheme for custody and parentage.

## B. Carvin v. Britain [FN141]

### 1. Factual Background

Exercising its equitable power "to adjudicate relationships between children and families," the Washington Supreme Court extended the common law to recognize the doctrine of de facto parenthood in the context of a woman's claim that she was a second mother to her former same-sex partner's biological child. [FN142] After several months of dating in 1989, Page Britain and Sue Ellen Carvin began living together. [FN143] Five years later, Carvin personally inseminated Britain at home with semen donated by a male friend, John Auseth. [FN144] On May 10, 1995, Britain gave birth to a baby girl, L.B. [FN145] Both women took an active role in raising L.B. until she was six years old, making collaborative decisions on ***25** discipline, day care, schooling, and medical care. [FN146] L.B. called Carvin "mama" and Britain "mommy." [FN147] When "L.B. was nearly six years old[,] [Britain and Carvin] ended their relationship." [FN148] "After initially sharing custody and parenting responsibilities, Britain eventually limit[ed] Carvin's contact with L.B. and in the spring of 2002, [Britain] terminated all of Carvin's contact with L.B." [FN149] On November 15, 2002, Carvin, who has no biological relationship to L.B., petitioned for a determination of coparentage and visitation. [FN150] Shortly thereafter, Britain married Auseth, who in turn signed a paternity affidavit. [FN151]

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The family court dismissed Carvin's petition and refused to order visitation because Washington's Uniform Parentage Act ("UPA") did not grant standing to psychological parents. [FN152] Although the trial judge found that a "substantial relationship" existed between Carvin and L.B. and that "terminating visitation between [Carvin] and the child harmed the child," the UPA did not confer standing on Carvin to seek a parentage declaration. [FN153] In addition, Carvin was not entitled to third-party visitation absent a showing that Britain was unfit. [FN154]

On appeal, "[t]he Court of Appeals agreed that Carvin lacked standing under the UPA but reversed" on Carvin's claims for third-party visitation and a declaration of parentage under the de facto parenthood doctrine. [FN155] With respect to parentage, the appellate court concluded that "a common law claim of de facto or psychological parentage exists in Washington separate and distinct from the parameters of the UPA and that such a claim is not an unconstitutional infringement on the parental rights of fit biological parents." [FN156] The court explained that the "legislature's omission of language addressing the legal rights of parties to familial relationships such as the one presented here does not imply the complete denial of remedy but rather leaves the matter to be resolved by common law." [FN157]

> The Court of Appeals held that a [third party] may prove a parent-child relationship by presenting evidence sufficient to prove: "(1) the natural or legal parent consented to and fostered the parent-like ***26** relationship; (2) the petitioner and the child lived together in the same household; (3) the petitioner assumed obligations of parenthood without expectation of financial compensation; and (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." [FN158]

Finally, in regard to her petition for visitation, the appellate court also held that Carvin could petition for visitation without proving that Britain is unfit; instead, Carvin need only prove that "'it is detrimental to the child to sever the very parent-child relationship that Britain first consented to and fostered."' [FN159]

2. The Washington Supreme Court Decision

The question before the Washington Supreme Court was "whether, in the absence of a statutory remedy, the equitable power of our courts in domestic matters permits a remedy outside of the statutory scheme, or conversely, whether our state's relevant statutes provide the exclusive means of obtaining parental rights and responsibilities." [FN160] One Washington statute provides:

> The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the [S]tate of Washington[,] nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. [FN161]

"Washington courts have construed this statute to permit the adaptation of the common law to address gaps in existing statutory enactments ." [FN162] In the context of Carvin's parentage claim, the court explicitly recognized that the "legislature has been conspicuously silent when it comes to the rights of children like L.B., who are born into nontraditional families." [FN163]

The court's analysis of legislative intent proceeded as follows:

• "Washington courts have [previously] recognized individuals not biologically nor legally related to children [as] a child's ***27** 'psychological parent,"' although noting that prior cases had not afforded psychological parents the same fundamental rights as legal parents; [FN164]

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• Washington common law recognizes the status of a de facto parent, citing one case where a stepmother was awarded custody over the objection of the biological parent because the deaf child had shown "'remarkable development"' as a result of her care. [FN165] Additionally, the court relied on another case where an aunt who raised the child was awarded custody over the biological father; [FN166]

• The UPA reflects the state's policy that parentage questions are to be resolved "without differentiation on the basis of the marital status or [sex] of the parent[s]"; [FN167]

• Although the UPA provides that "'[t]his chapter governs every determination of parentage in this state,"' it does not preclude courts from exercising their common law equity jurisdiction to determine parentage for situations not addressed in the statute; [FN168] and

• In order to address the "paramount considerations" of the child's welfare, "courts [may] exercise their common law equitable powers to award custody of minor children" in situations not addressed in the statute. [FN169]

Concluding that it had authority to consider parentage doctrines outside those established by the legislature, the court addressed the specific question of whether Washington common law recognizes de facto parentage. [FN170] Citing cases from Colorado, Indiana, Maine, Mass-achusetts, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, and Wisconsin, the court concluded that "[r]eason and common sense support recognizing the existence of de facto parents and according them the rights and responsibilities which attach to parents in this state." [FN171] ***28** The court relegated to a footnote the decisions from Michigan, New Hampshire, New York, Tennessee, and Vermont that reached contrary results. [FN172]

In reaching its conclusion, the court made clear that it was recognizing a new parentage right for third parties:

> Our state's current statutory scheme reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notion of familial relations We cannot read the legislature's pronouncements on this subject[, including the section stating that the statute "governs every determination of parentage in this state," [FN173]] to preclude any potential redress to Carvin or L.B. In fact, to do so would be antagonistic to the clear legislative intent that permeates this field of law-to effectuate the best interest of the child in the face of differing notions of family and to provide certain and needed economical and psychological support and nurturing to the children of our state. While the legislature may eventually choose to enact differing standards than those recognized here today, and to do so would be within its province, until that time, it is the duty of this court to "endeavor to administer justice according to the promptings of reason and common sense." [FN174]

After declaring that Washington's common law recognizes de facto parents, the court announced what rights now exist in favor of the de facto parent by holding "that henceforth in Washington, a de facto parent stands in legal parity with an otherwise legal parent, whether biological, adoptive, or otherwise." [FN175] "Thus, if, on remand, Carvin can establish standing as a de facto parent, Britain and Carvin would both have a 'fundamental liberty interest[]' in the 'care, custody, and control' of L.B." [FN176] L.B. could then have two mothers and a father since Britain had married the child's biological father.

***29** The court rejected Britain's argument that granting Carvin rights akin to a biological or adoptive parent infringed Britain's fundamental rights in the "care for and control" of her biological child. [FN177] Recognizing that strict scrutiny was the appropriate analytic framework to review the State's infringement on a parent's fun-

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damental liberty interest in third-party visitation disputes, the court found those cases to be distinguishable. [FN178] The court's basis for distinguishing those cases, and thus not applying strict scrutiny to analyze Britain's claim, was that the other cases did not involve competing interests of two parents. [FN179] Rather than address whether it infringed Britain's fundamental rights to treat Carvin as a parent, the court held that once a court declares a third party to be a parent, the newly declared parent's constitutional rights are equivalent to the biological parent's rights. [FN180] The case was remanded to the trial court with instructions to determine whether Carvin had established that she was a de facto parent. [FN181]

The dissenting opinion raised two primary issues. First, the dissent explained that the outcome unconstitutionally infringed upon a "parent's fundamental right to make child rearing decisions." [FN182] Second, the dissent criticized the majority for "look[ing] beyond [the] detailed and complete statutory scheme adopted by the legislature [to] create[] by judicial decree a new method for determining parentage." [FN183]

The dissent pointed out the deficiencies in the majority's treatment of the constitutional question, accusing the majority of "waving a magic wand and creating 'de facto' parents." [FN184] The dissent explained that "it is this court's creation of this new class of parents that is the constitutional violation." [FN185] The dissent implied that the majority should have applied strict scrutiny to determine whether declaring Carvin to be a second ***30** parent to the child infringed upon the biological mother's rights. [FN186] Instead, the majority declared Carvin a parent, without any initial constitutional analysis, and then found that because both Carvin and Britain were parents, there was no constitutional issue to resolve. [FN187] Because the majority elevated a nonparent to de facto parent status without any determination that Britain was unfit, it infringed upon Britain's parental rights. [FN188]

The dissent described the majority's reliance on the common law in its analysis as even "worse" than the faulty constitutional analysis. [FN189] The dissent viewed the UPA as unambiguously defining "parent" and establishing the exclusive means of establishing a mother-child relationship. [FN190] The dissent admonished the majority for failing to recognize that "separation of powers requires a court to resist the temptation to rewrite an unambiguous statute to suit its notions of public policy and to recognize that 'the drafting of a statute is a legislative, not a judicial, function."' [FN191] "The majority improperly concludes that the legislature's failure to speak is somehow an invitation for this court to add further definitions or provisions to a statute that is clear, unambiguous, and all encompassing." [FN192]

The dissent explained that the majority's view of its common law authority to create additional statutory provisions is particularly inappropriate where four years earlier a court of appeals opinion that refused to treat as a de facto parent a former same-sex partner of a woman who conceived a child through artificial insemination alerted the legislature of the need to address the issue: "'If the marriage statute, adoption statute, UPA presumptions or surrogacy statute are inadequate when an unmarried couple, same gender or not, conceive artificially, it is up to the [l]egislature to make any changes."' [FN193] According to the dissent, ***31** the legislature's choice not to amend the UPA and recognize de facto parents was a legislative pronouncement on the issue. [FN194] As a result, the majority's decision to recognize de facto parents is an improper exercise of its common law authority insofar as the new means to establish parentage "goes against the express intent of the legislature." [FN195] A decision from the Vermont Supreme Court reveals the judiciary's willingness to create parentage law when it believes the legislature has failed to enact laws that respond to modern family dynamics.

C. Miller-Jenkins v. Miller-Jenkins

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Lisa Miller met Janet Jenkins in 1997 while both women were living in Virginia. [FN196] A few months later, Miller moved in with Jenkins. [FN197] In December 2000, they traveled to Vermont to enter into a civil union, immediately returning to their home in Virginia. [FN198] After unsuccessfully attempting to adopt a special needs child in Virginia, Miller expressed her desire to have a baby. [FN199] Miller's first attempt, in mid-2001, at becoming pregnant by assisted reproductive technology was not successful. [FN200] The second procedure, however, in August 2001, was successful. [FN201] In April 2002, Miller gave birth to Isabella in Virginia. [FN202] Around August 2002, Miller and Jenkins moved to Vermont. [FN203] Approximately one year later, the couple separated. [FN204]

In November 2003, Miller filed standard court forms in Vermont to dissolve the civil union. [FN205] She filed them pro se, by mail from Virginia, ***32** without the advice or representation of counsel. [FN206] Miller did, however, receive some assistance from a court clerk in Vermont, who instructed Miller to complete the entire form, checking a box for each question. [FN207] Miller checked the boxes to indicate that she should be awarded the physical and legal rights and responsibilities over Isabella and that Jenkins should be awarded supervised parent-child contact (that is, visitation). [FN208] In addition, when the form asked her to list the "biological or adoptive children" of the civil union, Miller identified Isabella. [FN209]

In response to the complaint, Jenkins retained counsel and asserted a counterclaim seeking an award of physical and legal custody, with an award of parent-child contact to Miller. [FN210] The answer and counterclaim did not contain any allegation that Miller was an unfit parent or that Jenkins had adopted the child-because she had not-but simply alleged she was a parent and desired custody. [FN211]

Prior to the court's first hearing concerning a temporary order for parental rights and responsibilities, Miller's first attorney intended to object to the court's treating Jenkins as a second parent to Isabella. [FN212] Soon after, Miller retained a new lawyer, Deborah Lashman, who would ***33** not meet her until the first day of hearings on March 15, 2004. [FN213] Without consultation with Miller, Lashman purported to waive Miller's right to challenge the court's treatment of Jenkins as a parent. [FN214] Despite the efforts of Miller's third attorney, Judy Barone, to revoke the waiver at the next day of hearings, the court refused to address the waiver issue. [FN215]

Without deciding whether Miller had waived her parental rights, on June 17, 2004 the court issued a temporary order (the "Temporary Custody Order") granting Jenkins, over Miller's objections, "parent-child contact" and awarding Miller "legal and physical responsibility" over Isabella. [FN216] The order directed Miller to give Jenkins unsupervised visitation with then two-year-old Isabella two weekends in June, one weekend in July, and then one week each month of unsupervised visitation in Vermont, beginning in August 2004. [FN217]

Five months after it granted Jenkins parent-child contact in the Temporary Custody Order, the trial court declared Jenkins a parent to Isabella. [FN218] In that November 17, 2004 order (the "Parentage Order"), the court addressed Miller's arguments that (1) she be permitted to rebut any presumption of parentage in favor of Jenkins by submitting evidence that Jenkins had no genetic link to Isabella, and (2) Lashman's waiver of Miller's parental rights was without her consent. [FN219] With respect to the paternity presumption, Miller argued that to the extent a husband or wife is able to rebut a paternity presumption through submission of genetic tests demonstrating that the husband is not the father, Miller ***34** should also be able to rebut any presumption that Jenkins is a parent to Isabella with genetic proof that Jenkins is not biologically related to Isabella. [FN220] Although the court applied the paternity presumption to the case to find that Jenkins was Isabella's parent, it refused to apply the statutory genetic exception to rebut the presumption. [FN221]

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The court analyzed the parentage question by first explaining that Vermont had not previously "been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination." [FN222] After briefly discussing a case from New York and a case from California, [FN223] the court "adopt[ed] the reasoning of other courts" [FN224] and created a new test for Vermont. [FN225] The test provides that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." [FN226] The court then retroactively applied this new test to determine parentage of Isabella. [FN227] Pursuant to the new test, the court declared Jenkins to be Isabella's second mother because Jenkins and Miller were in a civil union relationship when Miller and Jenkins planned for Miller to have a child. [FN228] The trial court did not address Miller's constitutional parental rights argument. [FN229]

***35** On appeal, Miller advanced several arguments as to why the order should not be affirmed, including an attack on its constitutionality. [FN230] First, she explained that prior to the trial court's decision declaring a new parentage rule for Vermont, nothing under existing Vermont law treated Jenkins as a parent to Isabella: Jenkins did not adopt Isabella and, unlike other states, Vermont had not enacted a statute setting forth criteria to determine parentage of a child born by assisted reproductive technology. [FN231] Jenkins's only claim to parentage was under Vermont's paternity presumption for children born during a marriage, which provided an opportunity to rebut the presumption with genetic proof. [FN232] The statute provides:

> A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if:
> (1) the alleged parent fails to submit without good cause to genetic testing as ordered; or
> (2) the alleged parents have voluntarily acknowledged parentage under the laws of this state or any other state, by filling out and signing a Voluntary Acknowledgment of Parentage form and filing the completed and witnessed form with the department of health; or
> (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test; or
> (4) the child is born while the husband and wife are legally married to each other. [FN233]

