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Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families

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BREAKING THE MOLD AND PICKING UP THE PIECES: RIGHTS OF PARENTHOOD AND PARENTAGE IN NONTRADITIONAL FAMILIES

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The past few decades have shown us myriad ways to form a family. Married couples and their biological offspring no longer define the dominant model, nor do they constitute the majority of domestic arrangements. But while contemporary culture tends to applaud social diversity, we cannot be certain that novel, highly individualized family formation is always consonant with child well-being. Further, courts and legislatures have been slow to acknowledge and accommodate domestic diversity. When judges and lawmakers do confer parental rights on a particular class of individuals, the results are not always equitable or even logical. The era of the traditional nuclear family may be past, but the task of legitimating, recognizing, and strengthening new parent–child bonds is just beginning.

Key Points For The Family Court Community:

- Even in light of its decreasing relevance, the nuclear family model continues to shape our perception of what a family should look like.
- The presence of a biological tie between parent and child is not always dispositive of parental rights.
- Despite the prevalence of nontraditional family forms, the notion of de facto parenthood continues to be hotly contested.
- Stepparent families are America's fastest growing domestic arrangement. Yet, courts and legislatures are slow to accord legal status to nonbiological coparents, whether married or cohabiting.
- The use of assisted reproductive technology is on the rise among same-sex couples as well as infertile couples and single parents. These families are greatly in need of legal definition and validation in order to function and survive as families.

Keywords: *Cohabitation*; *De Facto Parenthood*; *Marriage*; *Nontraditional Family*; *Reproductive Technology*; *Stepfamilies*; *and Same-Sex Couples*.

I. INTRODUCTION: A VERY HARD ACT TO FOLLOW

It used to be so simple. Marriage, biology and adoption defined the class of adults who could aspire to the rights and obligations of parenthood. By limiting the number of persons who could claim parental status, the law achieved a measure of predictability, stability and certainty benefitting children and parents.[2] By the dawn of the 21st century, predictability had been submerged within a wave of multi-layered and impermanent family relationships, reproduction engineered by gamete donors and gestational surrogates, same-sex coparental unions, and nonmarital childbearing. The rise of family diversity has sorely taxed the power of the legal system to reinvent and reassign parental roles. Meanwhile, the social worth of so much change and complexity is sometimes questionable, especially in terms of family and child well being. It is tempting to wish we could roll back the tide to an earlier, easier time. But those times were not all good and, as Stephanie Coontz might counsel us, "we need to realize that many of our worries reflect how much better we want to be, not how much better we used to be."[3]

We have come to crave highly individualized romantic and familial bonds. As explained by Andrew Cherlin, in the pre-1960s United States, "marriage and only marriage was one's ticket of admission to a full family life."[4] As self-actualization became more gratifying than playing the marital role of

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good provider, homemaker or responsible parent, the notion of lifetime vows yielded to the quest for "personal growth and deeper intimacy."[5] The availability of consensual and even unilateral divorce expanded the arena of personal choice. The drive for self-development, along with the spirit of negotiation and egalitarianism, began to occupy the field of intimate relationships.[6] Increasingly, couples bypassed the public commitment of marriage in favor of the more private arrangement of cohabitation.[7] The number of single-person households grew as well, from 1% of those aged 18 to 29 in 1950, to 7% today.[8] Young professionals in particular devote their 20s and early 30s to career advancement rather than building families.[9] People marry later now, or not at all.[10] In the realm of consequences both intended and unintended, only one in ten women ended her childbearing years without giving birth in the 1970s. Today it is one in five.[11]

Infertility brought on by delayed childbearing fueled the need for Assisted Reproductive Technologies (ART). Same-sex couples who desired children also helped to swell the demand for sperm and egg donors and gestational surrogates. Lacking the determinants of biological parentage, ART's patrons turned to courts and legislatures to devise a legal means with which to link them with their non-genetic offspring. Despite these legal innovations, the cultural and legal preference for biological parentage remains formidable. When same-sex unions dissolve, the non-genetic parent risks the loss of contact with a son or daughter he or she has raised as his or her own. Similarly, stepparent/stepchild bonds rarely survive a break-up between the stepparent and the biological parent. Though these individuals may function as parents in all but name, they are traditionally biological strangers and nonparents in the eyes of the law. To prevent harm to children and preserve nontraditional parent-child attachments, courts have searched for ways to "confer rights considered parental upon those who are not legally recognized as parents."[12]

Conceptually, the task is difficult enough, but it is complicated even further by the instability and fluidity of today's family relationships. Bonds between child and nonparent are formed and broken with amazing rapidity. Qualitatively, as courts have found, some of these relationships are more 'parentlike' than others. By the time a court has reached such a determination, the child may have moved on to yet another family constellation. Divorced individuals repartner and divorce again. For unmarried couples with children, the turnover in genetically unrelated parent figures is even higher. In America today, more than half of all births to women under 30 occur outside marriage.[13] These pregnancies are "largely unplanned, a byproduct of uncommitted relationships."[14] Still, despite their fragility, stepfamilies are now more commonly formed by nonmarital birth and cohabitant repartnering than by marital birth and remarriage.[15]

By the late 20th century, the growing complexities of parentage demanded legal frameworks more adaptable to contemporary realities. The "best interests" standard may have been well-suited to custody and visitation battles between biological parents but, in and of itself, it cannot assist a court in parsing a dispute between an intended parent and a gestational surrogate, between a lesbian coparent and the child's genetic mother, or between a stepparent and a biological parent. In such cases, the ultimate determination of a child's best interests is most often preceded by an inquiry into the nature of the claimant's tie to the child, the natural parent's rights and preferences, and whether the claimant's interests can be accommodated by existing legal definitions of parenthood.

The legal and cultural recognition of nontraditional forms of parenthood is often hampered by our tendency to view them through "the lens of nuclear family norms."[16] So dominant is the conventional two-parent paradigm that it serves to "marginalize other family forms."[17] Further, as genetic links between parent and child become attenuated by adoption and the use of ART, biology assumes a crucial importance. Adopted children, as well as those conceived by sperm and egg donor, long to find that 'missing piece' of themselves and to know their genetic and ancestral origins.[18] As a result, most infant adoptions today are open and allow for the exchange of information between biological and adoptive parents.[19] Children of ART search for "family-type connections" among donor sibling registries because "it is biology, and biology alone, that provides the basis for a connection between donor-conceived family communities."[20] For all its novelty, family diversity is rooted in generations of tradition. Reconciling past and present can be difficult because, in the theater of family law, the biological nuclear family model is proving a very hard act to follow.

II. DE FACTO PARENTING IN THE ERA OF OPTIONAL MARRIAGE

For the continued viability of a legal system, demographics are destiny.[21] The family law universe no longer spins along the axis of a married heterosexual couple and their children. But while twenty-first century America presents a panoply of diverse domestic arrangements, the legal system that used to regulate families is now engaged in tracking them, unevenly, sometimes warily, and usually at a distance. As our legal framework is rebuilt with functional materials replacing biological ones, much is gained, much is lost. Fairness and accuracy are the winners in this new design. But the move to practical, 'as-designed-and-lived' blueprints to resolve core family issues sacrifices simplicity and certainty, and these are not inconsequential losses. Ultimately, there is no going backwards, no return to a supposedly golden era of perfect family forms that never really was.[22] The mold of family law is clearly broken, and how we pick up the pieces becomes especially important.

A quick look back may give us perspective on the present. De facto parenting would have mystified our common law ancestors. They viewed the offspring of married couples as the only ones who legally counted; an illegitimate child was *filius nullius*, nobody's son.[23] Maintaining the marital line was essential for inheritance.[24] Marital fidelity even trumped biology, since the bloodline of a child born out of wedlock was irrelevant.[25] Legitimacy was also a prime moral standard, "an encouragement to virtue."[26] But the innocent child paid the price for the parents' lack of virtue.[27] Adoption, a latecomer to family law, did not formally exist until the mid-19th century in the United States, and in England not until 1926.[28] Perhaps most importantly, the common law developed a comprehensive treatment of family burdens and benefits in a world *without divorce*.[29] Although divorce became more widely accessible in the course of the 19th century, its occurrence "was the merest trickle in comparison to the rate in more recent times."[30] Even with the significant rise in divorce throughout the 20th century, the normative nature of the heterosexual family form was unchallenged until the last decades of the century.[31]

Although their legal status is often contested, families are increasingly characterized as "two or more persons related by birth, adoption, marriage, or choice."[32] The core concept involves "the creation of 'an intimate familial relationship that is stable, enduring, substantial and mutually supportive, . . . one that is cemented by strong emotional bonds and provides deep and pervasive emotional security.' "[33] New Jersey Supreme Court Justice Virginia A. Long has sensitively described these emerging family norms:

> Those qualities of family life on which society places a premium—its stability, the love and affection shared by its members, their focus on each other, the emotional and physical care and nurturance that parents provide their offspring, the creation of a safe harbor for all involved, the wellspring of support family life provides its members, the ideal of absolute fealty in good and bad times that infuses the familial relationship (all of which justify isolation from outside intrusion)—are merely characteristics of family life that, except for its communal aspect, are unrelated to the particular form a family takes.[34]

The central difficulty with contemporary family law is that the subject matter has changed faster and more thoroughly than the formal legal principles. The central aims of family law "cannot be fully accomplished when 'family' is defined in law to exclude a significant part of the population of actual families."[35] Even though married couples and their children now form a minority of households, most state statutes have not caught up to the enormous demographic changes in family composition.[36] Moreover—and not surprisingly—many children in these new family compositions are raised by parents who do not fit the married heterosexual mold.[37]

The nature of parenthood has not changed. But the identity of the parents is now more than ever a contested terrain. As the Colorado Supreme Court noted, "Parenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities."[38] When these modern families experience legal turmoil, they must turn to judges who have little or no statutory guidance in dealing with these new domestic configurations. These clashes over parentage,

custody, and visitation often present novel and knotty issues for the courts because society is evolving faster than legislatures can—or choose to—keep up.[39] Many judges have recognized that "[t]he changing realities of modern family life, and the increasing use of collaborative reproductive technology to procreate children by asexual means, has forced a reconsideration of the meaning of parenthood."[40] In the absence of appropriate legislative revision of statutory concepts derived from a bygone era, courts often formulate or adapt equitable remedies to resolve the family dispute fairly for the parties and their children, bearing in mind that many similar and dissimilar families will soon bring their conflicts to these same courts for a determination of their parenting rights and obligations. As a California appellate court recently noted, "numerous states have recognized the parental rights of same-sex co-parents who do not have a biological or adoptive relationship with a child."[41]

The Supreme Judicial Court of Massachusetts has provided a comprehensive definition of a de facto parent: "one who has no biological relation to the child, but has participated in the child's life as a member of the child's family."[42] The de facto parent also "resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent."[43] Finally, the de facto parent "shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide."[44]

As with surrogacy agreements, de facto parenting is a quotidian reality of American life. Difficulties arise when an "untraditional" family faces disruption or dissolution, and even then only when the biological parent argues that the other parent—who in many case has fully shared parenting joys, burdens, and duties since the child's birth—is in fact a domestic gatecrasher, an unwanted intruder into the family. This argument is, of course, a canard. A litigant who successfully set up her family to include a coparent and a child, and then for years fully invested both herself and the other members in that family structure, cannot sincerely argue that it was all fake, that her family was a sham not to be taken seriously. Yet this "chutzpah" argument has been reported—although generally rejected—in numerous cases.[45]

Equitable recognition of de facto parenting in based on the principle " 'that disruption of a child's preexisting relationship with a nonbiological parent can be potentially harmful to the child,' thus warranting State intrusion into the private realm of the family."[46] Thus, establishing a parent-child relationship must precede the best interests custody/visitation inquiry.[47] The parentage determination is a prerequisite to the grant of parental rights.

The common law was structured to avoid parentage determinations. A heterosexual married couple with children born during the marriage generally presented no parentage issues. Indeed, this marital presumption was one of the strongest known to law.[48] For the millions of 'untraditional' families today, proof of parentage may be problematic. As discussed above, some jurisdictions conduct hearings to establish whether the evidence bears out a de facto parenting relationship.[49] Others phrase the inquiry somewhat differently. The North Carolina Supreme Court has held that a natural parent's "constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child" may be lost "if his or her conduct is inconsistent with this presumption."[50] If so, then the court may conduct a custody hearing and may award some parenting rights to the nonparent, pursuant to the best interests of the child.[51] This inconsistent-with-paramount-parental-interest standard is similar to the de facto parenting test, but there is a critical difference. Courts that follow this line of reasoning may grant the prevailing nonparent custody or visitation rights, but they do not afford him or her co-equal status as a parent.[52]

In some states, the route to de facto parenting has been decisively blocked. For example, in *Debra H. v. Janice R.*, the New York Court of Appeals reaffirmed its two-decades-long refusal to acknowledge any parent but a natural or adoptive one.[53] New York's adoption statute had been interpreted to permit "the unmarried partner of a child's biological mother, whether heterosexual or homosexual, who is raising the child together with the biological parent, [to] become the child's second parent by means of adoption."[54] In its most recent ruling, the court insisted that its rejection of de facto parentage, "in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups otherwise fraught with the risk of 'disruptive . . . battle[s]'

over parentage as a prelude to further potential combat over custody and visitation."[55] That 'bright-line' rationale has been somewhat strengthened by the passage of New York's same-sex marriage statute, which presumably will carry over the common law presumption of parentage whenever a child is born to either spouse during the marriage.[56] For children raised by a same-sex couple but not born during the marriage, adoption by the non-biological parent remains the only option to assure parentage.