Because the civil union law required courts to treat civil union couples the same as married couples "with respect to a child of whom either becomes the natural parent during the term of the civil union," [FN234] Miller argued that she should be allowed to rebut the presumption to the same extent she would be able to do so in the marriage context. [FN235] Although Jenkins explained that the statutory requirement with respect to parentage of a child born during a civil union "evinces an intention to ensure that children born to couples in civil unions are treated equally to those born to married couples," [FN236] she argued that if Miller, the natural parent, were permitted to submit genetic proof to rebut parentage, as provided for under the statute, the civil union law would "be a nullity" with respect to treating her as a parent. [FN237] Indeed, except in the rare ***36** situation where one partner's ovum is implanted into the womb of the other partner, there is usually no dispute that only one woman in the same-sex civil union relationship is a biological parent to the child. [FN238]

On appeal, Jenkins urged the court to affirm the new law created by the trial court concerning parentage of children born by assisted reproductive technology. [FN239] She explained that given the increasing number of children born to heterosexual and homosexual couples by use of assisted reproductive technology, the parentage presumption must be interpreted to "refuse[] to permit either parent to challenge the parentage of the consenting spouse" when "both spouses jointly agree to use [assisted reproductive technology] to create a family." [FN240] She explained:

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> This Court should not wait for the Vermont Legislature to enact a specific statute about [assisted reproductive technology], as Lisa argues. The reality in Vermont today is that many children are born through [assisted reproductive technology]. When faced with the reality of these children, the courts cannot simply defer adjudicating their parentage until the legislature enacts a specific statute. Rather, as this Court has acknowledged, "it is the courts that are required to define, declare[,] and protect the rights of children raised in these [assisted reproductive technology] families. . . ." [FN241]

Miller offered three arguments in response. [FN242] First, Miller explained that refusing to treat Jenkins as a parent does not render the parentage presumption a nullity. [FN243] Rather, if the court were to permit Miller to rebut parentage with genetic proof, it would be consistent with the statutory obligation "to treat civil union partners the same as married partners In a marriage, a spouse can rebut the presumption of 'natural' parentage by demonstrating that the child is not biologically related to the 'parent.' The same must apply to partners in a civil union." [FN244] To deny Miller the opportunity to rebut parentage because she was in a same-sex civil union, rather than a marriage, would afford civil union partners unequal rights as compared to married couples. [FN245] Miller also explained that the trial court had "drafted new legislation" when it declared Jenkins a parent because there was no possible way to "construe" or apply the parentage presumption "to declare [Jenkins] to be a 'natural parent,' particularly where she admits ***37** she is not a 'natural' parent." [FN246] Finally, Miller argued that it would deprive her of her fundamental parental rights to treat Jenkins as a parent by denying Miller the ability to rebut the parentage presumption. [FN247]

The Vermont Supreme Court ultimately rejected both parties' arguments concerning the scope and application of the parentage presumption: "[w]e have examined the legislative history of the statute and can find no indication that it was intended to govern the rights of parentage of children born through artificial insemination or to same-sex partners, or to do anything other than provide a speedy recovery of child support." [FN248] Instead, the court relied on its 1985 decision that articulated the circumstances under which a stepparent could obtain custody or visitation over his stepchild. [FN249] Quoting its 1985 decision, the court held,

> where the stepparent has assumed the role of a parent with respect to the child-that is, had acted "in loco parentis"-the lower court can give custody to the stepparent, over the opposition of the biological parent, if it finds that it is in the best interest of the child to do so and "the natural parent is unfit or extraordinary circumstances exist to warrant such a custodial order." [FN250]

As applied to Jenkins, the court held:

> Assuming extraordinary circumstances are even required for a visitation order, we conclude that extraordinary circumstances are present in this case. The court's findings demonstrate that [Jenkins] acted in loco parentis with respect to [Isabella] as long as [Jenkins] and [Miller] were together. Thus, our short answer to [Miller's] argument is that the visitation order is supported by Paquette even if [Jenkins] is not considered [Isabella's] parent under [the paternity presumption]. [FN251]

***38** Although the court acknowledged that the legislature had not addressed parentage of children born by assisted reproductive technologies, [FN252] it concluded that "in the absence of [legislative] action, we must protect the best interests of the child." [FN253] Clearly, "[m]any factors are present here that support a conclusion that [Jenkins] is a parent, including, first and foremost, that [Jenkins] and [Miller] were in a valid legal union at the time of the child's birth." [FN254] The other relevant factors relied on by the court included the trial court's findings that: (1) Miller and Jenkins both intended Jenkins to be Isabella's parent; (2) Jenkins participated in Miller's decision to be artificially inseminated; (3) Jenkins participated in the prenatal care and birth; (4) Miller and Jenkins both treated Jenkins as Isabella's parent during the time they resided together; and (5) Miller identified Jenkins as a parent in the dissolution petition. [FN255] The court concluded the parentage discussion

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by stating, "This is not a close case under the precedents from other states We do note that, in accordance with the common law, the couple's legal union at the time of the child's birth is extremely persuasive evidence of joint parentage." [FN256]

The court also briefly addressed Miller's fundamental parental rights argument: "[Jenkins] was awarded visitation because she is a parent of [Isabella]. [Miller's] parental rights are not exclusive." [FN257] In other words, like the Washington Supreme Court in Carvin v. Britain, [FN258] the court did not inquire whether elevating Jenkins to the status of a parent infringed Miller's fundamental constitutional rights as Isabella's sole biological parent. [FN259] Instead, the court declared Jenkins a parent ***39** and then held that because two parents are involved in the custody dispute, Miller's "parental rights are not exclusive." [FN260] In August 2006, the Vermont Supreme Court affirmed the family court's order declaring Jenkins a parent to Isabella. [FN261]

When confronted with a similar, third-party parentage question, the Utah Supreme Court addressed the constitutional implications of declaring a legal stranger to be a parent over parental objection, an issue that both the Washington and Vermont Supreme Courts failed to seriously consider. In light of the weighty policy decisions that accompany changes in parentage law, the Utah Supreme Court properly deferred to the legislature a decision to make appropriate amendments to the law.

***40** D. Jones v. Barlow

Cheryl Barlow and Kerri Jones were involved in a same-sex relationship when, in November 2000, they decided to have a child together. [FN262] They planned that Barlow would be the first of the two to have a child by artificial insemination. [FN263]

> [They] selected a sperm donor who shared both of their characteristics Barlow conceived in February 2001. During the pregnancy, Jones participated in prenatal care with Barlow and her physician.
>
> On October 4, 2001, Barlow gave birth to a baby girl The birth certificate listed the child's surname as "Jones Barlow." For the first two years of the child's life, both Barlow and Jones cared for the child [I]n May 2002, the parties obtained [a court] order design-nating Jones and Barlow as co-guardians of the child. [FN264]

"Jones and Barlow ended their relationship around October 2003," when the child was two years old. [FN265] Barlow and her child moved out of the shared residence, with Barlow eventually ending "all contact between Jones and the child." [FN266] At that time, Barlow petitioned the court for an order removing Jones as the child's co-guardian. [FN267]

In December 2003, Jones filed suit, "seeking a [d]ecree of custody and visitation, claiming that she had standing under the common law doctrine of in loco parentis." [FN268] The district court bifurcated the proceedings, and for the first phase, the parties participated "in an evidentiary hearing to assess whether Jones stood in loco parentis to the child," and therefore had standing to petition for custody or visitation. [FN269] The court concluded that she had standing because she stood in loco parentis. [FN270] For the second phase, the court limited the issues to visitation and child support, concluding that Utah's adoption statutes precluded a consideration of custody in favor of Jones. [FN271] The court found that "continued contact with Jones would be in the child's best interest and ordered visitation." [FN272] Barlow appealed. [FN273] The Utah Court of ***41** Appeals certified the case for direct appeal to the Utah Supreme Court. [FN274]

On appeal, Barlow argued that "the trial court lack[ed] jurisdiction because the in loco parentis doctrine does

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not grant Jones standing to seek visitation." [FN275] The court began its analysis by explaining the in loco parentis doctrine, noting it "is applied when someone who is not a legal parent nevertheless assumes the role of a parent in a child's life by assuming the 'status and obligations of a parent without formal adoption."' [FN276] A person has the "'same rights, duties, and liabilities as a parent"' as long as she stands in loco parentis. [FN277]

The specific legal question addressed by the court was "whether a legal parent may terminate the in loco parentis status by removing the child from the relationship with the surrogate parent or whether the in loco parentis doctrine allows the surrogate parent to extend the relationship against the legal parent's will." [FN278] The court held that Jones lacked standing to seek visitation because "at common law all rights and obligations end with the termination of the in loco parentis relationship," which either party has the "right to terminate." [FN279] To recognize "a legally protectable right under the rubric of in loco parentis would be 'an unwarranted expansion of an otherwise well-established common law doctrine."' [FN280]

Alternatively, Jones asked the court to "recognize a new judicial doctrine in Utah that creates in a third party the right to seek visitation with a child in contexts outside those recognized by this state's domestic relation laws." [FN281] Whether labeled "'psychological parent"' or "'de facto parent,"' the court explained that recognition of such a doctrine would "create permanent and abiding rights similar to those of an actual parent." [FN282] The court "decline[d] to craft such a doctrine" for two reasons. [FN283]

> ***42** First . . . [the] de facto parent doctrine fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases [to determine standing]. A de facto parent rule for standing, which rests upon ambiguous and fact-intensive inquiries into the surrogate parent's relationship with a child and the natural parent's intent in allowing or fostering such a relationship, does not fulfill the traditional gate-keeping function of rules of standing. [FN284]

Second, and more importantly, the court properly recognized that "adopting a de facto parent doctrine would exceed the proper bounds of the judiciary." [FN285] Although the court acknowledged that "mutual bonds of affection can be formed between a child and an adult who does not fit within the traditional definition of a parent," the adoption of the de facto parent doctrine is "ultimately based upon policy preferences, rather than established common law." [FN286] Because the legislature had defined the manner in which a parent-child relationship is established, which did not include de facto parentage, the court refused to adopt a common law doctrine that would contradict the statutory scheme. [FN287]

> Quoting the Michigan Supreme Court, the Utah Supreme Court explained that [a]s a general rule, making social policy is a job for the [l]egislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another [.] The responsibility for drawing lines in a society as complex as ours-of identifying priorities, weighing the relevant considerations and choosing between competing alternatives-is the [l]egislature's, not the judiciary's. [FN288]

The rationale for leaving the decision to the legislature reflects the unique role played by that governmental branch. As illustrated in Jones:

> Jones asks this court to exercise the wisdom of Solomon by adopting a de facto parent doctrine based upon our weighing of the competing policies at play. Although this court is routinely called upon to make difficult decisions as to what the law is, or even to fill the interstices of jurisprudence, in this case we are asked to create law from whole cloth where it currently does not exist Courts are unable to fully investigate the ramifications of social policies and cannot gauge or ***43** build the public consensus necessary to

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> effectively implement them. Unlike the legislature, which may craft a comprehensive scheme for resolving future cases and then may repeal or amend it at any time should it prove unworkable, courts are not agile in developing social policy. If we miscalculate in legislating social policy, the harm may not be corrected until an appropriate case wends its way through the system and arrives before us once again. . . . [FN289]

In his dissent, Chief Justice Durham disagreed with the majority's conclusion that the legislature's silence in the statutory scheme precluded the court's creation of the de facto parenthood doctrine. [FN290] Citing the Washington Supreme Court's decision in Carvin v. Britain and the Wisconsin Supreme Court's decision in Holtzman v. Knott, the Chief Justice would have "recognize[d] common law standing for de facto parents." [FN291] He then articulated a new test to determine who qualifies as a de facto parent. He would require that the third party show by clear and convincing evidence that "(1) the legal parent intended to create a permanent parent-child relationship between the third party and the child, and (2) an actual parent-child relationship was formed." [FN292] The dissent explained that for purposes of visitation, but not necessarily custody, the test passed constitutional muster because the biological parent waived her constitutional rights by fostering a relationship between her biological child and the third party. [FN293]

## III. Protecting Fundamental Parental Rights in the Face of Third- Party Custody or Visitation Claims

### A. Strict Scrutiny Should Be Applied

Utilizing any test other than strict scrutiny to resolve third-party parentage claims fails to protect a biological or adoptive parent's fundamental constitutional rights. [FN294] Although some states presently distinguish between visitation and custody cases for purposes of the ***44** parental rights analysis, [FN295] neither should be ordered over parental objections absent proof that the order serves a compelling governmental interest and the order is narrowly tailored to achieve that interest. [FN296] Unless a parent is unfit, however, there is no compelling governmental interest to undermine the parent's decision concerning visitation and custody.

Unfortunately, courts have failed to apply strict scrutiny. Some courts, in the context of third-party visitation claims, have adopted a harm standard that recognizes the fundamental liberty interest at stake, but falls short of strict scrutiny. [FN297] The Virginia Supreme Court, for ***45** example, has held that a third party cannot constitutionally be awarded visitation over the objection of the biological parent absent proof by clear and convincing evidence that "'actual harm to the child's health or welfare"' will occur without the visitation. [FN298] Two subsequent Virginia Court of Appeals decisions highlight the difficult hurdle third parties must overcome to be declared a parent under Virginia's harm standard.