Whether the opportunity to marry or to proceed with a second-parent adoption is sufficient and realistic in safeguarding families formed by same-sex couples is problematic. Many same-sex couples want to have children and do not desire to wed. Increasingly, domestic unions, whether heterosexual or homosexual, are formed by couples choosing to cohabit rather than marry.[57] As for the adoption alternative, a 2011 ruling by a New York Appellate Division court in a surrogacy case may be instructive. In *T.V. v. New York State Dep't of Health*, the court rejected the lower court's ruling that the genetic mother should adopt the child birthed by the gestational surrogate.[58] The court noted that this alterative "underestimates the hardships of adoption."[59] It quoted approvingly from an earlier case that summarized the difficulties with the process and suggested that it was an inappropriate way to determine parentage, particularly when compared to the "quick and easy"[60] filiation procedures customarily used for determining parentage:

> Adoptions are complicated and filled with technicalities such that it is critical, if not imperative, to employ a lawyer at considerable cost. . . . Adoption proceedings are generally lengthy, taking many months. . . . Adoption requires an intrusive (and often expensive) professional 'home study' involving intimate details of a couple's relationship, finances, family and living situation, as well as fingerprinting and a mandatory check for criminal record and any prior reported child abuse or neglect.[61]

The Court of Appeals' assertion in *Debra H.* that a same-sex partner interested in securing coparent status would adopt the child assumes a level of legal sophistication not required of any other type of parent. Moreover, it turns a blind eye to the vagaries of the domestic relationship itself, in which both partners may believe and act upon the premise that they are coequal, and the question of formal adoption may be seen as a disturbing intrusion by the formal legal system. The *Debra H.* case itself may have contained just this scenario. In her petition to the trial court, the same-sex partner seeking to establish parentage, Debra Hirshman, averred that more than once she raised the issue of her adopting the child with Janice Roven, his biological mother. According to Hirshman, Roven dissuaded her from pursuing an adoption by saying "We don't need an adoption. *You are his parent. I'm a lawyer.* I know the court system. We don't want the courts to get involved."[62]

The complexities of family life cut against the well-intended but ultimately cruel choice that the New York Court of Appeals has placed before same-sex couples and their children. Assessing the reality of parenthood may be arduous and time-consuming. But life is messy, families often nonconformist, and the insistence that same-sex partners follow specific and lengthy legal procedures in order to verify their right to parent the children they view as their own will ultimately hurt the children of these families. These children will be ripped from a relationship with one of the parents who was raising them because of the spite of their other parent and the obstinacy of the judicial system.

In contrast with New York's formalistic position, the Pennsylvania Supreme Court has aptly and realistically noted that "[t]he ability to marry the biological parent and the ability to adopt the subject child have never been and are not now factors in determining whether the third party assumed a parental status and discharged parental duties."[63] The de facto parenting standard calls for sensitive fact gathering and, yes, sometimes lengthy litigation ensues. But the other alternatives have fared little better in shortening the period of legal uncertainty, and done so at the cost of achieving a result sometimes at odds with the family structure the parties and children actually created. In cases of contested parentage, two goals should be uppermost: The facts should establish whether or not the natural parent welcomed the other adult into the relationship as a coparent. If so, the proper focus should shift to the nature and quality of the parental bond between the child and the adult seeking legal recognition.

III. THE LAW OF STEPFAMILIES: MORE COMPLEXITY, LESS CLARITY

Inquiries into the quality and nature of adult-child bonds form the crux of most legal issues pertaining to stepfamilies. In past decades, stepfamilies were commonly created when custodial parents remarried after divorce. Today, as America's fastest growing family form,[64] they are just as likely to arise when single mothers marry men who are not the fathers of their children.[65] With nonmarital childbirth increasing and marriage rates declining, the great majority of stepfamilies are now formed by cohabitation rather than marriage.[66] It is estimated that one-third of U.S. children will live in a remarried or cohabiting stepfamily before reaching adulthood.[67] More than half of all coresidential stepparents have children residing in another household.[68]

Whether married or not, stepfamilies are burdened with "deficit based perspectives," and are likely to be seen as poorly functioning entities more problematic and less worthy than nuclear families, or as incomplete institutions easily overlooked.[69] These views derive from long-held notions of biological parenthood's exclusive, privileged status[70] and from evolutionary assumptions that parents invest more in their biological children in order to perpetuate their genetic lineage.[71] Ganong and Coleman are unequivocal in their belief that "[p]arents love their children more than other people do," and "children love their parents more than they love other adults."[72]

Although stepfamily relationships can be successful and fulfilling, the period of adjustment is often quite stressful. Disagreements over childrearing are the most frequent source of discord among remarried, but not first-married, couples.[73] Divorce rates among couples with stepchildren are higher than those without.[74] In fact, in stepfamilies, the ability of adult partners to communicate and build cooperative coparental relationships is more predictive of marital quality than the stability of the marriage itself.[75]

Stepparents enter into situations where loyalties and behavioral dynamics are already well established. Ganong and Coleman liken it to "beginning a novel in the middle of the book."[76] Role ambiguity abounds, with stepparents expected to be friendly and supportive but not to usurp the power of the primary parent.[77] Mothers, in particular, want partners, not coparents.[78] Often, they act as "gatekeepers," defending their children from a stepfather's "perceived slights, lack of insight regarding the child, and unrealistic expectations for the child's behavior."[79] Ron Chernow, writing about George Washington and his rebellious stepson, Jacky, summed up the problem perfectly:

> To Washington fell the thankless task of being the family disciplinarian and he had to tread delicately in criticizing Jacky for fear of antagonizing his indulgent mother. Lacking the full legitimacy of a biological father, he found himself in a predicament as he tried to reform Jacky's habits without running afoul of Martha. Though he might be the Master of Mount Vernon, George Washington was far less powerful in the tiny domain of his nuclear family.[80]

Legally, Washington was not alone in his limited domain. Though stepparents may live with and care for children on a daily basis, they have fewer rights than a legal guardian, foster parent[81] or even a nonresidential biological parent.[82] They have no authority to give consent for medical treatment or engage in educational decision-making.[83] But with stepfamilies becoming more and more prevalent throughout the U.S.,[84] issues of support, inheritance, day-to-day authority, and rights upon dissolution of the adult relationship demand greater attention and legitimacy.[85] Yet, due to their diversity, complexity and variability, stepfamilies are not readily amenable to uniform regulation.[86] They differ markedly in the length and quality of the stepparent-child bond, in the sharing of decision-making with coresidential and nonresidential biological parents, and in the number of preceding adult partners involved in the child's life. Stepparents' practical responsibilities may be real, but their legal rights remain theoretical.[87]

According to Margaret Mahoney, the "current 'law of stepfamilies' consists of a series of limited exceptions, created by the state legislatures and the courts, which recognize the stepparent status for a single purpose in the law."[88] The 'single purpose,' may be an action for child support, visitation or custody but, even in the aggregate, these determinations are insufficient to "define a clear and

consistent legal status for residential, nonadoptive stepparents."[89] State laws on stepparent rights and obligations vary so widely that, stitched together, they would resemble a "patchwork quilt"[90] of disparate rules and interpretations.

Inconsistent legal treatment of nonbiological coparents produces both contradictory and, at times, unjust results. In matters of child support, for instance, fewer than half of U.S. states impose a financial duty on stepparents during marriage to the child's legal parent.[91] Stepparent rights, such as they are, derive from the relationship with the biological parent. Thus, support obligations generally end upon the termination of the husband–wife relationship.[92] However, New York's highest court has held that an unmarried, same-sex nonbiological coparent may owe a duty of child support even after the adult relationship has ended.[93] Inexplicably, in a different case decided on the same day, the court denied standing to a lesbian coparent seeking custody or visitation with regard to her partner's biological child.[94] Under the common law, rights and duties operate in tandem but, taken together, the paradoxical result of these cases is to impose a duty while withholding a corresponding right.[95]

People are not in the habit of consulting the law before they form nontraditional family alliances. However, the law becomes vital "when human affairs start to unravel and people become disputatious."[96] Painful issues arise when the romantic relationship is over but a coparent has developed a loving relationship with a partner's biological or adopted child. The law of stepfamilies is sparse and unsettled. A handful of jurisdictions expressly confer standing on stepparents to seek visitation.[97] In other states, stepparent visitation is subsumed within broader grants of standing to third parties.[98] A married stepparent is more likely to be awarded visitation upon dissolution of the relationship than a second parent in a cohabiting union.[99] Courts are far more apt to award visitation to stepparents than custody.[100]