In Griffin v. Griffin, a woman gave birth to a boy on June 25, 1998. [FN299] At that time, her husband believed that the child was his. [FN300] Fifteen months later, the wife moved out of the home, taking her son with her. [FN301] The wife allowed weekly visitation for more than two months, when a court-ordered paternity test established that another man was the father. [FN302] Afterwards, the wife discontinued the weekly visits and her husband petitioned the court for visitation rights. [FN303] Applying the best interest standard, the domestic relations court awarded visitation to the husband. [FN304] It found that denying visitation would be "detrimental" to the child. [FN305] Applying the actual harm standard, the Court of Appeals reversed, explaining:

> Absent a showing of actual harm to the child, the constitutional liberty interests of fit parents "take

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> precedence over the 'best interests' of the child." As a result, "a court may not impose its subjective notions of 'best interests of the child"' in derogation of parental rights protected by the Constitution. A "vague generalization about the positive influence" of non-parent visitation cannot satisfy the actual harm requirement. To be sure, in this context, forced visitation "cannot be ordered absent compelling circumstances which suggest something near unfitness of custodial parents." [FN306]

The court explained that while the evidence supported an inference that the "child would grieve the loss of the emotional attachment he has for his mother's estranged husband and 'could be' emotionally hurt if ***46** visitation with him ended [that evidence] falls far short of satisfying [the] clear and convincing [standard] the actual-harm test [requires]." [FN307]

In Surles v. Mayer, the Virginia Court of Appeals held it could not award Surles visitation over the objections of the biological parents in the absence of actual harm, despite the fact that Surles acted as a surrogate father to the child for almost four years and had standing to petition for visitation. [FN308] In that case, Mayer, the biological mother of James, began dating Surles in November of 1998. [FN309] At that time, James was ten months old. [FN310] During the first few months of dating, Surles saw James two or three times a month, but by the summer of 1999, Surles began to have almost daily contact with James. [FN311] James's biological father, however, had almost no contact with him. [FN312] In February 2000, Mayer and Surles moved in together, separated soon afterward, and reunited in the middle of July. [FN313] One month later, Mayer learned that she was pregnant with Surles's child and in May 2001, she gave birth to Kayla. [FN314] Although they never married, Surles and Mayer continued their relationship until December 2002. [FN315]

After they separated, Mayer filed a petition for custody of Kayla. [FN316] On May 5, 2003, the domestic relations court entered a custody order granting the parties joint legal custody of Kayla. [FN317] The order awarded primary physical custody to Mayer and granted Surles the right to "reasonable and seasonable visitation" with Kayla. [FN318] Surles's last visit with James took place in November of 2003, when James was almost six years old. [FN319] When Mayer sought to move to Florida in late 2003, Surles not only filed a motion to modify the May 2003 custody order, but also petitioned for visitation with James. [FN320] In an expedited hearing, the juvenile and domestic relations district court denied his motion to modify ***47** the custody order. [FN321] After Mayer moved to Florida, the district court dismissed Surles's petition for visitation with James. [FN322] Surles appealed this decision to the circuit court, which subsequently granted Mayer's motion to strike Surles's petition, finding that Surles did not have standing. [FN323]

The Virginia Court of Appeals affirmed on other grounds. Contrary to the trial court's finding, the court of appeals held that "Surles-who acted as a surrogate father to James for almost four years"-had standing to petition for visitation. [FN324] Even though he had standing, the court held he was not entitled to that visitation because he "failed to present any evidence indicating that the absence of visitation would result in 'actual harm' to James." [FN325] The court explained the interplay between the required showing of harm and the best interest analysis:

> [W]hen fit parents object to non-parental visitation, a trial court should apply the best interests standard in determining visitation only after it finds harm if visitation is not ordered However, this Court has made clear that "[a] vague generalization about the positive influence of nonparent visitation cannot satisfy the actual-harm requirement.". . . .
>
> . . .
>
> Surles, as the party requesting visitation with James, bore the burden of producing clear and convincing evidence that James would suffer "actual harm" to his "health or welfare" in the absence of visita-

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> tion. Because Surles failed to produce any evidence-much less clear and convincing evidence-that would support a finding of "actual harm" to James'[s] "health or welfare," we hold that the trial court did not err in denying the petition for visitation. [FN326]

The Virginia Supreme Court has explained why it is necessary to adhere to a strict harm analysis in order to protect the fundamental parental rights of biological parents:

> No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But that is not what we meant by "actual harm to the child's health or welfare." If it were, any nonparent who has developed an emotionally enduring relationship with another's child would satisfy ***48** the actual-harm requirement. The constitutional rights of parents cannot be so easily undermined. [FN327]

Even Virginia's harm analysis, however, falls short of adequately protecting a parent's constitutional rights because it does not require a showing of unfitness. Unless the parent's conduct or choices harm the child, the state lacks the requisite compelling interest to interfere with the parent's choice concerning visitation or custody vis-a-vis third parties. [FN328]

The "exceptional circumstances" standard adopted by some courts reflects circular reasoning that ignores the high hurdle that must be overcome to show a compelling governmental interest. In a same-sex custody dispute, the New Jersey Supreme Court, in V.C. v. M.J.B., explained the role of the exceptional circumstances test in third-party petitions for custody or visitation. [FN329] In that case, the biological parent argued that the court could not interfere with her constitutional rights absent a showing that she was unfit. [FN330] The court stated, however, that the "'exceptional circumstances' category has been recognized as an alternative basis for a third party to seek custody and visitation of another person's child." [FN331] "Subsumed within that category is the subset known as the psychological parent cases in which a third party has stepped in to assume the role of the legal parent who has been unable or unwilling to undertake the obligations of parenthood." [FN332] The court then extended the category to include cases, such as the one before it, where the legal parent has not been unwilling or unable to undertake parenting obligations but has actively been parenting the child. [FN333] The court then adopted the Holtzman v. Knott test for de facto parenthood to establish when compelling circumstances exist. Thus, a person who is a de facto parent under the four-prong test falls within the exceptional circumstances category without any constitutional analysis of the legal ***49** parent's rights or any showing of actual harm to the child or parental unfitness. [FN334]

To require a showing of unfitness before a court can interfere with the parent's choice is also consistent with a state's parens patriae authority. Parens patriae is a common law doctrine in which the state has the duty to protect society's weakest members from those who would do them harm. [FN335] The parens patriae power is only properly invoked when there is a threat of serious danger to the health or safety of a child. [FN336] That threat of serious harm to the child would satisfy the compelling governmental interest necessary to interfere with the parent's constitutional rights. Many courts, however, have invoked the state's parens patriae authority to substitute the court's views concerning third-party visitation or custody where the parents are undeniably fit. [FN337] In those cases, the parens patrie power is used to substitute the court's view of what is best for the child in place of the parent's determination.

In contrast to those courts that have adopted a harm standard, several courts have sidestepped the difficult constitutional question altogether. For example, rather than evaluating whether a third party's petition for parentage rights (including visitation) infringed the biological parent's rights (through application of a harm, strict scrutiny, or fitness standard), the courts simply declare the third party to be a parent. Those courts either ignore

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the constitutional inquiry altogether, [FN338] or, like the Washington and Vermont Supreme Courts, ***50** take the additional step of summarily concluding that the constitutional rights of the biological parent and the third party are coextensive. [FN339] The error is manifest. If a parent's fundamental rights dictate that courts perform a constitutional inquiry before a third party can be awarded visitation, the constitutional analysis is even more vital to protect the biological parent's rights when a court considers treating a third party as a parent. [FN340]

Other courts have sidestepped the constitutional analysis by concluding that the biological parent implicitly waived her constitutional rights. [FN341] For example, one court explained that "[t]hrough consent, a ***51** biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child." [FN342] While consent is a relatively straight-forward question when a parent expressly waives her parental rights, the difficult proof issues inherent in a determination of an implicit waiver should prevent any such determination.

The Utah Supreme Court explained the inherent deficiencies in a factual determination of implicit waiver:

> [A]dopting a de facto parent doctrine fails to provide an identifiable jurisdictional test that may be easily and uniformly applied in all cases. A de facto parent rule for standing, which rests upon ambiguous and fact-intensive inquiries into the surrogate parent's relationship with a child and the natural parent's intent in allowing or fostering such a relationship, does not fulfill the traditional gate-keeping function of rules of standing. Under such a doctrine, a party could try the merits of her case under the guise of an inquiry into standing, unduly burdening legal parents with litigation. [FN343]

Prior to Miller-Jenkins v. Miller-Jenkins, the Vermont Supreme Court echoed the same sentiments. [FN344]

Not only are there proof problems inherent in an implicit waiver standard, but it is inconsistent with United States Supreme Court ***52** precedent concerning waiver of fundamental rights. "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights" [FN345] and "'do not presume acquiescence in the loss of fundamental rights."' [FN346] Additionally, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." [FN347] In the context of waiving the right to assistance of counsel, the Supreme Court has explained:

> The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution. [FN348]

As a result, an accused retains the right to counsel unless he knowingly waives that right. Embodied within the "knowingly" requirement is not just that he knows that he executed a waiver but that he appreciates the legal consequence of that waiver. As courts have stated, "'[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."' [FN349] As the Virginia Supreme Court stated, the "[e]ssential elements of [waiver] are both knowledge of the facts basic to the exercise of the right and intent to relinquish that right." [FN350] In addition, since the constitutional right belongs to the individual, the right can only be waived by the individual-not by her attorney. [FN351] A similar standard is used concerning the right to confront an adverse witness, [FN352] the Sixth Amendment right to a jury trial, [FN353] the Miranda warnings, [FN354] and, as stated above, the Sixth Amendment right to counsel. [FN355]

***53** Waiving one's constitutional parental rights to have exclusive authority to make decisions concerning

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who visits with or has custody over one's child is, at a minimum, of similar weight to these other rights so as to require a similar waiver standard. Nevertheless, some courts have concluded that the biological mother implicitly waived her parental rights by consenting to the development of a relationship between her biological child and a third party. [FN356]

For example, the de facto parenthood test adopted by many courts asks whether the biological parent consented to and fostered a relationship between the third party and the child. [FN357] If so, then the third party can be declared a parent over the objections of the parent. Whether the parent consented to the third party's establishing a relationship with the child, however, is not the relevant constitutional inquiry. While that question focuses on whether the biological parent permitted a third party to become involved in the life of the parent's child, it does not provide any insight into the relevant legal inquiry of whether the biological parent was fully aware of her fundamental parental rights and knowingly intended to relinquish those rights to a third party. [FN358] Stated differently, although the parent consented to her child forming a relationship with a third party a court cannot necessarily infer that she knowingly, and irrevocably, waived her constitutional right to (1) be ***54** treated as the child's sole parent, or (2) make exclusive determinations concerning custody and visitation concerning her child. [FN359]

Nor is the constitutional infringement somehow lessened when a court grants only visitation, rather than custody. In either situation, the court infringes upon the legal parent's constitutional right to decide with whom her child associates. The only difference between a custody and visitation award is the degree of the constitutional infringement. The Utah Supreme Court explained that treating someone as a parent for visitation purposes necessarily impacts the parental rights of the biological parent: “[I]n carving out a permanent role in the child's life for a surrogate parent, this court would necessarily subtract from the legal parent's right to direct the upbringing of her child and expose the child to inevitable conflict between the surrogate and the natural parents.” [FN360]

That is particularly true where the court grants visitation because the third party is treated as a parent rather than pursuant to a third-party visitation statute. As in any custody dispute, the “parent” awarded visitation can seek modification of the order at a later time, requesting a change in primary custody.

Nor does the fact that the biological parent is a single parent justify deprivation of the biological mother's constitutional rights. [FN361] Both the California and Vermont Supreme Courts, in declaring a third party to be a parent, have cited the fact that unless the court treats the third party as a parent the child will be left with only one parent, suggesting that single parents have less constitutional rights to parent their children. [FN362] One Wisconsin Supreme Court judge highlighted the specious nature of that argument:

> Contrary to the majority opinion, the child here does not need the “protection of the courts.” His mother is the one who should have had ***55** the courts protecting her right to raise her own child and to determine what is in her child's best interests But, this child is in no “societal drift,” Dickensian or otherwise. This child is no “Oliver Twist”-he is not an orphan, he has a mother. Thousands and thousands of single parents, widows and widowers from time immemorial have raised children and made the choices parents have always had to make that are part of raising, supporting and nurturing their children, including deciding with whom their child shall associate. And, they have done so without government interference. This mother has a constitutional right to do the same. [FN363]

A state's preference that a child be raised in a two-parent home is not sufficiently strong to deprive a parent of her constitutional rights.

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B. Courts Should Respect the Separation of Powers

In performing strict scrutiny, courts must also resist the temptation to take matters into their own hands. Courts must remember that they are called to decide what the law is, not to make law. Several courts have expressly commented on the proper role of the judiciary in the context of parentage determinations. [FN364] For example, New York appellate courts have repeatedly had the opportunity to expand the legal definition of parent but have, each time, refused to do so, recognizing the unique role of the legislature to make such a public policy determination. For example, in Alison D. v. Virginia M., the New York Court of Appeals, the highest court in New York, addressed "whether petitioner, a biological stranger to a child who is properly in the custody of his biological mother, has standing to seek visitation with the child." [FN365] Petitioner and ***56** Respondent, two women, were in a relationship until the child was two years and four months old. [FN366] For three years, the women agreed to a visitation schedule that permitted the former same-sex partner to visit with the child a few times a week. [FN367] The biological mother ended all contact between the former partner and the child after the former partner moved to Ireland. [FN368] At that time, the child was approximately six years old. [FN369] The former partner claimed that she was a de facto parent or, alternatively, that she should be treated as a parent by estoppel. [FN370] The court held:

> We decline petitioner's invitation to read the term parent in [S]ection 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child. While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the [l]egislature did not in [S]ection 70 give such nonparent the opportunity to compel a fit parent to allow them to do so. [FN371]

More recently, the Utah Supreme Court explained the limited authority of courts to make public policy determinations concerning parentage and visitation: "While the distinction between applying the law to unique situations and engaging in legislation is not always clear, by asking us to recognize a new class of parents, this court [is invited] to overstep its bounds and invade the purview of the legislature." [FN372]

Two justices of the Wisconsin Supreme Court, dissenting in the seminal case that established a four-part test to determine when a third party is a de facto parent, echoed the sentiments of the New York Court of Appeals:

> There is no justification for a court to seek to impose in the name of the law, common or equitable, its own ideas of social policy and a new found theory of family law which creates new "rights" for those who have no legally binding relationship to the child (for instance, no duty of support). This is especially true when doing so requires overruling its own cases interpreting controlling statutory authority. Changes in ***57** family law as drastic as those created here should only be done by the legislature following full hearings and debate by ninety-nine Representatives, thirty-three Senators and the Governor. The majority opinion is a bad example of legislation by judicial fiat. [FN373]

Another justice of that court also explained that

> [a] state court functions at its lowest ebb of legitimacy when it not only ignores constitutional mandates, but also legislates from the bench, usurping power from the appropriate legislative body and forcing the moral views of a small, relatively unaccountable group of judges upon all those living in the state. Sadly, the majority opinion in this case provides an illustration of a court at its lowest ebb of legitimacy. [FN374]

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## Conclusion

Under the guise of changing the law to reflect evolving social mores, some courts have adopted a view of parental rights that protects a biological mother's liberty interest in private property more than her interest in her children. [FN375] Whereas one can acquire an ownership interest in real property by prescriptive easement or adverse possession only after he has had open, continuous use of the property for a prescribed number of years, one can acquire fundamental parental rights in another's child without any requirement that the third party live with and raise the child for any set period of time. [FN376] While some courts grant a third party parental status only after she has been in a parental role for a length of time "sufficient to have established with the child a bonded, dependent relationship, parental in nature," [FN377] that standard ***58** still permits a third party to gain constitutional interests in parenting another person's child in much shorter time than that person could have gained a protected interest in another's real property. Worse still, other courts, including Vermont, have adopted a standard that does not require the third party to live with the child for any period of time whatsoever. [FN378] Even college roommates, who share furniture, music collections, and appliances during their time together know that upon graduation, the items belong to the original owner despite the four year period of continuous use of another's property. Yet, the concept seems lost on some members of the judiciary and the third parties seeking to become a parent to another's child.

The intent to share parenting responsibilities for a child and time spent acting as a parent, coupled with the third party's desire to be a parent and time spent acting as a parent, does not make the third party a parent to another's child. Regardless of the wisdom of the biological parent's decision to involve a third party in the child's life, parents do not abdicate their constitutional rights to raise their children to the exclusion of third parties. The government lacks any authority, even under the guise of what is best for the child and society, to take all, or a part, of a parent's interest in her child and give it to a legal stranger pursuant to some form of eminent domain.