Most states fail to state specific guidelines for awarding stepparent visitation.[101] In the absence of statutory guidelines, courts have limited relief to cases where the stepparent and child have formed an ongoing psychological relationship that is in the child's best interests to continue.[102] But courts are just as prone to withhold equitable relief where statutory authority is lacking. In *Multari v. Sorrell*, an unmarried stepfather sought visitation with his girlfriend's son, a child with whom he had had a six-year loving and "fatherly" relationship.[103] The court determined that, no matter how close the bond, the petitioner was a biological stranger to the child, the child already had an operative parental relationship, and the petitioner could not invoke equitable estoppel to circumvent his lack of standing to seek visitation.[104] *In re Marriage of Freel*, an unmarried stepmother lived with and cared for a child for five years. Since the child's father was often on the road as a truck driver, he had the stepmother appointed as the child's legal guardian. When the parties separated, the father petitioned to remove the stepmother as guardian and was granted sole custody by the trial court. The stepmother was found to have acted as de facto parent and was awarded visitation. On appeal, the court reversed the visitation order, holding that "though the equities strongly favor" the stepmother, the state's visitation statute limited standing to grandparents.[105]

The validity of third party visitation statutes depends upon the extent to which they defer to a parent's constitutional right to make childrearing decisions. In *Troxel v. Granville*,[106] the U.S. Supreme Court struck down a law permitting "any person" to petition a court for visitation rights "at any time" whenever such visitation was deemed to be in the child's best interests.[107] The Court ruled that, as applied in this case, the provision violated the substantive due process rights of the mother.[108] Noting that a fit parent is presumed to act in his or her child's best interests, the Court plurality held that analysis of third party visitation law must "accord at least some special weight to the parent's own determination."[109] The Court failed to "elaborate on the nature or extent of that 'weight,' "[110] and efforts to interpret or follow the *Troxel* precedent have been "mixed and confused."[111] Unlike the nonresident grandparent petitioners in *Troxel*, cohabiting stepparents are often encouraged to engage in day-to-day childcare by the natural parent. When the relationship ends, assigning weight to the biological parent's preference and intent requires a balancing of mixed impulses. While coparenting may have been more or less acceptable to the biological parent during the relationship, upon dissolution, the prospect of continued stepparent involvement turns intolerable.

The principal dilemma in stepparent visitation is that it seeks to confer parent-like rights on a third party where a child already has one or two fit, living parents. One approach to bypassing constitutional impediments is to apply a rule more stringent than the best interest standard, such as requiring proof that visitation by a stepparent is necessary to avert harm to the child.[112] A Washington court invoked similar reasoning in awarding custody to an unmarried stepmother over the objection of the legal father. *In re Marriage of Allen* concerned a profoundly deaf child, an extraordinarily dedicated and devoted stepmother, and an otherwise fit but "apathetic and fatalistic" father.[113] The court found the best interest standard inapplicable in a dispute between a nonparent and a biological parent.[114] However, since placing the child with an otherwise fit parent would be detrimental to the child, the court determined that the parent's right to custody was outweighed by the state's interest in the child's welfare.[115]

Stepparents have asserted claims to visitation based on having functioned as the child's de facto or psychological parent, or as having stood in loco parentis to the child. De facto parenthood status places the third party in parity with the biological or adoptive parent and renders constitutional objections moot.[116] Still, courts are averse to awarding parental status when to do so would intrude on an existing parental relationship.[117] Visitation statutes that premise standing on in loco parentis requirements serve to screen out rather than enable stepparent visitation claims.[118]

Stepparents challenge the established notion that "the family model . . . has room for only two parents or parent figures."[119] Often, they lose, and the traditional model wins. Yet, children do form attachments and relationships with multiple adult parental figures, some of which are ongoing, valuable, and even essential to the child's well being.[120] It is important to acknowledge, however, that the "time, attention and loyalty of a child are not limitless,"[121] and that some adult-child relationships are more susceptible than others to judicial or legislative enforcement. In this era of changeable, fragile families, a child can have too few parents, or too many.

However many parent figures a child has, a lack of legal recognition seriously undermines the benefits of those relationships. Stepparents, whether married or cohabiting, encounter daunting obstacles to formalizing their bonds with a partner's child. Even in states permitting second-parent adoption, consent of the noncustodial biological parent is required. To strengthen the rights and duties of stepparents, Mahoney proposes a system of voluntary registration.[122] With input from state legislatures, residential stepparents who formalize their status can seek clarity as to the scope of their parental authority and economic responsibility, as well as their post-dissolution rights and obligations. Similarly, Jones endorses a model based on England's Children Act 1989.[123] Under that law, a residential stepparent married to the child's biological parent for two years may obtain a "residence order." This grant of parental authority supplements, but does not negate, the biological parent's duty to the child.[124]

Currently, our legal system offers little economic solace to stepchildren and the children of a cohabiting parent who has died or become disabled. In matters of intestacy, tort suits for wrongful death and loss of consortium as well as entitlement to workers compensation and social security survivor's benefits, Bowman argues for comprehensive reform.[125] In most states, stepchildren and the children of cohabitants fight decidedly uphill battles in regard to inheritance, the right to governmental benefits, and standing to bring certain tort claims. Children, as Bowman says, should not be punished for their illegitimacy.[126] Nor should stepchildren be consigned to legal limbo because of ambiguous and poorly recognized parental relationships.

IV. THE REPRODUCTIVE TECHNOLOGY FAMILY

Compared with stepfamilies, the law of families conceived by Alternative Reproductive Technology (ART) presents an even more radical intrusion on traditional notions of kinship and domestic arrangements. ART has created an alternate universe for conception. The miracle of life blended in a Petri dish has also spawned vivid challenges for both law and culture. Altering the biological connections between parent and child disrupts our understanding of family relationships. Is a woman

who bears a child containing none of her genetic material still the biological mother? What, if any, are her legal rights to the child? And what, if any, are the rights of individuals who acquire the sperm and ova, secure the services of the gestational surrogate, and procure the medical know-how needed to create a child for their family who is biologically unrelated to them? Most ART children are born to heterosexual couples, but childbearing within same-sex unions—which particularly jars conventional thinking about the parent-child bond—always requires ART.