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[FN1]. Assisted reproductive technology refers generally to the various "techniques facilitating human procreation by means other than normal sexual intercourse." LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 275 (2002). The major techniques include in vitro fertilization, artificial insemination, and surrogacy. Id. at 275-76. "[In vitro] fertilization involves the removal of an egg or eggs from a woman, the donation of sperm from a man, and the combination of them [outside the uterus]." Id. at 276. The fertilized egg is then returned to the woman's body or donated to someone else. Id. Artificial insemination, however, does not require removal of the eggs from the woman's body. Id. at 275. Instead, the sperm is injected into the woman's body in the hopes that fertilization will occur. Id. Surrogacy refers to the situation where a woman (surrogate) carries and gives birth to a child for another person or couple. Id. at 276. The surrogate can use either an egg from another woman or her own egg that is fertilized by donated sperm. Id.

[FN2]. In the book, a mother bird leaves her egg to gather food. While the mother bird is gone, the baby bird hatches and begins to look for its mother. As it encounters a cat, hen, dog, cow, car, and boat, the baby bird asks whether each is its mother, which of course none are. The answer was easy because the bird did not look like any of the other animals or objects and was not brought into this world by them. Finally, when the mother bird

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returns, the baby bird immediately recognized its mother. P.D. EASTMAN, ARE YOU MY MOTHER? (1960).

[FN3]. Not factored into the analysis are those rare cases where a biological mother attempted to regain custody of a child placed into an adoptive home. See, e.g., In re Baby M, 537 A.2d 1227 (N.J. 1988).

[FN4]. See, e.g., Assisted Reproductive Technology (ART) Timeline, http:// www.art parenting.org/about/index.html (last visited Dec. 1, 2008). Although artificial insemination had been successfully performed prior to the 1970s, the use of all forms of assisted reproductive technology dramatically increased after the first successful birth using in vitro fertilization in 1978. See D. Micah Hester, Reproductive Technologies as Instruments of Meaningful Parenting: Ethics in the Age of ARTs, 11 CAMBRIDGE Q. OF HEALTHCARE ETHICS 401, 401 (2002); see also Assisted Reproductive Technology (ART) Timeline, supra.

[FN5]. See, e.g., J.F. v. D.B., 897 A.2d 1261, 1265-67 (Pa. Super. Ct. 2006) (deciding whether gestational carrier had right to custody of the children she bore pursuant to a surrogacy agreement where the fertilized eggs from an egg donor were implanted into the surrogate who agreed to carry the children for a third woman).

[FN6]. See 1 Kings 3:16-28. Two women came before King Solomon, both claiming to be the mother of a child. Id. The two women, who shared a home, both gave birth within three days of each other. 1 Kings 3:17-18. When one woman's baby died during the night, she exchanged the babies, claiming in the morning that the living child was her own. 1 Kings 3:19-22. To resolve the dispute, King Solomon ordered the living child to be cut in two, with one half given to each woman. 1 Kings 3:24-25. One woman stopped him, stating, “Please, my lord, give her the living baby! Don't kill him!” 1 Kings 3:26. The second woman replied, “Neither I nor you shall have him. Cut him in two!” Id. Concluding that the real mother would not allow her child to be killed, the King gave his ruling: “Give the living baby to the first woman. Do not kill him; she is his mother.” 1 Kings 3:27. When he initially ordered that the baby be cut in two, King Solomon knew that the child's mother would be willing to lose her child to the other woman if it spared the child's life. See 1 Kings 3:28.

[FN7]. See Robin Cheryl Miller, Annotation, Child Custody and Visitation Rights Arising from Same-Sex Relationship, 80 A.L.R.5th 1 (2000).

[FN8]. See infra Part II (discussing various approaches taken).

[FN9]. See infra Part III (discussing the appropriate test to use).

[FN10]. Carvin v. Britain, 122 P.3d 161 (Wash. 2005) (en banc); see infra Part II.B (discussing case).

[FN11]. Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 63, 180 Vt. 441, 469, 912 A.2d 951, 972-73.

[FN12]. Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm, at 11 (Rutland Fam. Ct. Nov. 17, 2004) [hereinafter Parentage Order] (ruling denying Plaintiff's Motion to Withdraw Waiver to Challenge Presumption of Parentage) (on file with the Regent University Law Review); see infra Part II.C (discussing case).

[FN13]. Jones v. Barlow, 2007 UT 20, ¶ 43, 154 P.3d 808, 819; see infra Part II.D (discussing case).

[FN14]. Robinson v. Ford-Robinson, 208 S.W.3d 140 (Ark. 2005); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); In re Marriage of Simmons, 825 N.E.2d 303 (Ill. App. Ct. 2005); King v. S.B., 837 N.E.2d 965 (Ind. 2005); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146; Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); In re Bon-

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field, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241; Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); Jones v. Barlow, 2007 UT 20, 154 P.3d 808; Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951; Carvin v. Britain, 122 P.3d 161 (Wash. 2005); Clifford K. v. Paul S. ex rel Z.B.S., 619 S.E.2d 138 (W. Va. 2005); Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995); see also infra 106-107 (listing additional cases that have considered whether to grant parental rights to legal strangers).

[FN15]. Troxel v. Granville, 530 U.S. 57, 65 (2000).

[FN16]. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[FN17]. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citing Pierce, 268 U.S. at 535).

[FN18]. 262 U.S. 390, 396 (1923).

[FN19]. Id. at 396, 399.

[FN20]. Id. at 399.

[FN21]. Pierce, 268 U.S. at 530.

[FN22]. Id. at 534-35.

[FN23]. Id. (emphasis added). Supreme Court precedent recognizes that absent harm to the child, government has no authority to interfere with parental decision-making of a biological parent. Further, the right and "high duty" to direct a child's upbringing flows directly from the God-given duty of parents to train their children according to the truths of Scripture. See, e.g., Deuteronomy 6:6-7 ("These commandments that I give you today are to be upon your hearts. Impress them on your children. Talk about them when you sit at home and when you walk along the road, when you lie down and when you get up."); Proverbs 22:6 ("Train a child in the way he should go, and when he is old he will not turn from it."); Isaiah 59:21 ("'As for me, this is my covenant with them,' says the Lord. 'My Spirit, who is on you, and my words that I have put in your mouth will not depart from your mouth, or from the mouths of your children, or from the mouths of their descendants from this time on and forever."'); Ephesians 6:4 ("Fathers, do not exasperate your children; instead, bring them up in the training and instruction of the Lord.").

[FN24]. 321 U.S. 158 (1944).

[FN25]. Id. at 159-60.

[FN26]. Id. at 166, 171.

[FN27]. Id. at 171. The propriety of the Court's decision to affirm the conviction in that case is beyond the scope of this Article.

[FN28]. Wisconsin v. Yoder, 406 U.S. 205 (1972).

[FN29]. Id. at 231.

[FN30]. Id. at 213-14.

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[FN31]. Id.

[FN32]. Id. at 233.

[FN33]. Id. at 233-34.

[FN34]. See Santosky v. Kramer, 455 U.S. 745, 766-67 (1982) (suggesting that a "clear and convincing evidence" standard of proof is the minimal standard of proof required to satisfy due process in a termination of parental rights hearing); Garcia v. Rubio, 670 N.W.2d 475, 483 (Neb. Ct. App. 2003) ("[A] court may not, in derogation of the superior right of a biological or adoptive parent, grant child custody to one who is not a biological or adoptive parent unless the biological or adoptive parent is unfit to have child custody or has legally lost the parental superior right in a child." (quoting Stuhr v. Stuhr, 481 N.W.2d 212, 217 (Neb. 1992))).

[FN35]. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)) (dealing with rights of an unwed father).

[FN36]. M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citations omitted) (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

[FN37]. Stanley, 405 U.S. at 657-58. This Article does not address the special situation of a biological parent who is for some reason not fit to exercise custody or control over a child. Throughout this Article, therefore, it shall be understood that all references to a "biological parent" are to an adult who is fit to exercise the normal rights and duties of a parent.

[FN38]. Troxel v. Granville, 530 U.S. 57, 70 (2000) (plurality opinion). Justice O'Connor announced the judgment of the Court, in which Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer joined.

[FN39]. Id. at 69-70.

[FN40]. Id. at 60.

[FN41]. Id.

[FN42]. Id.

[FN43]. Id.

[FN44]. Id.

[FN45]. Id. at 60-61 (citing Smith v. Stillwell-Smith, 969 P.2d 21, 23 (Wash. 1998), aff'd sub nom. Troxel v. Granville, 530 U.S. 57 (2000)).

[FN46]. Brief for Respondents at 8-9, Troxel, 530 U.S. 57 (No. 99-138), 1999 WL 1146868.

[FN47]. Troxel, 530 U.S. at 61.

[FN48]. Id. (quoting WASH. REV. CODE ANN. § 26.10.160(3) (West 2005), declared unconstitutional by Troxel v. Granville, 530 U.S. 57 (2000)).

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[FN49]. § 26.10.160(3).

[FN50]. Troxel, 530 U.S. at 61 (citing Smith, 969 P.2d at 23).

[FN51]. Id.

[FN52]. Id.

[FN53]. Id. (citing Smith, 969 P.2d at 23).

[FN54]. Id. at 61-62 (citations omitted).

[FN55]. Id. at 62 (citations omitted).

[FN56]. Id.

[FN57]. Id. (quoting In re Troxel, 940 P.2d 698, 700 (Wash. Ct. App. 1997)).

[FN58]. Smith v. Stillwell-Smith, 969 P.2d 21, 23 (Wash. 1998), aff'd sub nom. Troxel v. Granville, 530 U.S. 57 (2000).

[FN59]. Id. at 29-30.

[FN60]. Id.

[FN61]. Id. at 29.

[FN62]. Id. at 30.

[FN63]. Id.

[FN64]. Id. at 31.

[FN65]. Troxel, 530 U.S. at 63.

[FN66]. Id. at 65, 67.

[FN67]. Id. at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923)); see supra notes 18-20 and accompanying text (discussing Meyer).

[FN68]. Id. (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)); see supra 21-23 and accompanying text (discussing Pierce).

[FN69]. Id. at 66 (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)); see supra 29-33 and accompanying text (discussing Yoder).

[FN70]. Id. at 67.

[FN71]. Id.

[FN72]. Id. at 69 (citing Parham v. J.R., 442 U.S. 584, 602 (1979)).

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[FN73]. Id. at 68-69. The Court explained that while "[i]n an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren whether such an intergenerational relationship would be beneficial in any specific case is for the parent[, not the court,] to make in the first instance." Id. at 70.

[FN74]. Id. at 69.

[FN75]. Id. (alteration in the original).

[FN76]. Id. at 72-73.

[FN77]. Id. at 69-70. The Court also found it significant that Granville never sought to cut off visitation entirely. Id. at 71. The dispute between Granville and the Troxels arose when Granville decided to limit visitation to one day per month and on special holidays. Id. The trial court rejected Granville's proposal, settling on a middle ground between the Troxels' visitation request and Granville's offer of visitation. Id. The Court pointed out that many states "expressly provide by statute that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party." Id. As discussed infra Part II, unless those statutes require the third party to show, at a minimum, actual harm to the child absent visitation, it infringes the parent's constitutional rights to order visitation over the parent's objections.

[FN78]. Id. at 73.

[FN79]. See id. at 75-80 (Souter, J., concurring).

[FN80]. Id. at 78.

[FN81]. Id. at 78-79 (footnote omitted). Justice Souter noted that the Supreme Court of Washington invalidated the statute on similar reasoning. The Supreme Court of Washington explained:

> Some parents and judges will not care if their child is physically disciplined by a third person; some parents and judges will not care if a third person teaches the child a religion inconsistent with the parents' religion; and some judges and parents will not care if the child is exposed to or taught racist or sexist beliefs. But many parents and judges will care, and, between the two, the parents should be the ones to choose whether to expose their children to certain people or ideas.

Id. at 79 n.4 (quoting Smith v. Stillwell-Smith, 969 P.2d 21, 31 (Wash. 1998)).

[FN82]. Id. at 80 (Thomas, J., concurring).

[FN83]. Id. Justice Thomas began his opinion by pointing out that neither party argued that the Court's substantive due process cases were wrongly decided or that the original understanding of the Due Process Clause precluded judicial enforcement of unenumerated rights under that constitutional provision. As a result, he agreed that the Court's precedent recognizing a fundamental right of parents to direct the upbringing resolved the case. Id.

[FN84]. Id.

[FN85]. Id. at 80-81, 86-89 (Stevens, J., dissenting).

[FN86]. Id. at 80-81.

[FN87]. Id. at 86.

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[FN88]. Id.

[FN89]. Id. at 89. Justice Stevens's approach to third-party visitation claims fails to adequately protect a parent's rights. For example, under the Washington statute, once a third party filed a petition for visitation, the court determined whether visitation would be in the child's best interests. WASH. REV. CODE ANN. § 26.10.160(3) (West 2005). Under Justice Stevens's approach, once a third party files a petition, the court must determine whether the parents' refusal to grant visitation is not motivated by an interest in the welfare of the child. In reality, a court that believes it is in a child's best interest to have visitation with the third party will then find that the parent, who is denying the visitation, is not motivated by the child's best interests.

[FN90]. Troxel, 530 U.S. at 90-91 (Stevens, J., dissenting). Justice Stevens also discussed his view that children have rights independent from their parents. He stated that it is "extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." Id. at 88. The Court reserved consideration of this question when it decided Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

[FN91]. Id. at 91-92 (Scalia, J., dissenting).

[FN92]. Id. at 92.

[FN93]. Id. Justice Scalia noted that whether parental rights constitute a liberty interest for purposes of procedural due process is a different question not implicated in Troxel. Id. at 92 n.1. Justice Scalia also suggested that there might be First Amendment claims a biological parent could bring on behalf of her children. Justice Scalia stated:

I note that respondent is asserting only, on her own behalf, a substantive due process right to direct the upbringing of her own children, and is not asserting, on behalf of her children, their First Amendment rights of association or free exercise. I therefore do not have occasion to consider whether, and under what circumstances, the parent could assert the latter enumerated rights.

Id. at 93 n.2.

[FN94]. Id. at 94 (Kennedy, J., dissenting).

[FN95]. Id.

[FN96]. Id. at 95-96.

[FN97]. Id. at 98.

[FN98]. Id.

[FN99]. Id.

[FN100]. Id. at 99 (quoting Smith v. Stillwell-Smith, 969 P.2d 21, 30 (Wash. 1998)).

[FN101]. Id.

[FN102]. Id. at 100-01 (Kennedy, J., dissenting). He did not explain who qualifies as a de facto parent. Earlier in his opinion, he characterized the plurality opinion as assuming "that the parent or parents who resist visitation have always been the child's primary caregivers and that the third parties who seek visitation have no legitimate

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and established relationship with the child." Id. at 98. Perhaps Justice Kennedy would draw on the American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, which explains that before a person can be declared a de facto parent, she must have lived with the child "for a significant period of time not less than two years." § 2.03(1)(c) (2000) [hereinafter FAMILY DISSOLUTION] (emphasis added). Alternatively, he may have been referring to the situation where a third party has acted in a caregiving role when a parent has declined, or been unable, to do so.