The central question is whether parenthood is to be determined genetically or by consistent, purposeful, nurturing behavior. Genetics can determine biological parenthood. But legal parenthood can no longer simply follow suit; our law and culture must adapt to a wide range of individual cases and policy aims. What is clear, however, is that the reign of biological determinism as the legal gold standard for parentage is coming to an end. Biology alone is no longer a valid or reliable measure for assessing and legitimating many of today's parental relationships. Nor may we continue to assume that giving birth aligns with a genetic match, and so the law of parentage must adjust to fit the new reality.[127]

All ART efforts involve collaborative reproduction. In working out the new body of parentage rules, courts must resolve two different types of issues. First, when surrogates are involved, the parentage rules must be clear because the birth parent will be, in virtually every case, the gestational carrier but not the genetic parent. These cases are not conceptually difficult, so long as the parties clearly manifested their intent that the gestational surrogate was bearing the child for the genetic, intended, parent.[128] More problematic is a second category of cases in which the child has no genetic ties to the gestational carrier or to either of the intended parents. In these cases, neither of the intended parents was able or willing to provide his or her own genetic material, and so donated sperm and ova were combined into an embryo for the gestational surrogate to bear. All same-sex parentage cases have one partner who falls into this latter category. Gay male couples may only use one partner's genetic material to combine with a donated egg. Lesbian couples will use donated sperm to impregnate one of the partners; sometimes the other partner's egg is used, but that does not change the fact that reproductive technology has not yet found a way to feasibly allow both same-sex partners to achieve genetic parenthood of the same child. In cases where genetic ties to the child are entirely lacking, some courts are applying the twin norms of *intention plus behavior* to ascertain parentage.[129]

Reproductive technology cases were not the first to question traditional notions of family composition.[130] Nor are they the first examples of legislative inertia leading exasperated courts to resolve judicial disputes without the appropriate statutory guidance.[131] But the dilemmas of assisted conception cut to the heart of our legal identity, as the Connecticut Supreme Court pointed out in expressing a measure of frustration with legislative quiescence:

> [N]o one can deny that assisted reproductive technology implicates an essential matter of public policy—it is a basic expectation that our legal system should enable each of us to identify our legal parents with reasonable promptness and certainty. Despite the fact that assisted reproductive technology has been available for some time, and that the technology implicates the important issue of the determination of legal parentage, our laws, and the laws of most other states, have struggled unsuccessfully to keep pace with the complex legal issues that continue to arise as a result of the technology.[132]

But perhaps our family relations are developing too quickly to be properly codified in statutory form. Although gestational surrogacy contracts are increasingly common, these agreements "seem beyond the boundaries of settled law, reaching into a morass of issues and rights involving morality, ethics, and responsibility."[133] In declaring a common law status of de facto parentage in the face of a legislative gap, the Washington Supreme Court remarked that the 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."[134] Given the rising tide of nontraditional family cases, the legislative hiatus is necessarily resulting in a transformation in the judicial allocation of parenting rights and obligations.

A trio of recent scenarios suggests the broad dimensions of the rift between the established legal categories and contemporary culture in the construction of the modern family and suggests an eventual resolution premised on functional norms. The variety of these parentage cases attests to the panorama of family forms in the 21st century:

- A married heterosexual couple arranged to implant an embryo created with their genetic material into the wife's sister, who bore the child as a gestational surrogate;[135]
- A gay male couple contracted with a gestational surrogate to bear them a child, using a donor egg and the sperm of one of the partners;[136] and
- One partner in a lesbian couple gave birth via artificial insemination while the other co-parented the child with the consent of the natural parent.[137]

If the couples in these examples come to a parting of the ways and dispute child custody or visitation, should the court provide legal recognition to the family that the parties and children have constructed? When phrased in this way, an affirmative answer appears obvious. It bears emphasizing at the outset that allowing the family members to construct and maintain their own family on their own terms is an essentially *conservative* notion that preserves the structure in place and counsels against state power interfering with family organization.[138] Although the movement is uneven, the trend of recent judicial decision agrees with the aim of safeguarding the parental and familial status quo.

Terms such as de facto parent, equitable parent, and psychological parent were initially unknown to the common law world, rooted as it was in biology with the later addition of adoption. But the courts (and a handful of legislatures) that designed and now employ these terms are not seeking to inject a stranger into the natural family. To the contrary, cases in this area call for an answer to three questions at the heart of family reconstruction: (1) whether the petitioning party claiming legal parenthood status was accorded that status by the other legal parent during the time they lived together as a family with the child; (2) whether that adult has been performing as a parent for a sufficiently long period of time; and, critically, (3) whether that adult and the child have established a parent-child relationship. What is new and strange in these cases is the non-biological or adoptive origin of the parent-child bond, not the essential nature of that bond or the lived experience of family life.

V. CONCLUSION: SIMPLY FAMILIES

The act of devising workable, humane legal constructs for today's unconventional families is a difficult and, at times, unenviable challenge. It calls for a reexamination and revision of cultural, legal, and biological principles long believed to be fixed and immutable. Slowly, courts and legislatures are adjusting their fields of vision to encompass these novel and varied domestic arrangements. If their efforts prove successful, families of the future will no longer be labeled *traditional* or *nontraditional*, but simply families.

NOTES

1. J. Herbie DiFonzo (lawjhd@hofstra.edu) is a Professor of Law at the Maurice A. Deane School of Law at Hofstra University; Ruth C. Stern (branwell226@msn.com) is an independent legal researcher and writer. This article is in many ways a follow-up to our previous article, *The Children of Baby M.*, 39 CAP. U. L. REV. 345 (2011). We are continuing our research in this area and at work on INTIMATE ASSOCIATIONS: THE LAW AND CULTURE OF AMERICAN FAMILIES. As always, we want to especially thank our law librarian extraordinaire, Patricia A. Kasting, who can find anything on the planet.

2. William C. Duncan, *The Legal Fiction of De Facto Parenthood*, 36 J. LEGIS. 263 (2010).

3. Stephanie Coontz, *The American Family*, Life Magazine, Nov. 1999, at http://www.stephaniecoontz.com/articles/article10.htm.

4. Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARR. & FAM. 848, 852 (2004); *see also* STEPHANIE COONTZ, MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY OR HOW LOVE CONQUERED MARRIAGE 243

(2005) (As recently as the 1960s, "nothing seemed more obvious to most family experts and to the general public than the preeminence of marriage in people's lives and the permanence of the male breadwinner family.")

5. Cherlin, *supra* note 4, at 853.

6. *Id*. at 852.

7. *Id*. at 854; *see also* Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 Cardozo L. Rev. 1299, 1316 (1997) (describing the "mosaic of modern living arrangements [which] has displaced the nuclear family as the predominant American form.").

8. ERIC KLINENBERG, GOING SOLO 31 (2012).

9. *Id.* at 61–63.

10. The median age at first marriage has never been higher, 26.5 years for women, and 28.7 years for men. 72% of all adults age 18 or older were married in 1960, compared to 51% today. D'Vera Cohn, *et al. Barely Half of U.S. Adults are Married—A Record Low*, Pew Research Center, Dec. 14, 2011, at http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/.

11. KLINENBERG, *supra* note 8, at 67.

12. Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. AND POL'Y 1, 34 (2009).

13. Jason DeParle and Sabrina Taverise, *Unwed Mothers Now a Majority Before Age 30*, N.Y. TIMES, Feb. 18, 2012.

14. *Id.*

15. Megan M. Sweeney, *Remarriage and Stepfamilies: Strategic Sites for Family Scholarship in the 21st Century*, 72 J. MARR. & FAM. 667, 668 (2010).

16. Anna C. Jones, *Reconstructing the Stepfamily: Old Myths, New Stories*, 48 SOC. WORK 228, 237 (2003).

17. *Id*. at 235.

18. Naomi Cahn, *The New Kinship*, 100 GEORGETOWN L.J. 367, 385 (2012); Deborah H. Siegel & Susan Livingston Smith, Openness in Adoption, Evan B. Donaldson Adoption Institute 11–12 (Mar. 2012).