[FN103]. Troxel, 530 U.S. at 101 (Kennedy, J., dissenting).

[FN104]. Id.

[FN105]. Id. at 69, 73 (O'Connor, J., plurality opinion).

[FN106]. See, e.g., Leavitt v. Leavitt, 132 P.3d 421, 427 (Idaho 2006) (allowing grandparent visitation over parental objection upon clear and convincing evidence that visitation would be in the child's best interest); Davis v. Heath, 128 P.3d 434, 438-39 (Kan. Ct. App. 2006) (quoting KAN. STAT. ANN. § 38-129 (2000), declared unconstitutional as applied by State v. Paillet, 16 P.3d 962 (Kan. 2001)) (finding Kansas statute constitutional on its face and permitting a court to grant grandparent visitation over parental objection "upon a finding that the visitation rights would be in the child's best interests and when a substantial relationship between the child and the grandparent has been established"); Stadter v. Siperko, 661 S.E.2d 494, 497 (Va. Ct. App. 2008) (citing Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997)) (holding that "courts may grant visitation to [third parties, including grandparents,] in contravention of a fit parent's expressed wishes only when justified by a compelling state interest").

[FN107]. See, e.g., Riepe v. Riepe, 91 P.3d 312, 318 (Ariz. Ct. App. 2004) (allowing one standing in loco parentis to obtain visitation over objections of fit, biological parent without mentioning Troxel); Robinson v. Ford-Robinson, 208 S.W.3d 140, 144 (Ark. 2005) (granting a stepparent visitation because she stood in loco parentis); Elisa B. v. Superior Court, 117 P.3d 660, 670 (Cal. 2005) (granting parental rights and responsibilities to the biological mother's former lesbian partner); In re E.L.M.C., 100 P.3d 546, 562 (Colo. Ct. App. 2004) (granting former same-sex partner joint parenting time and decision-making authority over objection of fit, biological mother); King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005) (entitling former same-sex partner to some rights of visitation to former partner's biological child); C.E.W. v. D.E.W., 2004 ME 43, ¶ 15, 845 A.2d 1146, 1152 (finding that once a court determines nonparent in a same-sex relationship to be a de facto parent, the court is free to award parental rights over biological parent's objections); E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (concluding that the best interest analysis applies when determining custody between biological parent or de facto parent); Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007) (citing Troxel, 530 U.S. at 73) (upholding the constitutionality of a third-party visitation statute and granting visitation to a third party who stood in loco parentis over parental objection); V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000) (holding that once an individual is found to be a psychological parent, he or she stands in parity with biological parent); A.C. v. C.B., 829 P.2d 660, 663-64 (N.M. Ct. App. 1992) (holding coparenting agreement between a lesbian couple enforceable); Mason v. Dwinnell, 660 S.E.2d 58, 64 (N.C. Ct. App. 2008) (noting that best interest of the child standard shall apply whenever custody is sought regardless of the relationship of the recipient of custody to the child); Rubano v. DiCenzo, 759 A.2d 959, 975 (R.I. 2000) (stating that a de facto parent has parental rights in limited circumstances, in spite of Troxel); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶¶ 45-48, 180 Vt. 441, 460-61, 912 A.2d 951, 967 (concluding that the rationale behind granting a former same-sex partner acting in loco parentis custody over opposition of biological parent applies equally to visitation); Carvin v. Britain, 122 P.3d 161, 177

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(Wash. 2005) (en banc) (holding that a de facto parent stands in legal parity with a biological parent); Clifford K. v. Paul S. ex rel Z.B.S., 619 S.E.2d 138, 156-58, 160 (W. Va. 2005) (defining psychological parent status and granting custody to partner of deceased mother over biological father); Holtzman v. Knott, 533 N.W.2d 419, 435-36 (Wis. 1995) (adopting a four-prong test to determine de facto parenthood).

[FN108]. See, e.g., Kazmierazak v. Query, 736 So. 2d 106, 110 (Fla. Dist. Ct. App. 1999) (denying nonparent in same-sex relationship parental rights because psychological parent lacked parental status equivalent to biological mother); Clark v. Wade, 544 S.E.2d 99, 108 (Ga. 2001) (holding that a biological parent may not lose custody to a nonparent without clear and convincing evidence that the biological parent is unfit or the parental custody would cause harm to the child); In re Marriage of Simmons, 825 N.E.2d 303, 307-08, 312-13 (Ill. App. Ct. 2005) (refusing to recognize a de facto parent even when child called the nonparent "Daddy" and nonparent co-parented the child since birth); In re Visitation with C.B.L., 723 N.E.2d 316, 320-21 (Ill. App. Ct. 1999) (refusing to award visitation to former same-sex partner due to lack of standing); In re Ash, 507 N.W.2d 400, 404 (Iowa 1993) (refusing to grant visitation to former boyfriend of biological mother); McGuffin v. Overton, 542 N.W.2d 288, 292 (Mich. Ct. App. 1995) (refusing to allow deceased mother's former same-sex partner to challenge biological father's custody rights or gain visitation rights); In re Nelson, 825 A.2d 501, 504 (N.H. 2003) (upholding objection of biological parent over nonparent's claim to parental rights); Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (rejecting former same-sex partner's claim to visitation over objection of biological parent); In re Bonfield, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241, at ¶ 34 (rejecting claim that same-sex partner was a parent for purposes of entering shared parenting agreement); White v. Thompson, 11 S.W.3d 913, 919 (Tenn. Ct. App. 1999) (rejecting biological mothers' former same-sex partners' claims to visitation and concluding that Tennessee law does not provide for award of custody or visitation to nonparent except as provide by its legislature); Coons-Andersen v. Andersen, 104 S.W.3d 630, 635-36 (Tex. App. 2003) (rejecting same-sex partner's claim for visitation because in loco parentis is temporary and ends when the child is no longer under the care of the person in loco parentis); Jones v. Barlow, 2007 UT 20, ¶ 22, 154 P.3d 808, 813 (holding that "a legal parent may freely terminate in loco parentis status by removing her child from the relationship, thereby extinguishing all parent-like rights vested in the former surrogate parent" (italics added)); Stadter v. Siperko, 661 S.E.2d 494, 498, 501 (Va. Ct. App. 2008) (affirming lower court's holding that former cohabitant failed to prove by clear and convincing evidence that denial of visitation would harm child). But see Beth R. v. Donna M., 853 N.Y.S.2d 501, 508-09 (N.Y. App. Div. 2008) (refusing to follow New York precedent and concluding that biological parent equitably estopped from cutting off former same-sex partner's custody and visitation rights).

[FN109]. Compare Mason, 660 S.E.2d at 70 (affirming the trial court's finding that a biological mother partially relinquished the exclusive right to direct her child's upbringing to her former same-sex partner, requiring the court to apply a best interest analysis to decide the custody dispute), with Brewer v. Brewer, 533 S.E.2d 541, 548 (N.C. Ct. App. 2000) (upholding a biological parent's objection to a de facto parent's visitation claim where parent voluntarily relinquished custody to other biological parent).

[FN110]. See Janice M. v. Margaret K., 948 A.2d 73, 93 (Md. 2008).

[FN111]. See id. The Maryland Court of Appeals refused to find that a de facto parent "necessarily will overcome the right of the legal parent to custody and control over visitation." Id. at 91. The court, however, permitted the de facto parent status to be "a strong factor to be considered in assessing whether exceptional circumstances exist" to justify interference with a fit parent's constitutional rights. Id. at 93.

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[FN112]. BLACK'S LAW DICTIONARY 803 (8th ed. 2004).

[FN113]. Jones, 2007 UT 20, ¶ 13, 154 P.3d at 811 (italics added) (quoting Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978)).

[FN114]. Id. (italics added) (quoting Sparks v. Hinckley, 5 P.2d 570, 571 (Utah 1931)).

[FN115]. Id. ¶ 22, 154 P.3d at 813; see also In re Agnes P., 800 P.2d 202, 205 (N.M. Ct. App. 1990); McDonald v. Tex. Employers' Ins. Ass'n, 267 S.W. 1074, 1076 (Tex. Civ. App. 1924); Harmon v. Dep't of Soc. & Health Servs., 951 P.2d 770, 775 (Wash. 1998) (en banc) (citing Taylor v. Taylor, 364 P.2d 444, 445-46 (Wash. 1961) (en banc)).

[FN116]. Jones v. Jones, 2005 PA Super. 337, ¶ 1.

[FN117]. Id. ¶ 8.

[FN118]. Id.

[FN119]. Id. ¶ 1, 9 ("Boring does not seriously contest that Jones is in loco parentis ."); see also J.A.L. v. E.P.H., 682 A.2d 1314, 1319-21 (Pa. Super. Ct. 1996) (holding that the fact that third party lived with the child and the biological mother in a family setting and developed a relationship with the child as a result of the participation and acquiescence of biological mother must be an important factor in determining whether third party has standing in loco parentis); Kellogg v. Kellogg, 646 A.2d 1246, 1249 (Pa. Super. Ct. 1994) (holding that for a third party to be accorded standing he or she must prove by clear and convincing evidence that she has shown a sustained, substantial, and sincere interest in the welfare of the child).

[FN120]. Jones, 2005 PA Super. 337, ¶ 9.

[FN121]. Id. ¶ 10.

[FN122]. Id.

[FN123]. Id. ¶ 12 (emphasis added). The appellate court found that

[w]hile the scale was tipped in favor of Boring, Jones [had] produced clear and convincing reasons to even the scale and then tip it on her side. Jones did not establish that Boring was unfit, and was not required to do so, but Jones did clearly and convincingly establish that the children would be better off with her as the primary custodian and that the children's relationship with both parties would be better fostered if custody were awarded to Jones. [The court] noted during the initial round of hearings in this case, wherein primary custody was awarded to Boring, that Boring was inclined "to attempt to exclude Jones" and the court cautioned that Boring "can't totally control the children's lives without any input from the other person that was a parent."

Id. ¶ 14 (citations omitted).

[FN124]. Id. ¶¶ 12, 15-16.

[FN125]. Carvin v. Britain, 122 P.3d 161, 168 n.7 (Wash. 2005) (en banc) (quoting JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973)) (citations omitted). Even though the claims of psychological parents typically yield to the rights of the legal parent, the court held that a de facto parent has standing to seek visitation even where the biological mother had married the child's biological father. Id. at 164 n.3, 167-68, 178; see infra Part II.B. The phrase "psychological parent" is also used in custody disputes

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between natural parents. In that context, the phrase refers to the psychological bonds formed between the child and parent. See, e.g., Randolph v. Randolph, 2008-51, p. 8 (La. App. 3 Cir. 4/30/08); 982 So. 2d 281, 286 (psychologist recommended that the mother remain the domiciliary parent because she "has been a primary caregiver for this child and the child truly sees her as the 'psychological parent"').

[FN126]. BLACK'S LAW DICTIONARY 448 (8th ed. 2004).

[FN127]. KY. REV. STAT. ANN. § 403.270 (LexisNexis 1999 & Supp. 2007) (emphasis added).

[FN128]. 194 S.W.3d 310, 311 (Ky. 2006). In B.F., T.D. adopted the child during her relationship with B.F., but the two separated when the child was six years old. Id. at 310; see also Marquez v. Caudill, 656 S.E.2d 737, 742-44 (S.C. 2008) (quoting Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006)) (affirming family court's determination that stepfather was a psychological parent by applying four-prong test that included required showing of an assumption of obligations of parenthood).

[FN129]. Holtzman v. Knott, 533 N.W.2d 419, 435-36 (Wis. 1995).

[FN130]. Id. at 421 (emphasis added).

[FN131]. Id. (footnotes omitted).

[FN132]. See, e.g., Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146; E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); Carvin v. Britain, 122 P.3d 161 (Wash. 2005) (en banc). See generally Robin Cheryl Miller, Annotation, Child Custody and Visitation Rights Arising from Same-Sex Relationship, 80 A.L.R.5th 1 (2000).

[FN133]. Elisa B. v. Superior Court, 117 P.3d 660, 662 (Cal. 2005); see also CAL. FAM. CODE § 7570(a) (West 2004 & Supp. 2008), declared unconstitutional by San Diego County Health & Human Servs. Agency v. Jennifer G., 59 Cal. Rptr. 3d 703, 714 (Ct. App. 2007) ("Establishing paternity is the first step toward a child support award.").

[FN134]. Id. at 667-70.

[FN135]. Id. at 667 (quoting CAL. FAM. CODE § 7611(d) (West 2004 & Supp. 2008), declared unconstitutional by San Diego County Health & Human Servs. Agency v. Jennifer G., 59 Cal. Rptr. 3d 703, 714 (Ct. App. 2007)). The Code creates a presumption of paternity (1) if he is the husband of the child's mother, is not impotent or sterile, and was cohabiting with her, CAL. FAM. CODE § 7540 (West 2004), (2) if he signs a voluntary declaration of paternity stating he is the biological father, or (3) if "[h]e receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE §§ 7611(c)(1), (d) (West 2004 & Supp. 2008), declared unconstitutional by San Diego County Health & Human Servs. Agency v. Jennifer G., 59 Cal. Rptr. 3d 703, 714 (Ct. App. 2007).

[FN136]. Elisa B., 117 P.3d at 664-65, 667-69 (citing Los Angeles County Dep't of Children & Family Servs. v. Leticia C., 124 Cal. Rptr. 2d 677, 681 (Ct. App. 2002)).

[FN137]. Id. at 667-68 (explaining that it "is generally a matter within the discretion of the superior court" to determine whether to permit the presumption to be rebutted by proof that the presumed parent is not biologically

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related to the child). Although the court did not explain what sort of a case would be "an appropriate action" to rebut the presumption, Elisa B. was not such a case primarily because there was no one else who claimed to be the child's second parent. Id. at 668.

[FN138]. Charisma R. v. Kristina S., 44 Cal. Rptr. 3d. 332, 333, 336-37 (Ct. App. 2006).

[FN139]. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004). An earlier edition of Black's specified that in "child custody determinations" parens patriae refers to "acting on behalf of the state to protect the interests of the child." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

[FN140]. C.E.W. v. D.E.W., 2004 ME 43, ¶ 10, 845 A.2d 1146, 1149 (italics added) (footnote omitted) (quoting Roussel v. State, 274 A.2d 909, 925-26 (Me. 1971)).

[FN141]. 122 P.3d 161 (Wash. 2005) (en banc). The court relied on two decisions that awarded custody to third parties over the biological parents' objections. Id. at 168. In one case, the stepmother was awarded custody after divorcing the biological father because his deaf child had shown significant intellectual advances as a result of the stepmother's dedication to the child's training. Id. (citing In re Marriage of Allen, 626 P.2d 16, 18-20 (Wash. Ct. App. 1981)). In the second case, the Washington Court of Appeals reversed custody for the biological father when the aunt served as the "psychological parent" of the child and provided a "family unit" that could not be ignored. Id. at 169 (citing Stell v. Stell, 783 P.2d 615, 621-23 (Wash. Ct. App. 1989)).

[FN142]. Id. at 163.

[FN143]. Id. at 163-64.