19. Siegel & Smith, *supra* note 18, at 23.

20. Cahn, *supra* note 18, at 394.

21. As Judge Robert Grant phrased the point almost a century ago, "Public sentiment is stronger than any court." Robert Grant, *A Call to a New Crusade*, Good Housekeeping, Vol. 73, 42–43, 140–144 (Sep. 1921), *quoted* in J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 43 (1997).

22. *See generally* Stephanie Coontz, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRIP (1992).

23. *See* 1 William Blackstone, Commentaries *442, *447; R. H. Helmholz, *Support Orders, Church Courts, and the Rule of* Filius Nullius*: A Reassessment of the Common Law*, 63 VIRGINIA L. REV. 431, 431 (1977) (quoting SIDNEY B. SCHATKIN, DISPUTED PATERNITY PROCEEDINGS, Vol. 1, §1.08 at 1–27 (4th ed. Rev. 1975) ("The Common Law of England was ruthless in its denial of any rights to children born out of wedlock.").

24. *See* Joseph C. Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 23 (1902) (explaining the traditional rule that "since it is necessary that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir."); HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 1 (1971) ("In past societies in which the passing of property and status from generation to generation . . . was one of the prime functions of law, the illegitimate child was the loose thread in the social fabric.").

25. *See* HOMER CLARK, THE LAW OF DOMESTIC RELATIONS §4.1, at 149 (2d. ed. 1988) (stating that a nonmarital child traditionally had no rights of inheritance from either mother or father).

26. Ayer, *supra* note 24, at 3738 ("It was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions.").

27. *See id.* ("Parents were to be punished in their children's disabilities more effectively than in themselves.").

28. *See* C.M.A. McCauliff, *The First English Adoption Law and Its American Precursors*, 16 SETON HALL L. REV. 656, 656 (1986). On the development of American adoption law, see David Ray Papke, *Pondering Past Purposes: A Critical History Of American Adoption Law*, 102 W. VA. L. REV. 459 (1999). The extremely late arrival of legal adoption in England may be partially attributed to the fact that English law "officially disfavored practices that could impugn bloodline as the basis for the descent of property." Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 274 (2002).

29. In England, except for the rare Parliamentary special bill, divorces were not allowed until 1857. Divorce and Matrimonial Causes Act of 1857, 20 & 21 Vict., c. 85; *See* Margaret K. Woodhouse, *The Marriage and Divorce Bill of 1857*, 3 Am. J. Legal Hist. 260 (1959). *See also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204–206 (2d. ed. 1985) (describing the spread of early divorce legislation in the United States).

30. FRIEDMAN, *supra* note 29, at 206.

31. One significant cultural marker might be the first appellate case affirming the denial of a marriage license to two same-sex partners. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding that the statute governing marriage does not authorize same-sex unions, and—with a paucity of analysis—that the statute did not deprive the would-be spouses of their due process and equal protection rights).

32. Katherine R. Allen et al., *An Overview of Family Diversity: Controversies, Questions, and Values*, *in* HANDBOOK OF FAMILY DIVERSITY 1 (David H. Demo et al. eds., 2000); *see also id.* ("The key elements are "socioemotional ties and enduring responsibilities, particularly in terms of one or more members' dependence on others for support and nurturance."); CAROL B.

STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 31 (1996) (viewing a family as "the smallest, organized, durable network of kin and non-kin who interact daily, providing domestic needs of children and assuring their survival"); Marjorie Maguire Shultz, *Legislative Regulation of Surrogacy and Reproductive Technology*, 28 U.S.F. L. REV. 613, 618 (1994) ("Intention and biology are often mutually reinforcing in family design. When they are not, I would have the law prioritize intention and deliberative commitment over genes and gendered reproductive function.").

33. V.C. v. M.J.B., 748 A.2d 539, 556–57 (N.J. 2000) (Long, J., *concurring*) (*quoting* Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994)).

34. *Id.* at 556 (asserting that these family attributes "may be found in biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons").

35. Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135, 164 (2005). *See* Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion) (noting that "[t]he demographic changes of the past century make it difficult to speak of an average American family"); Hofstad v. Christie, 240 P.3d 816, 820 (Wyo. 2010) ("Even if [the parties] are not married, nor related by blood, that they lived together on and off for approximately ten years, all the while sharing an intimate relationship which resulted in the birth of their twins is evidence that a family relationship exists."); J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIMONIAL LAW 1, 38 (2008) ("The citadel of the biological/adoptive family has for some years been besieged by the burgeoning segment of nontraditional families."); Nancy E. Dowd, *Law, Culture, and Family: The Transformative Power of Culture and the Limits of Law*, 78 CHI.-KENT L. REV. 785, 789 (2003) ("Although our dominant legal norm is that family is a heterosexual, marital, biological unit, our social and cultural patterns expose a culture that is largely at odds with that nuclear, marital family norm.").

36. *See generally* Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 162–73 (2000) (describing the legal system's assumptions about families). A minority of scholars believes that the norms of the prototypical 1950s marriage could still adequately shape contemporary families. *See*, *e.g.*, Daniel D. Polsby, *Ozzie and Harriet Had It Right*, 18 HARV. J.L. & PUB. POL'Y 531, 533 (1995) (arguing for the "superiority of the Ozzie-and-Harriet family"); Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1964 (2000) (noting that "many modern religious and cultural conservatives would like to return to an earlier era of both stable marriage and patriarchal gender roles.").

37. *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (observing that "[a] child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent.").

38. N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000).

39. *See* Kris Franklin, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 WM. MITCHELL L. REV. 655, 656 (2006) ("[T]hese cases ask the courts to think about the growing elasticity in cultural understandings of families in the United States, and to make decisions about where to draw the line in defining the legitimacy (or illegitimacy) of different kinds of families.").

40. Charles P. Kindregan, Jr., *Family Law in the Twenty First Century: Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIMONIAL 43, 45 (2008).

41. S.Y. v. S.B., 201 Cal.App.4th 1023, 1039, 134 Cal.Rptr.3d 1, 14 (2011) (citing cases from 19 states: Arizona, Colorado, Connecticut, Indiana, Maine, Massachusetts, Minnesota, Montana, Nebraska, North Carolina, New Jersey, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Washington, West Virginia, and Wisconsin).

42. E.N.O. v. L.M.M., *supra* note 37, 711 N.E.2d at 891.

43. *Id*.

44. *Id*. *See also* C.E.W. v. D.E.W., 845 A.2d 1146–47, 1152 (Me. 2004) (A de facto parent must have "undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life," and the individual must be "understood and acknowledged to be the child's parent both by the child and by the child's other parent."). Some courts rely on common law *in loco parentis* doctrine to grant nonbiological parents equal rights to their children. *See*, *e.g.*, Latham v. Schwerdtfeger, 802 N.W.2d 66, 72 (Neb. 2011) (*quoting* Weinand v. Weinand, 616 N.W.2d 1, 6 (Neb. 2000)):

> [A] person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.

The American Law Institute promulgated a similar definition for a de facto parent grounded in living with the legal parent and child in a parenting arrangement enabled by the legal parent. AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 118 (2002).

45. *See*, *e.g.*, Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011); Bethany v. Jones,) *S.W.3d*, 2011 Ark. 67; Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000). The majority of cases (including all those herein cited) rejected the chutzpah argument. Commenting on a same-sex partner's claim that she was only pretending when she and her former coparent jointly raised their child, one Montana Supreme Court Justice noted the deplorable legal conundrums faced by same-sex parents: Sadly, . . . this case represents yet another instance in which fellow Montanans, who happen to be lesbian or gay, are forced to battle for their fundamental rights to love who they want, to form intimate associations, to form family relationships, and to have and raise children—all elemental, natural rights that are accorded, presumptively and without thought or hesitation, to heterosexuals. Kulstad v. Maniaci, 220 P.3d 595, 611 (Mont. 2009) (Nelson, J., *concurring*).