[FN144]. Id.

[FN145]. Id.

[FN146]. Id.

[FN147]. Id. (citing In re Parentage of L.B., 89 P.3d 271, 275 (Wash. Ct. App. 2004)).

[FN148]. Id.

[FN149]. Id.

[FN150]. Id.

[FN151]. Id. at 164 n.3.

[FN152]. Id. at 164.

[FN153]. Id. at 164-65.

[FN154]. Id. at 165.

[FN155]. Id. (citing In re Parentage of L.B., 89 P.3d 271, 278-79 (Wash. Ct. App. 2004)).

[FN156]. Id. (citing L.B., 89 P.3d at 284).

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[FN157]. Id. (citing L.B., 89 P.3d at 279).

[FN158]. Id. (quoting L.B., 89 P.3d at 285).

[FN159]. Id. (quoting L.B., 89 P.3d at 286). As implied by the Virginia Supreme Court, there are different types of harm a child can suffer if visitation is denied to someone who has been involved in the child's life, not all of which justify judicial interference with parental choices concerning visitation. See, e.g., Williams v. Williams, 501 S.E.2d 417 (Va. 1998). In particular, harm can refer to the sorrow of losing a loved one (which should not justify judicial interference) or actual physical harm to the child (which would justify judicial interference because it approximates a showing of unfitness). See infra Part III.

[FN160]. Carvin, 122 P.3d at 166.

[FN161]. WASH. REV. CODE ANN. § 4.04.010 (West 2005).

[FN162]. Carvin, 122 P.3d at 166 (citing Dep't of Soc. & Health Servs. v. State Pers. Bd., 812 P.2d 500, 504 (Wash. Ct. App. 1991)).

[FN163]. Id. at 169.

[FN164]. Id. at 167 & n.7.

[FN165]. Id. at 168 (citing In re Marriage of Allen, 626 P.2d 16, 19 (Wash. Ct. App. 1981)).

[FN166]. Id. at 169 (citing Stell v. Stell, 783 P.2d 615, 622 (Wash. Ct. App. 1989)).

[FN167]. Id. at 170 (citing WASH. REV. CODE ANN. §§ 26.26.051, .106 (West 2005)). Section 26.26.106 prohibits marital status discrimination in determining the rights of children born out of wedlock. WASH. REV. CODE ANN. § 26.26.106 (West 2005). Section 26.26.051 states that "provisions relating to determination[s] of paternity appl[y] to determination[s] of maternity. WASH. REV. CODE ANN. § 26.26.051 (West 2005).

[FN168]. Carvin, 122 P.3d at 170 (emphasis added) (quoting WASH. REV. CODE ANN. § 26.26.021(1) (West 2005)).

[FN169]. Id. at 172.

[FN170]. Id. at 173.

[FN171]. Id. at 173-76 (citing In re Interest of E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004); King v. S.B., 818 N.E.2d 126 (Ind. Ct. App. 2004); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146; E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); In re Bonfield, 97 Ohio St. 3d 387, 2002-Ohio-6660, 780 N.E.2d 241; T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995)).

[FN172]. Id. at 175 n.23 (citing McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995); In re Nelson, 825 A.2d 501 (N.H. 2003); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); White v. Thompson, 11 S.W.3d 913 (Tenn. Ct. App. 1999); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997)).

[FN173]. WASH. REV. CODE ANN. § 26.26.021 (West 2005).

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[FN174]. Carvin, 122 P.3d at 176 (quoting Bernot v. Morrison, 143 P. 104, 106 (Wash. 1914)).

[FN175]. Id. at 177. Almost immediately thereafter, the court made the seemingly contradictory statement that "[a] de facto parent is not entitled to any parental privileges, as a matter of right, but only as is determined to be in the best interests of the child at the center of any such dispute." Id. The court's subsequent discussion in the case of the biological mother's fundamental parental rights makes clear that a de facto parent does in fact stand "in parity with biological and adoptive parents" in Washington. Id. at 178. The court also created new law when it decided to grant de facto parents the same rights as legal parents. In its decision, it explained that prior cases had not afforded psychological parents the same rights as legal parents. See id. at 167 n.7.

[FN176]. Id. at 178 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

[FN177]. Id. at 177-78.

[FN178]. Id. at 178.

[FN179]. Id.

[FN180]. Id.

[FN181]. Id. at 177-79. The responsibility of a court under the best interest of the child standard is to make an order, after considering statutorily defined factors that furthers the child's best interests in the midst of a divorce between the child's parents. See, e.g., LYNN D. WARDLE & LAURENCE C. NOLAN, FUNDAMENTAL PRINCIPLES OF FAMILY LAW 863 (2002). When the custody dispute is between a parent and a third party, Troxel mandates that at least some special weight be given to the parent's preferences. Troxel, 530 U.S. at 70. As discussed infra Part III, a court infringes the biological or adoptive parent's fundamental rights when it grants custody or visitation to a third party over the parent's objections unless the parent is unfit.

[FN182]. Carvin, 122 P.3d at 181 (Johnson, J., dissenting).

[FN183]. Id.

[FN184]. Id.

[FN185]. Id.

[FN186]. Id.

[FN187]. Id. at 178 (majority opinion).

[FN188]. Id. at 181 (Johnson, J., dissenting).

[FN189]. Id.

[FN190]. Id. at 182. Section 26.26.101 sets forth five situations in which the mother-child relationship is established:

(1) when a woman gives birth to a child[;] (2) through an adjudication of [biological] maternity[;] (3) through adoption[;] (4) by a surrogate parentage contract[;] or (5) by an affidavit and physician's certificate stating [the] intent [of the ovum donor or gestational surrogate] to be bound as a parent of a child born through al-

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ternative reproductive medical technology.
Id. (citing WASH. REV. CODE ANN. § 26.26.101. (West 2005)).
[FN191]. Carvin, 122 P.3d at 182 (Johnson, J, dissenting) (quoting State v. Jackson, 976 P.2d 1229, 1235 (Wash. 1999) (en banc)).

[FN192]. Id.

[FN193]. Id. at 183 (quoting State ex rel. D.R.M. v. Wood, 34 P.3d 887, 894-95 (Wash. Ct. App. 2001) (emphasis added)).

[FN194]. Id. The dissent also explained that earlier that year, the court had refused to reach the de facto parentage issue where the paternal grandmother filed a nonparental custody petition and sought to be declared the de facto parent of a child she had raised from ages two to eight. Id. (citing Luby v. Da Silva, 105 P.3d 991, 992, 993 n.3 (Wash. 2005) (en banc)).

[FN195]. Id. at 184.

[FN196]. The Videotaped Deposition of Lisa Miller-Jenkins at 7-8, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. 2007) [hereinafter Deposition] (on file with the Regent University Law Review); see also April Witt, About Isabella, WASH. POST, Feb. 4, 2007, (Magazine), at W14, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/01/30/AR2007013001316.html (providing detailed history of the factual and legal issues involved in the case).

[FN197]. Witt, supra note 196, at 18.

[FN198]. Miller-Jenkins, 2006 VT 78, ¶ 3, 180 Vt. at 445, 912 A.2d at 956.

[FN199]. Deposition, supra note 196, at 24-35.

[FN200]. Id. at 36.

[FN201]. Id. at 36-37.

[FN202]. Miller-Jenkins, 2006 VT 78, ¶ 3, 180 Vt. at 445, 912 A.2d at 956.

[FN203]. Id.

[FN204]. Id.

[FN205]. Id. ¶ 4, 180 Vt. at 446, 912 A.2d at 956. At the time, because Virginia did not legally recognize same-sex relationships, Vermont was the only state in which Miller could file to dissolve the civil union. See VA. CODE ANN. § 20-45.2 (2008) ("A marriage between persons of the same sex is prohibited."); see also Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002) (affirming trial court's ruling that it lacks subject matter jurisdiction to dissolve Vermont same-sex civil union); Lane v. Albanese, No. FA044002128S, 2005 WL 896129, at *4 (Conn. Super. Ct. Mar. 18, 2005) (finding court lacks subject matter jurisdiction to dissolve Massachusetts same-sex marriage).

[FN206]. Witt, supra note 196, at 20-21.

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[FN207]. Id. at 21.

[FN208]. Id. at 21, 28. Miller indicated in a handwritten notation on the form that Jenkins should only be awarded "supervised" parent-child contact. Id. at 28. In Vermont, "'[p]arental rights and responsibilities' means the rights and responsibilities related to a child's physical living arrangements, parent[-]child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." VT. STAT. ANN. tit. 15, § 664(1) (2002). Additionally, "'[p]arent-child contact' means the right of a parent who does not have physical responsibility to have visitation with the child." Id. § 664(2). Both phrases refer to rights afforded a parent in a custody or visitation dispute. This Article refers to parental rights and responsibilities as "custody," and refers to parent-child contact as "visitation."

[FN209]. Deposition, supra note 196, at 93. Miller has testified that she listed Isabella in response to that question because Isabella was her biological child. Id. She did not understand the question to represent a legal acknowledgment that Jenkins was a parent to Isabella. See id.

[FN210]. Notice of Appearance, Answer to Civil Union Dissolution Complaint & Counterclaim, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. Jan. 16, 2004) [hereinafter Counterclaim] (on file with the Regent University Law Review); Witt, supra note 196, at 28 ("In early 2004, seven weeks after Lisa asked the court to dissolve their union, Janet filed a counterclaim seeking custody of Isabella for herself and visitation for Lisa.").

[FN211]. See Counterclaim, supra note 210; see also Witt, supra note 196, at 28.

[FN212]. Witt, supra note 196, at 28. Miller terminated the attorney-client relationship with her first attorney, Linda Reis, before the first day of the temporary hearings. Id.

[FN213]. Witt, supra note 196, at 28-29 (explaining that "Lisa worked her way" through the phone book to find a new attorney). Miller met Lashman for the first time at the courthouse, approximately thirty minutes before the hearing began. Id.; see also Continuation of Request for Temporary Order Hearing at 40-41, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. May 26, 2004) [hereinafter Continuation] (on file with the Regent University Law Review).

[FN214]. Witt, supra note 196, at 28-29. Lashman testified that she had a different interpretation than Miller concerning the parental rights of former partners and, without discussing the waiver issue with Miller, purported to waive Miller's parental rights in court. Id. During a break in the hearing, Miller asked Lashman to clarify the courtroom discussion concerning the waiver, but Lashman explained that she would not discuss the issue with her at that time. Id. at 29. After the hearing, Miller demanded that Lashman take steps to revoke the purported waiver. Id. After Miller continued to insist that Jenkins was not Isabella's parent, Lashman withdrew. Id. Later in the case, Miller learned that Lashman was an anonymous plaintiff in the landmark Vermont case legalizing second parent adoption for same-sex couples. Id. at 28; see also In re B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993); Continuation, supra note 213, at 40-41.

[FN215]. Witt, supra note 196, at 29-30; see also Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 62, 180 Vt. 441, 468-69, 912 A.2d 951, 972.

[FN216]. Miller-Jenkins, 2006 VT 78, ¶ 4, 180 Vt. at 445-46, 912 A.2d at 956.

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[FN217]. Id.

[FN218]. Id. ¶ 8, 180 Vt. at 446, 912 A.2d at 957.

[FN219]. Parentage Order, supra note 12, at 3.

[FN220]. Id. at 9-10. VT. STAT. ANN. tit. 15, § 308 (2002) ("A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if: (1) the alleged parent fails to submit without good cause to genetic testing as ordered; or (3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test .").

[FN221]. Miller-Jenkins, 2006 VT 78, ¶ 54, 180 Vt. at 464, 912 A.2d at 969.

[FN222]. Parentage Order, supra note 12, at 10.

[FN223]. Id. at 10. Both of those cases, decided in the late 1960s and early 1970s, involved the question of whether the ex-husband, who had consented during the marriage to artificial insemination of his wife with sperm from an anonymous donor, should be treated as the father to the child born during the marriage. People v. Sorensen, 437 P.2d 495, 497 (Cal. 1968); In re Adoption of Anonymous, 345 N.Y.S.2d 430, 431 (N.Y. Sur. Ct. 1973).

[FN224]. Parentage Order, supra note 12, at 11.

[FN225]. Id.

[FN226]. Id.

[FN227]. Id. at 12. The court stated:

This court can not [sic] impose a hurdle for a party to a civil union that it would not impose on a married couple. The court sees no reason why a husband choosing to create a family with his wife by utilizing an anonymous sperm donor would be required under Vermont law to initiate an adoption proceeding to protect his rights, and the court can not [sic] impose this obstacle upon a party to a civil union who makes that same choice. Id.

[FN228]. See id. at 11; see also Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 56, 180 Vt. 441, 465, 912 A.2d 951, 970.

[FN229]. See Parentage Order, supra note 12.

[FN230]. Miller-Jenkins, 2006 VT 78, ¶¶ 59-60, 62, 180 Vt. at 466-68, 912 A.2d at 971-72.

[FN231]. Id. ¶¶ 41-42, 180 Vt. at 459, 912 A.2d at 965-66.

[FN232]. VT. STAT. ANN. tit. 15, § 308 (2002).

[FN233]. Id.

[FN234]. VT. STAT. ANN. tit. 15, § 1204(f) (2002).

[FN235]. Miller-Jenkins, 2006 VT 78, ¶¶ 41-42, 180 Vt. at 459, 912 A.2d at 966.

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[FN236]. Brief of the Appellee at 18, Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (No. 454-11-03 Rddm).

[FN237]. Id. at 18-19.

[FN238]. See, e.g., Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993).

[FN239]. Brief of the Appellee, supra note 236, at 17-18.

[FN240]. Id. at 22.

[FN241]. Id. at 23-24 (quoting In re B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993)).

[FN242]. See Reply Brief, Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951 (No. 454-11-03 Rddm).

[FN243]. Id. at 13.

[FN244]. Id.

[FN245]. Id.

[FN246]. Id. at 14; see also Miller-Jenkins, 2006 VT 78, ¶¶ 41-42, 180 Vt. at 459-60, 912 A.2d at 966. The statute seeks to declare "natural" parentage, the plain language of which suggests a genetic connection between the child and alleged parent. Id.

[FN247]. Reply Brief, supra note 242, at 14; see also Miller-Jenkins, 2006 VT 78, ¶ 59, 180 Vt. at 466-67, 912 A.2d at 971.

[FN248]. Miller-Jenkins, 2006 VT 78, ¶ 44, 180 Vt. at 460, 912 A.2d at 966.

[FN249]. See Paquette v. Paquette, 499 A.2d 23, 30 (Vt. 1985).

[FN250]. Miller-Jenkins, 2006 VT 78, ¶ 45, 180 Vt. at 460, 912 A.2d at 966-67 (quoting Paquette, 499 A.2d at 30).