46. A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006), *quoting* Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002).

47. *Id.*at 1069.

48. *See generally* JOHN DEWITT GREGORY, ET AL., UNDERSTANDING FAMILY LAW §5.02[B], at 120 (3rd ed. 2005).

49. Under California's version of the Uniform Parentage Act, the de facto parent inquiry is phrased in "presumed parent" terms. *See* E.C. v. J.V.,136 Cal.Rptr.3d 339 (Cal. App. 2012). New Jersey has adopted a similar "psychological parent" test. *See* V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000).

50. Price v. Howard, 484 S.E.2d 528, 534 (N.C. 1997). The court made it clear that the "conduct inconsistent with the parent's protected status. . .need not rise to the statutory level warranting termination of parental rights." *Id.*

51. *Id.* at 535. Subsequent North Carolina cases have made it clear that the Price v. Howard rule applies in resolving custody disputes between former same-sex partners. *See*, *e.g.*, Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010).

52. *See*, *e.g.*, Middleton v. Johnson, 633 S.E.2d 162 (S.C. 2006) (finding compelling circumstances to allow mother's ex-boyfriend to have visitation with the child).

53. Debra H. v. Janice R., 930 N.E.2d 184, 191 (N.Y. 2010) (reaffirming the "core holding" of Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) that "parentage under New York law derives from biology or adoption."); *see also* Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008) (holding that Maryland law does not recognize de facto parenthood.)

54. Matter of Jacob, 660 N.E.2d 397, 398 (N.Y. 1995).

55. Debra H., 930 N.E.2d at 191–192 (*quoting* Matter of Jacob, 660 N.E.2d at 399).

56. New York's "Marriage Equality Act" was enacted in 2011. L. 2011, ch. 95. *See* McKinney's DRL § 10-a, *et seq*.

57. *See* J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J. L. & PUB. POL'Y 521 (2011).

58. T.V. v. N.Y. State Dep't of Health, 929 N.Y.S.2d 139 (2011).

59. *Id.* at 151.

60. *Id.*, *quoting* Matter of Sebastian, 879 N.Y.S.2d 677 (2009).

61. *Id.*

62. Hirshman v. Roven, Verified Petition, ¶ 31, May 12, 2008, 2008 WL 7471048 (N.Y. Sup.) (emphasis in original).

63. T.B. v. L.R.M., 786 A.2d 913, 918–919 (Pa. 2001).

64. Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES L. 127, 135 (2012).

65. Margaret Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L. Q. 81, 82 (2006).

66. Jay Teachman & Lucky Tedrow, *The Demography of Stepfamilies in the United States*, in JANPRYOR, ED. THE INTERNATIONAL HANDBOOK OF STEPFAMILIES 23 ((Jan Pryor Ed., 2008).

67. LAWRENCE H. GANONG & MARILYN COLEMAN, STEPFAMILY RELATIONSHIPS 5 (2004).

68. Francis Goldscheider and Sharon Sassler, *Creating Stepfamilies: Incorporating Children into the Study of Union Formation*, 68 J. MARR. & FAM. 275, 277 (2006).

69. Sarah E. Malia, *Balancing Family Members' Interests Regarding Stepparent Rights and Obligations: A Social Policy Challenge*, 54 FAM. REL. 298 (2005).

70. Katherine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

71. Sweeney, *supra* note 15, at 674.

72. Ganong & Coleman, *supra* note 67, at 229.

73. Sweeney, *supra* note 15, at 669.

74. Paul Schrodt & Dawn O. Braithwaite, *Coparental Communication, Relational Satisfaction, and Mental Health in Stepfamilies*, 18 PERS. REL. 352, 356 (2011).

75. *Id.* at 355.

76. Ganong & Coleman, *supra* note 67, at 39.

77. *Id.* at 231.

78. *Id.* at 152–3.

79. *Id.* at 144.

80. RON CHERNOW, WASHINGTON: A LIFE 154–5 (2010).

81. Jones, *supra* note 16, at 231.

82. Malia, *supra* note 69, at 301.

83. Mahoney, *supra* note 65, at 87–88.

84. Pew Research Center, *A Portrait of Stepfamilies*, PEW SOCIAL TRENDS, Jan. 13, 2011, at http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/.

85. Jan Pryor, *Where to from here? Stepfamilies and the future*, *in* THE INTERNATIONAL HANDBOOK OF STEPFAMILIES: POLICY, AND PRACTICE IN LEGAL, RESEARCH, AND CLINICAL ENVIRONMENTS 575 (Jan Pryor ed., 2008).

86. *Id*.

87. Bill Atkin, *Legal structure and re-formed families: The New Zealand example*, *in* THE INTERNATIONAL HANDBOOK OF STEPFAMILIES: POLICY, AND PRACTICE IN LEGAL, RESEARCH, AND CLINICAL ENVIRONMENTS 525 (Jan Pryor ed., 2008).

88. Mahoney, *supra* note 65, at 85.

89. *Id.*

90. Susan l. Pollet, *Still a Patchwork Quilt: A Nationwide Survey of State Laws Regarding Stepparent Rights and Obligations*, 45 FAM. CT. REV. 528, 536 (2010).

91. Laura Wish Morgan, *The Duty of Stepparents to Support Their Stepchildren*, SUPPORT GUIDELINES, at http://www.childsupportguidelines.com/articles/art199908.html.

92. *Id*. Malia, *supra* note 69, at 302.

93. In the Matter of H.M. v. E.T., 930 N.E. 2d 206 (N.Y. 2010) (granting jurisdiction where child's biological parent sought to establish that lesbian coparent was *de facto* parent and therefore liable for child support).

94. Debra H. v. Janis R., 930 N.E. 2d 184 (N.Y. 2010).

95. *See* Jason C. Beekman, *In Search of Parity: Child Custody/Visitation and Child Support for Lesbian Couples Under "Companion" Cases Debra H. and In Re H.M.*, 9, Cornell Law School Graduate Student Papers, May 15, 2011, available at http://scholarship.law.cornell.edu/lps_papers/27.

96. Atkin, *supra* note 87, at 528.

97. *See, e.g*., Cal. Fam. Code § 3101 (granting reasonable visitation to stepparent if determined to be in child's best interests); Kan. Stat. Ann. §60-1616(b) (Grandparents and stepparents may be granted visitation rights).

98. *See, e.g*., Or. Rev. Stat. §§ 107.105(1)(b); 109.119 (granting standing to third parties "who have established emotional ties creating a parent-like relationship" if visitation is in the child's best interests; Va. Code. Ann. §20-124.1 ("person with a legitimate interest" may petition for visitation).

99. Bowman, *supra* note 64, at 140.

100. *Id*. at 144; Robinson v. Ford-Robinson, 208 S.W. 3d 140, 143 (Ark. 2005).

101. LINDA ELROD, CHILD CUSTODY PRACTICE & PROCEDURE §7:14. (2012).

102. Wills v. Wills, 399 So. 2d 1130 (Fla. App. 1981); Francis v. Francis, 654 N.E.2d 4 (Ind. Ct. App. 1995); Simmons v. Simmons, 486 N.W.2d 788 (Minn. App. 1992).

103. Matter of Multari v. Sorrell, 287 A.D.2d 764, 765 n.1 (N.Y. App. 2001).

104. *Id.* at 765–768.

105. In re Marriage of Freel, 448 N.W.2d 26, 28 (Iowa 1989).

106. Troxel v. Granville, 530 U.S. 57 (2001).

107. Wash Rev. Code § 26.10. 160(3) (2000), *cited* in Troxel, 530 U.S. at 60.

108. *Troxel*, 530 U.S. at 73 (plurality opinion).

109. *Id.* at 70.

110. Robinson, 208 S.W. at 142.

111. Blecher-Prigat, *supra* note 12, at 11.

112. Mahoney, *supra* note 65, at 105.

113. In re Marriage of Allen, 626 P. 2d 16, 19 (Wash. 1981).

114. *Id.* at 17.

115. *Id.* at 23.

116. In the Matter of Parentage of L.B., 122 P. 3d. 161, 178 (Wash. 2005).

117. In re Parentage of M.F., 228 P.3d 1270, 1273 (Wash. 2010).

118. Mahoney, *supra* note 65, at 105.

119. *Id.* at 86.

120. Ana H. Marty, Christine A. Readdick, & Connor M. Walters, *Supporting Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CH. DEVEL. & CARE 271, 277 (2004).

121. Duncan, *supra* note 2, at 269.

122. Mahoney, *supra* note 65, at 106.

123. Jones, *supra* note 16, at 232 (citing Children Act 1989, 1989 Chap. 41).

124. *See* Children Act 1989, Sec. 4A(1)(a)-(b) (providing that "both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child", or "the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.") *amended by* Adoption and Children Act 2002, Chap. 38, Sec. 112.

125. *See* Cynthia Grant Bowman, *New Illegitimacy: Children of Cohabitating Couples and Stepchildren*, 20 AM. U. J. GENDER SOC POL'Y & L. 437 (2012).

126. *Id.* at 465.

127. Reproductive technology has succeeded in upending a formerly well-ordered corner of family law. *See* Charles P. Kindregan, Jr., *Family Law in the Twenty-First Century: Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIMONIAL 43, 43 (2008) (noting that by the mid-20th century, "issues of legal parenthood were well settled in American law; in the first decade of the twenty-first century, those issues are hardly settled at all.").

128. The lodestar case on this issue is Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (holding that while the Uniform Parentage Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child is the natural and legal mother); *see also* Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001) (holding that since the children were conceived by a married couple, they "should be presumed to be the children of marriage" even though another woman gave birth to them. *Id.* at 1137.

129. *See* DiFonzo & Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 407 (2011) ("This brace of norms-intention plus behavior-denotes a simple but telling format for approaching cases of second-parent disputes in gestational surrogacy and ART cases in general. Intent plus behavior will lead to a finding that nonparents have become parents, so long as both adult

partners manifest intent plus behavior, and the behavior includes establishing a parent-child relationship."). *Id.* at 409 n.496 (citing cases). No significant legal and cultural transition is seamless, of course, and some courts have ruled that a gestational surrogate is the legal mother even in the face of clear evidence that none of the parties intended this result. For example, In the Matter of the Parentage of a Child by T.J.S. and A.L.S., 16 A.3d 386 (N.J. App. 2011) involved a case of a married heterosexual couple who arranged for in vitro fertilization (IVF) of an ovum furnished by an anonymous donor using the husband's sperm. The resulting embryos were then implanted in a gestational surrogate for the purpose of producing a child for the married couple. Even though the surrogate who gave birth disclaimed any right to the child, the appellate court insisted that maternity could only be an attribute of a birth or genetic mother. The court acknowledged the "the intrinsic societal worth, emotional appeal, and compelling logic of granting [the intended mother] parenthood to the child." *Id.*, at 397. But it refused to boldly go where the legislature had not gone. The result of this retrograde decision is that the intended mother must now petition to adopt her own child. *See* Mary Ann Spoto, *Appeals Court Rules N.J. Woman Must Adopt Boy Conceived Through In Vitro to be Considered Mother*, NJ.com. Mar. 18, 2011, at http://www.nj.com/news/index.ssf/2011/03/nj_womans_case_exposes_laws_in.html.

130. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 504–06 (1976) (reversing a criminal conviction under an ordinance that narrowly defined the term "family" in light of historical non-lineal composition of families).

131. *See* J.F. v. D.B., 848 N.E.2d 873, 881 (Ohio App. 2006) (Slaby, J., concurring):

> The Ohio legislators have acknowledged but failed to address the rapid technological advances of surrogacy. . . . The case is the foundation of many and various issues to be decided by the state legislators or courts of the future. Extrapolating from the facts of this case, one can only imagine what the future can bring, the issues that will be raised, and the variety of conclusions that can result without legislative regulation. . . . Unless the state legislators begin to address the multiple issues involved, it will be the children that will be caught in a continual tug of war between the egg donor or donors, the sperm donor or donors, the surrogate parent or parents, and those that simply want to adopt a child from what they perceive as the ideal parents.

132. Raftopol v. Ramey, 12 A.3d 783, 785 (Conn. 2011); *see also* Carla Spivack, *The Law of Surrogate Motherhood in the United States*, 58 AM. J. COMP. L. 97, 101 (2010) (commenting on confused state of law regarding surrogacy and categorizing different approaches taken by various state legislature including inaction); Darra L. Hofman, *'Mama's Baby, Daddy's Maybe:' A State–by–State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 454 (2009) (noting that the "vast majority of states are silent or near silent on the issues of whether, when, and how surrogacy agreements are enforceable, void, or voidable").

133. Adam P. Plant, *With a Little Help from My Friends: The Intersection of the Gestational Carrier Surrogacy Agreement, Legislative Inaction, and Medical Advancement*, 54 ALA. L. REV. 639, 639 (2003). That surrogacy agreements are garnering increased public acceptance—or at least insouciance—may be seen in the lack of adverse reaction to the announcement that two grandchildren of Mitt Romney, the 2012 Republican candidate for President, had been born via a gestational surrogate in May 2012. *See* Ashley Parker, *2 New Grandchildren for Romney, With Help of Surrogate*, N.Y. TIMES, May 4, 2012.

134. In re Parentage of L.B., 122 P.3d at 176.

135. *See* In re the Paternity and Maternity of Infant R., 922 N.E.2d 59 (Ind. Ct. App. 2010) (Indiana appellate court held that the husband and wife were legally the child's parents).

136. *See* Raftopol, 12 A.3d at 783 (Connecticut Supreme Court held that the biological father's same-sex domestic partner was an intended parent who, as a party to a valid gestational agreement, may become a parent without first adopting the children; and that the surrogate mother, a gestational carrier, had no parental rights with respect to the children to whom she bore no biological relationship).

137. Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010) (Kentucky Supreme Court held that the mother waived her superior right as natural parent to custody of child in favor of a joint custody arrangement with her same-sex partner, and thus her partner was entitled to share custody of child following the dissolution of the adults' relationship).

138. Judicial accommodation to the family *in situ* is consonant "with notions of the modern family." E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999). The E.N.O. court did not view its recognizing de facto parents as a radical departure, since "[i]t is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto. . . ." *Id.*

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