[FN251]. Miller-Jenkins, 2006 VT 78, ¶ 47, 180 Vt. at 461, 912 A.2d at 967 (italics added). Although it is unlikely to have changed the court's analysis, the court mischaracterized Jenkins' interest as one for only visitation. Jenkins was awarded parent-child contact; she was not awarded third-party visitation. The significance of the difference is that because Jenkins is treated as a parent, she has the ability to request a modification of the parent-child contact order, asking the court to award her primary legal and physical responsibility of the child. If she had been awarded third-party visitation rights, she would not have the ability to make any such request. See supra note 210 and accompanying text (explaining that in her counterclaim, Jenkins sought primary custody in her favor).

[FN252]. Id. ¶ 52, 180 Vt. at 463, 912 A.2d at 968.

[FN253]. Id. ¶ 52, 180 Vt. at 463, 912 A.2d at 968-69 ("We express, as many other courts have, a preference for legislative action .").

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[FN254]. Id. ¶ 56, 180 Vt. at 465, 912 A.2d at 970.

[FN255]. Id; see also supra note 209 and accompanying text (discussing Miller's decision to list Isabella on the civil dissolution proceeding papers as a child of the union).

[FN256]. Miller-Jenkins, 2006 VT 78, ¶ 58, 180 Vt. at 466, 912 A.2d at 971.

[FN257]. Id. ¶ 59, 180 Vt. at 467, 912 A.2d at 971.

[FN258]. 122 P.3d 161 (Wash. 2005) (en banc).

[FN259]. See Miller-Jenkins, 2006 VT 78, 180 Vt. 441, 912 A.2d 951. The court also readily dispensed with Miller's argument that Lashman's purported waiver of Miller's constitutional rights should be revoked, stating:

We believe the family court acted within its broad discretion in awarding temporary visitation as it did, even if it could not make a final determination of parentage In any event, the timing of the court's action was harmless in this case. The family court eventually ruled that [Jenkins] had parental status with respect to [Isabella], a ruling we have affirmed.

Id. ¶¶ 62-63, 180 Vt. at 469, 912 A.2d at 972-73. The issue, however, raises substantial constitutional questions. Under what circumstances, if any, can a biological parent waive her exclusive rights to parent her child? What facts must be proven to establish that it was a knowing and voluntary waiver? Must the waiver be in writing? See infra notes 341-359 and accompanying text (discussing the waiver question).

[FN260]. Miller-Jenkins, 2006 VT 78, ¶ 59, 180 Vt. at 467, 912 A.2d at 971. The court's decision in Miller-Jenkins was a departure from cases in which the Vermont Supreme Court had refused to treat a former same-sex partner as a parent to the biological parent's child. See Titchenal v. Dexter, 693 A.2d 682, 683-85 (Vt. 1997). In fact, in February 2007, the Utah Supreme Court relied on Titchenal to support its decision not to adopt the de facto parent doctrine:

We agree with the Supreme Court of Vermont that "jurisdiction should not rest upon a test that in effect would examine the merits of visitation or custody petitions on a case-by-case basis. In reality, such a fact-based test would not be a threshold jurisdictional test, but rather would require a full-blown evidentiary hearing in most cases. Thus, any such test would not prevent parents from having to defend themselves against the merits of petitions brought by a potentially wide range of third parties claiming a parent-like relationship with their child."

Jones v. Barlow, 2007 UT 20, ¶ 31, 154 P.3d 808, 816 (quoting Titchenal, 693 A.2d at 687-88).

[FN261]. See Miller-Jenkins, 2006 VT 78, ¶ 72, 180 Vt. at 471, 912 A.2d at 974. The Vermont Supreme Court denied a petition for reargument in November 2006. Id. 180 Vt. at 441, 912 A.2d at 951. In June 2007, the Vermont family court issued a final order regarding the civil union dissolution and allocation of parental rights and responsibilities. See Findings of Fact, Conclusions of Law, & Order, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. June 15, 2007) [hereinafter June 15 Order] (on file with the Regent University Law Review). That order awarded Miller "sole physical and legal custody" of Isabella and gave Jenkins liberal, unsupervised visitation. June 15 Order, supra, at 14-15. Pursuant to that order, Jenkins was awarded visitation as follows: June 30 and July 7 in Virginia for eight hours each day; July 13-15 and July 27-29 in Virginia from Friday 5:00 p.m. until Sunday 9:00 a.m.; August 19-25 in Vermont; two weekends each month thereafter, with one visitation taking place in Virginia and one in Vermont. Id. By order dated December 31, 2007, the court modified the visitation schedule to avoid Isabella's traveling from Virginia to Vermont for two-day weekends while school was in session. See Order on Modification of Visitation Schedule, Miller-Jenkins v. Miller-Jenkins, No. 454-11-03 Rddm (Rutland Fam. Ct. Dec. 31, 2007) (on file with the Regent University Law Re-

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view). In March 2008, the Vermont Supreme Court affirmed the final order. Miller-Jenkins v. Miller-Jenkins, No. 2007-271, 2008 WL 2811218, at *2 (Vt. Mar. 2008). The United States Supreme Court denied review on October 6, 2008.

[FN262]. Jones, 2007 UT 20, ¶¶ 3-4, 154 P.3d at 810.

[FN263]. Id. ¶ 4, 154 P.3d at 810.

[FN264]. Id. ¶¶ 4-5, 154 P.3d at 810.

[FN265]. Id. ¶ 6, 154 P.3d at 810.

[FN266]. Id.

[FN267]. Id.

[FN268]. Id. ¶ 7, 154 P.3d at 810 (italics added) (internal quotation marks omitted).

[FN269]. Id. (italics added).

[FN270]. Id. ¶ 8, 154 P.3d at 810.

[FN271]. Id.

[FN272]. Id.

[FN273]. Id. ¶ 9, 154 P.3d at 810.

[FN274]. Id. ¶ 9 n.2, 154 P.3d at 810 n.2.

[FN275]. Id. ¶ 9, 154 P.3d at 810-11 (italics added). She also argued "the trial court's application of the in loco parentis doctrine violat[ed] Barlow's constitutional rights[,] the visitation order violat[ed] Barlow's right to privacy," and Jones never stood in loco parentis to the child. Id. ¶ 9, 154 P.3d at 811.

[FN276]. Id. ¶ 13, 154 P.3d at 811 (quoting Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978), abrogated by Jones, 2007 UT 20, 154 P.3d 810).

[FN277]. Id. (quoting Sparks v. Hinckley, 5 P.2d 570, 571 (Utah 1931)).

[FN278]. Id. ¶ 16, 154 P.3d at 812 (italics added).

[FN279]. Id. ¶ 14, 154 P.3d at 812 (italics added).

[FN280]. Id. ¶ 29, 154 P.3d at 815 (italics added) (quoting Coons-Andersen v. Andersen, 104 S.W.3d 630, 636 (Tex. App. 2003)).

[FN281]. Id. ¶ 30, 154 P.3d at 815.

[FN282]. Id. ¶ 30, 154 P.3d at 816 (italics added).

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[FN283]. Id. ¶ 31, 154 P.3d at 816.

[FN284]. Id. (italics added).

[FN285]. Id. ¶ 32, 154 P.3d at 816 (italics added).

[FN286]. Id. ¶¶ 33-34, 154 P.3d at 816-17.

[FN287]. Id. ¶¶ 40-41, 154 P.3d at 818-19.

[FN288]. Id. ¶ 34, 154 P.3d at 817 (quoting Van v. Zahorik, 597 N.W.2d 15, 18 (Mich. 1999)). There are unique dangers presented to our constitutional liberties and inalienable rights when the powers of two branches of government are combined into one. As Alexander Hamilton explained in the Federalist Papers, "'there is no liberty, if the power of judging be not separated from the legislative and executive powers."' THE FEDERALIST NO. 78, at 473 (Alexander Hamilton) (Bantam Classic ed. 1982) [hereinafter FEDERALIST NO. 78] (citing 1 MONTESQUIEU, THE SPIRIT OF LAWS bk. XI, ch. 6, para. 5, at 174 (Thomas Nugent trans., 1873)). "[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." Id.

[FN289]. Jones, 2007 UT 20, ¶¶ 35-36, 154 P.3d at 817 (italics added).

[FN290]. Id. ¶ 66, 154 P.3d at 826 (Durham, C.J., dissenting).

[FN291]. Id. ¶¶ 63-66, 154 P.3d at 825-26 (italics added).

[FN292]. Id. ¶ 68, 154 P.3d at 826.

[FN293]. Id. ¶¶ 93, 95, 154 P.3d at 833-34. But see infra Part III (explaining why an implicit waiver does not pass constitutional muster).

[FN294]. See C.E.W. v. D.E.W., 2004 ME 43, ¶ 14, 845 A.2d 1146, 1152 ("The question of by what standard a person is determined to be a de facto parent implicates the fundamental liberty interests of natural and adoptive parents ." (italics added)); Jones, 2007 UT 20, ¶ 33, 154 P.3d at 816 ("[I]n carving out a permanent role in the child's life for a surrogate parent, this court would necessarily subtract from the legal parent's right to direct the upbringing of her child and expose the child to inevitable conflict between the surrogate and the natural parents.").

[FN295]. See, e.g., Riepe v. Riepe, 91 P.3d 312, 317 n.3 (Ariz. Ct. App. 2004) (stating that standard for awarding custody is more onerous than for visitation); Robinson v. Ford-Robinson, 208 S.W.3d 140, 143 (Ark. 2005) (explaining that a more lenient standard applies when a stepparent seeks visitation rather than custody (citing Stamps v. Rawlins, 761 S.W.2d 933, 935 (Ark. 1988))); Middleton v. Johnson, 633 S.E.2d 162, 172-73 (S.C. Ct. App. 2006) (stating that in a dispute between a legal parent and a psychological parent, the "'presumptive rule"' is to give custody to the legal parent with visitation to the third party (citing V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000))).

[FN296]. See, e.g., Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (opining that the government "lack[ed] even a legitimate interest in second-guessing a fit parent's decision regarding visitation with third parties"); Clark v. Wade, 544 S.E.2d 99, 109 (Ga. 2001) (Sears, J., concurring) (stating that only the par-

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ental fitness test can be constitutionally applied when a third party seeks to remove a child from the care of his or her parents); Soohoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007) (stating that strict scrutiny is proper standard to apply in third-party visitation cases, but then failing to properly apply the standard (citing Troxel, 530 U.S. at 65; Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972))); In re R.A., 891 A.2d 564, 576, 579 (N.H. 2005) (stating that strict scrutiny analysis applied to grandmother's petition for joint custody with child's parents but adopting a rule that required only that there be "clear and convincing evidence that the stepparent or grandparent should obtain custody of the child"); Charles v. Stehlik, 744 A.2d 1255, 1260 (Pa. 2000) (Nigro, J., dissenting) ("I believe that natural parents have a constitutionally protected paramount right to custody, care and control of their child whenever there is no evidence that the parents were unfit or neglected the child's welfare."); Carvin v. Britain, 122 P.3d 161, 180-81 (Wash. 2005) (en banc) (Johnson, J., dissenting) (assuming that it is in the child's best interests to continue a relationship with a nonparent over the objection of a parent violates the constitutional presumption that a parent acts in their child's best interest); Holtzman v. Knott, 533 N.W.2d 419, 443 (Wis. 1995) (Steinmetz, J., concurring in part & dissenting in part) ("[A]bsent narrowly defined, compelling circumstances, the legal parent of a child is constitutionally entitled to decide whether visitation by a nonparent is in the best interest of the child.").

[FN297]. See, e.g., Roth v. Weston, 789 A.2d 431, 450 (Conn. 2002) ("The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child."); Beagle v. Beagle, 678 So. 2d 1271, 1276-77 (Fla. 1996) (holding that the state may not intrude upon a parent's fundamental right to raise their children without a finding that the child is threatened with harm); Clark, 544 S.E.2d at 100 ("[W]e construe the custody statute as requiring the third party to show by clear and convincing evidence that parental custody would harm the child in order to rebut the statutory presumption in favor of the parent."); In re R.A., 891 A.2d at 580 ("Accordingly, to grant custody to a stepparent or a grandparent as a means to protect the child, it is necessary that there be a substantial psychological parent-child relationship between the child and the stepparent or grandparent, such that denial of custody to that person would be 'emotionally harmful to the child."' (quoting In re Diana P., 424 A.2d 178, 181 (N.H. 1980))); Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn. 1993) ("Absent some harm to the child, we find that the state lacks a sufficiently compelling justification for interfering with [a parent's] fundamental right.").

[FN298]. Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998) (quoting Williams v. Williams, 485 S.E.2d 651, 654 (Va. Ct. App. 1997)).

[FN299]. 581 S.E.2d 899, 900 (Va. Ct. App. 2003).

[FN300]. Id.

[FN301]. Id.

[FN302]. Id.

[FN303]. Id.

[FN304]. Id. (court applied the best interest standard as codified in VA. CODE ANN. § 20-124.3 (2008)).

[FN305]. Id. at 901.

[FN306]. Id. at 903 (emphasis added) (citations omitted).

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[FN307]. Id.

[FN308]. 628 S.E.2d 563, 570-71, 574 (Va. Ct. App. 2006). With regard to standing, Surles qualified as "a person with legitimate interest." Id. at 570. A "person with legitimate interest" is broadly defined to include, but is not limited to "grandparents, stepparents, former stepparents, blood relatives and family members." VA. CODE. ANN. § 20-124.1 (2008).

[FN309]. Surles, 628 S.E.2d at 567.

[FN310]. Id. at 567-68.

[FN311]. Id. at 568.

[FN312]. Id.

[FN313]. Id.

[FN314]. Id.

[FN315]. Id.

[FN316]. Id.

[FN317]. Id.

[FN318]. Id.

[FN319]. Id. at 567-68.

[FN320]. Id. at 568.

[FN321]. Id.

[FN322]. Id. at 568-69.

[FN323]. Id. at 569-70.

[FN324]. Id. at 571, 573.

[FN325]. Id. at 573.

[FN326]. Id. (internal quotation marks and citations omitted) (quoting Griffin v. Griffin, 581 S.E.2d 899, 902-03 (Va. Ct. App. 2003)).

[FN327]. Griffin, 581 S.E.2d at 903 (citations omitted). The court in Surles relied on this passage. Surles, 628 S.E.2d at 573. In June 2008, the Virginia Court of Appeals applied the logic of Williams, Griffin, and Surles to a visitation dispute between a biological mother and her former same-sex partner. See Stadter v. Siperko, 661 S.E.2d 494, 496, 498 (Va. Ct. App. 2008), where the court affirmed the trial court's refusal to judicially create the de facto parent doctrine for Virginia in a case where two women in a lesbian relationship separated when the child was approximately eighteen months old. The court reaffirmed its requirement that harm be shown by clear

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and convincing evidence. Id. at 498.

[FN328]. See, e.g., Clark v. Wade, 544 S.E.2d 99, 109 (Ga. 2001) (Sears, J., concurring) ("[O]nly the traditional parental fitness test can be constitutionally applied" when a third party seeks custody).

[FN329]. 748 A.2d 539 (N.J. 2000).

[FN330]. Id. at 549.

[FN331]. Id. (citing Watkins v. Nelson, 748 A.2d 558, 564-65 (N.J. 2000)).

[FN332]. Id. (citing Sorentino v. Family & Children's Soc'y, 367 A.2d 1168 (N.J. 1976)).

[FN333]. Id. at 550.

[FN334]. Id. at 551 (citing Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995)).

[FN335]. See supra notes 139-140 and accompanying text (discussing parens patriae power).

[FN336]. Cf. Wisconsin v. Yoder, 406 U.S. 205, 233-34 (1972) (explaining that Prince v. Massachusetts was limited to situations where "it appears that parental decisions will jeopardize the health or safety of the child"). See generally supra notes 24-33 and accompanying text (discussing Prince).

[FN337]. See Holtzman, 533 N.W.2d at 441-42 (Day, J., concurring & dissenting) ("[T]he majority creates its law under the rubric of the court's longstanding equitable power to protect the best interest of a child Anything goes that a court may claim is in the best interest of the child!" (quotations omitted)); see also C.E.W. v. D.E.W., 2004 ME 43, ¶ 10, 845 A.2d 1146, 1149-50 (italics added) (quotations omitted) ("[N]ow familiar best interest of the child standard stands as the cornerstone of parens patriae doctrine."); Carvin v. Britain, 122 P.3d 161, 171 (Wash. 2005) (en banc) ("Washington courts have historically exercised broad equitable powers in considering cases regarding the welfare of children."); Clifford K. v. Paul S. ex rel Z.B.S., 619 S.E.2d 138, 147 (W. Va. 2005) ("[T]he best interest of children is the court's primary concern." (quoting W. VA. CODE ANN. § 48-9-101(b) (LexisNexis 2004))).

[FN338]. See, e.g., Riepe v. Riepe, 91 P.3d 312, 317 n.3 (Ariz. Ct. App. 2004) (stating that a biological parent's rights are not necessarily violated by awarding custody or visitation rights to a person standing in loco parentis); S.F. v. M.D., 751 A.2d 9, 14 (Md. Ct. Spec. App. 2000) ("The issue before us is thus largely governed by family law, not constitutional law."); A.C. v. C.B., 829 P.2d 660, 664, 666 (N.M. Ct. App. 1992) (holding that a non-parent may have rights over a parent's objection if the terms of a settlement agreement so dictate and it's in the best interests of the child); T.B. v. L.R.M., 874 A.2d 34, 38 (Pa. Super. Ct. 2005) ("'[C]ustody and visitation matters are to be decided on the basis of the judicially determined 'best interests of the child' standard, on a case-by-case basis, considering all factors which legitimately have an effect upon the child's physical, intellectual, moral, and spiritual well-being.'" (quoting Hicks v. Hicks, 868 A.2d 1245, 1247-48 (Pa. Super. Ct. 2005))).

[FN339]. See Rubano v. DiCenzo, 759 A.2d 959, 973 (R.I. 2000) ("[R]ights of a child's biological parent do not always outweigh those of other parties asserting parental rights, let alone do they trump the child's best interests."); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 58, 180 Vt. 441,466, 912 A.2d 951, 971 ("[Jenkins] was awarded visitation because she is a parent of [Isabella]. [Miller's] parental rights are not exclusive."); Carvin, 122 P.3d at 179 (contrasting the potential constitutional infringement of a third-party visitation with that

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in the case involving a visitation request by a de facto parent, which did not implicate the same constitutional interests).

[FN340]. See generally Troxel v. Granville, 530 U.S. 57, 70 (2000) (deciding what weight to afford parental preferences with respect to third-party visitation in light of the underlying fundamental parental right to rear children). Some have argued that the United States Supreme Court decision in Michael H. v. Gerald D., 491 U.S. 110 (1989), supports a state's right to determine parentage irrespective of biology. In that case, the Court considered the rights of the biological father of a child who was born during the mother's marriage to another man as a result of the biological father's adulterous affair with the woman. Id. at 113. The biological father had established a relationship with the child and had not been shown to be unfit. Id. at 121. The Supreme Court affirmed the constitutionality of California's parentage presumption, which, at the time, presumed the husband, not the biological father, to be the child's father. Id. at 129. That presumption could only be rebutted by the husband or wife, and then only in limited circumstances. Id. at 124. Applying that statute to the biological father, the United States Supreme Court affirmed California's decision that he lacked standing to challenge the presumption, specifically rejecting the father's parental rights argument. Id. at 125. That case, however, did not establish that the husband had an individual right to be treated as a de facto parent. Rather, the decision concerned the state's legitimate interest in protecting existing marriages against claims by a putative father who had engaged in an extramarital affair with the mother of the child. The decision reflects a choice to "preserve the integrity of the traditional family unit." Id. at 130. See generally Lynne Marie Kohm, Marriage and the Intact Family: The Significance of Michael H. v. Gerald D., 22 WHITTIER L. REV. 327 (2000) (discussing the emphasis the Court placed on protecting the intact family to reach its decision).

[FN341]. See, e.g., LaChapelle v. Mitten, 607 N.W.2d 151, 161 (Minn. Ct. App. 2000) ("By agreeing to share legal custody [she] functionally 'abandoned her right to [sole legal] custody."' (quoting Wallin v. Wallin, 187 N.W.2d 627, 629 (Minn. 1971))); V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000) (explaining that if the biological parent wishes to maintain "a zone of autonomous privacy for herself and her child she cannot invite a third party to function as a parent to her child and cannot cede over to that third party parental authority"); Mason v. Dwinnell, 660 S.E.2d 58, 69 (N.C. Ct. App. 2008) ("'[W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced."' (alteration in original) (emphasis omitted) (quoting Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. Ct. App. 2006))); cf. Jones v. Barlow, 2007 UT 20, ¶ 73, 154 P.3d 808, 828 (Durham, C.J., dissenting) ("If the legal parent wishes to maintain that zone of privacy, he or she need only choose not to delegate parental authority or encourage the formation of a permanent, parent-like relationship between his or her child and another party."). But see Stadter v. Siperko, 661 S.E.2d 494, 500 (Va. Ct. App. 2008) (rejecting third parties' argument that the biological parent had partially relinquished her parental rights to her former same-sex partner).

[FN342]. Holtzman, 533 N.W.2d at 436 n.40.

[FN343]. Jones, 2007 UT 20, ¶ 31, 154 P.3d at 816 (italics added).

[FN344]. See Titchenal v. Dexter, 693 A.2d 682, 687-88 (Vt. 1997) ("[J]urisdiction should not rest upon a test that in effect would examine the merits of visitation or custody petitions on a case-by-case basis. In reality, such a fact-based test would not be a threshold jurisdictional test, but rather would require a full-blown evidentiary hearing in most cases."). Ironically, while the vast majority of states have abolished common law marriage, the trend is to adopt a doctrine akin to common law parentage. One reason that states abolished common law mar-

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riage "was to secure reliable evidence by which the marriage could be proved to prevent fraud and litigation." John E. Wallace, The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post Mortem, 29 SEATTLE U. L. REV. 243, 247 (2005) (citing In re McLauglin's Estate, 30 P. 651, 655 (Wash. 1892)). That same concern, as explained by the Utah Supreme Court in Jones, should keep courts from adopting de facto parenthood. See Jones, 2007 UT 20, ¶ 31, 154 P.3d at 816.

[FN345]. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882)).

[FN346]. Id. (quoting Ohio Bell Tel. Co. v. Pub. Utils. Comm'n, 301 U.S. 292, 307 (1937)).

[FN347]. Id.

[FN348]. Id. at 465.

[FN349]. Travis v. Finley, 548 S.E.2d 906, 911 (Va. Ct. App. 2001) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)); see also State v. Merrill, 584 A.2d 1129, 1131 (Vt. 1990) (explaining that in order to find a knowing waiver of right to counsel, the "defendant may need to be advised of the available options to protect his rights to counsel, the full nature of the charges against him, the range of allowable punishment, and the consequences of proceeding without the aid of an attorney" (citing State v. Quintin, 460 A.2d 458, 460-61 (Vt. 1983); State v. Ahearn, 403 A.2d 696, 702 (Vt. 1979))).

[FN350]. Weidman v. Babcock, 400 S.E.2d 164, 167 (Va. 1991) (citing Fox v. Deese, 362 S.E.2d 699, 707 (Va. 1987)).

[FN351]. See Travis, 548 S.E.2d at 911 (concluding that a letter from counsel indicating that discovery answers would be forthcoming cannot constitute a waiver of the client's privilege against self-incrimination).

[FN352]. Brookhart v. Janis, 384 U.S. 1, 7-8 (1966).

[FN353]. McCarthy v. United States, 394 U.S. 459, 466 (1969).

[FN354]. Moran v. Burbine, 475 U.S. 412, 421 (1986).

[FN355]. Patterson v. Illinois, 487 U.S. 285, 292 (1988).

[FN356]. See supra note 341 (citing cases that have found implicit waiver).

[FN357]. See, e.g., Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995); see also supra note 132 (identifying decisions that have adopted the de facto parent doctrine).

[FN358]. The American Law Institute's PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 suffers from the same deficiency. It defines a de facto parent as:

[A]n individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years,

(i) lived with the child and,

(ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform

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caretaking functions,

(A) regularly performed a majority of the caretaking functions for the child, or

(B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.

FAMILY DISSOLUTION, supra note 102 (emphasis added). Cf. A.H. v. M.P., 857 N.E.2d 1061, 1074 (Mass. 2006) ("An express or implied agreement to have or raise a child may be relevant to the parties' intentions [b]ut evidence of an agreement is not and cannot be dispositive on the issue whether the plaintiff is the child's legal parent.").

[FN359]. See, e.g., Stadter v. Siperko, 661 S.E.2d 494, 500 (Va. Ct. App. 2008) (rejecting argument that the biological mother partially relinquished her parental rights to permit the court to grant third-party visitation over parental objection).

[FN360]. Jones v. Barlow, 2007 UT 20, ¶ 33, 154 P.3d. 808, 816. That conflict is magnified in these cases when the biological parent has left the homosexual lifestyle and is seeking to raise her child consistent with the Biblical understanding that the parent's former same-sex relationship was a sin. Cf. Witt, supra note 196 (providing detailed history of the factual and legal issues involved in Miller-Jenkins v. Miller-Jenkins).

[FN361]. See generally Troxel v. Granville, 530 U.S. 57, 65-67 (2000) (discussing fundamental parental rights in the context of "a parent's decision" to deny third-party visitation).

[FN362]. Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005) ("The twins in the present case have no father because they were conceived by means of artificial insemination using an anonymous semen donor. Rebutting the presumption that Elisa is the twin's parent would leave them with only one parent and would deprive them of the support of their second parent."); Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, ¶ 56, 180 Vt. 441,465, 912 A.2d 951, 970 ("[T]here is no other claimant to the status of parent, and, as a result, a negative decision would leave [Isabella] with only one parent.").

[FN363]. Holtzman v. Knott, 533 N.W.2d 419, 441 (Wis. 1995) (Day, J., concurring and dissenting); see also Troxel, 530 U.S. at 100-01 (Kennedy, J., dissenting).

[FN364]. Although it raises an issue that is more appropriately the subject of another law review article, many courts and scholars maintain, in error, that the judiciary has the authority to create new law. See, e.g., King v. S.B., 837 N.E.2d 965, 967 (Ind. 2005) (holding that because courts have authority to determine whether to place a child with a third party, it "necessarily includes the authority to determine whether such a person has the rights and obligations of a parent"); Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (N.Y. App. Div. 2002) ("Any extension of visitation rights to a same sex domestic partner who claims to be a 'parent by estoppel,' 'de facto parent,' or 'psychological parent' must come from the New York State Legislature or the Court of Appeals." (italics added)). But see A.B. v. H.L., 723 N.E.2d 316, 321 (Ill. App. Ct. 1999) ("Who shall have standing to petition for visitation with a minor is an issue of complex social significance. Such an issue demands a comprehensive legislative solution."); D.G. v. D.M.K., 1996 SD 144, ¶ 41, 557 N.W.2d 235, 243 ("It is up to the legislature to decide whether the definition of parent should be modified."); Wash. State Bar Ass'n. v. Washington, 890 P.2d 1047, 1050 (Wash. 1995) (en banc) ("'American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; and this principle has contributed greatly to the success of the American system of government and to the strength of the judiciary itself."' (quoting Wash. State Motorcycle Dealers Ass'n v. Washington, 763 P.2d

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442, 446 (Wash. 1988))).

[FN365]. 572 N.E.2d 27, 28 (N.Y. 1991) (per curiam).

[FN366]. Id.

[FN367]. Id.

[FN368]. Id.

[FN369]. See id.

[FN370]. Id. at 29.

[FN371]. Id. (citation omitted).

[FN372]. Jones v. Barlow, 2007 UT 20 ¶¶ 35, 154 P.3d 808, 817; see also Clifford K. v. Paul S. ex rel Z.B.S., 619 S.E.2d 138, 161 (W. Va. 2005) (Maynard, J., dissenting) ("Although this Court has previously acknowledged that it 'does not sit as a superlegislature' the majority does so in this case under the guise of doing what is in the best interests of Z.B.S It is improper for this Court to make new law in this area." (quoting Boyd v. Merritt, 354 S.E.2d 106, 108 (W. Va. 1986))).

[FN373]. Holtzman v. Knott, 533 N.W.2d 419, 442 (Day, J., concurring & dissenting) (concurring with the part of the opinion that dismissed the former partner's custody petition but dissenting from the part of the opinion allowing her to seek visitation).

[FN374]. Id. (Steinmetz, J., concurring in part & dissenting in part); see also FEDERALIST NO. 78, supra note 288.

[FN375]. See Laspina-Williams v. Laspina-Williams, 742 A.2d 840, 843 (Conn. Super. Ct. 1999) ("[F]or purposes of third party custody and visitation determinations, [t]raditional models of the nuclear family have come, in recent years, to be replaced by various configurations and we should not assume that the welfare of children is best served by a narrow definition of those whom we permit to continue to manifest their deep concern for a child's growth and development." (quoting Doe v. Doe, 710 A.2d 1297, 1317 (Conn. 1998))); Chambers v. Chambers, No. CN00-09493, 2002 WL 1940145, at *4 (Del. Fam. Ct. Feb. 5, 2002) ("[T]he societal definition of 'family' and 'parent' has dramatically changed As such, to the extent the passage of time has created a latent ambiguity in the definition of 'parent' in the support statute, the court must resolve the ambiguity."). See generally Lynn D. Wardle, Parenthood and the Limits of Adult Autonomy, 24 ST. LOUIS U. PUB. L. REV. 169 (2005) (discussing implications of adopting alternative family structures).

[FN376]. While not a perfect analogy, insofar as title acquired by adverse possession requires hostile possession of the property (that is, without owner's consent), whereas these custody disputes involve some aspect of initial consent, the analogy hopefully makes the point that courts, for the most part, fail to give proper attention to the deprivation of parental rights necessarily involved in granting a legal stranger parental rights.

[FN377]. Carvin v. Britain, 122 P.3d 161, 176 (Wash. 2005) (en banc).

[FN378]. The family court's test would confer parentage rights on a third party "where a legally connected

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couple utilizes artificial insemination to have a family[] [because] parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology." Parentage Order, supra note 12, at 11.

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