TRUSTING MOTHERS: A CRITIQUE OF THE AMERICAN LAW INSTITUTE'S TREATMENT OF DE FACTO PARENTS

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I. INTRODUCTION[1]

On September 11, 2005, Haleigh Poutre suffered a traumatic brain injury "similar to those caused by high speed car wrecks."[2] Only eleven years old, she was rushed to Noble Hospital in Westfield, Massachusetts, with, according to a police report, "both old and new bruises, old and new open cuts, several apparent weeping burns, . . . and a subdural hematoma [a collection of blood on the surface of the brain]."[3] Doctors would later determine that Haleigh's brain stem "was partly sheared."[4]

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1. This Article draws on a more complete examination of the American Law Institute's ("ALI") treatment of de facto parents in Robin Fretwell Wilson, *Undeserved Trust: Reflections on the American Law Institute's Treatment of De Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90, 94-101 (Robin Fretwell Wilson ed., 2006) [*hereinafter* RECONCEIVING THE FAMILY], and on an empirical study of the impact of the ALI's recommendations in Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution, *Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573 (2008).

2. Buffy Spencer, *Expert Testifies About Severity of Brain Injury*, REPUBLICAN, Nov. 7, 2008, at A1.

3. Patricia Wen, *Accused Stepfather Fights to Keep Girl Alive*, BOS. GLOBE, Nov. 6, 2005, at A1.

4. *Accused Abuser Seeks to Keep Victim Alive*, CHI. TRIB., Dec. 8, 2005, http://articles.chicagotribune.com/2005-12-08/news/0512080202_1_justices-jason-strickland-holli-strickland.

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

> the person who the children call[ed] daddy, the person who they cuddle[d] up to, the person who they play[ed] ball [with] in the backyard, the person who they practice[d] with for their softball team, or who coache[d] their team, or who [brought] them to their activities, or who work[ed] very hard so that their after school activities [could] be paid for.[10]

A mechanic who worked more than sixty hours a week, Jason taught Haleigh how to "work[] on cars."[11] Haleigh "handed him tools and . . . kept him company" while he worked.[12] Jason "renovat[ed Haleigh's] bedroom, carpeting[,] and wallpapering there and throughout the house."[13] On Friday and Saturday nights, the whole family "would have movie night. They would all pop corn, sit and watch movies together, have family fun, and other relationships."[14] At least one family friend believed that "'Jason seemed to have a heart for Haleigh.'"[15]

Under Massachusetts law at the time, Jason Strickland's request to make decisions for Haleigh should have been uncontroversial.

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5. Patricia Wen, *Poutre Stepfather Gets 12-15 Years in Prison*, BOS. GLOBE, Dec. 19, 2008, at B1. Holli Strickland died in a murder-suicide with her own grandmother. *Id.* The Massachusetts Department of Social Services took temporary custody of Haleigh and asked that a "do-not-resuscitate" order be filed for her. *See id.* Jason then moved to block the order as Haleigh's de facto parent. *See infra* note 28 and accompanying text.

6. Wen, *supra* note 3; Patricia Wen, *Bid to End Life Support Was Quick*, BOS. GLOBE, Feb. 7, 2006, at B2.

7. Transcript of Hearing on a Motion and Preliminary DNR Hearing at 22, *In re* Care & Prot. of Poutre, No. CP05H0068 (Juv. Ct. Hampden County Sept. 26, 2005) [hereinafter Transcript of Hearing].

8. *Id.* at 12.

9. *Id.* at 13.

10. *Id.* at 10.

11. Brief for Petitioner/Appellant Jason Strickland at 30, *In re* A Juvenile, No. SJC-09629 (Mass. Sup. Ct. Oct. 6, 2005) (on file with the Hofstra Law Review).

12. *Id.*

13. *Id.*

14. Transcript of Hearing, *supra* note 7, at 10.

15. Patricia Wen, *Haleigh Reported Hurting Herself, Specialist Says*, BOS. GLOBE, Nov. 21, 2008, at B4 (quoting testimony given by former family friend, Stephanie Adams).

Borrowing from the *Principles of the Law of Family Dissolution* ("*Principles*") proposed by the prestigious American Law Institute ("ALI"), Massachusetts courts had awarded parental rights to significant adults in a child's life since 1999. Beginning with *Youmans v. Ramos*,[16] Massachusetts had recognized as de facto parents adults who resided with a child and performed as much caretaking as the child's own parent, with that parent's blessing. Under the ALI's approach, if Jason had been recognized as Haleigh's de facto parent, he would have been entitled not only to visitation, but also to a share of custody if he and Haleigh's mother had divorced.[17] He presumably would have also been entitled to make medical decisions for Haleigh if her mother could not.[18]

Despite clear precedent for naming Jason as Haleigh's de facto father, the Massachusetts Supreme Judicial Court concluded that doing so would be "unthinkable [under] the circumstances."[19] Together with Holli, Jason had subjected Haleigh to an ominous, escalating pattern of abuse and neglect over a period of more than three years.[20] Long

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16. 711 N.E.2d 165, 167 n.3 (Mass. 1999) (adopting the *Principles*' test for de facto parents in Massachusetts); *see infra* app. C, at 1174.

17. *See infra* notes 55-67 and accompanying text.

18. *See infra* notes 55-67 and accompanying text.

19. *In re* Care & Prot. of Sharlene, 840 N.E.2d 918, 926-27 (Mass. 2006). Sharlene is a pseudonym for Haleigh Poutre. *Id.* at 920.

20. *See* Wen, *supra* note 5. Acknowledging that the Massachusetts Department of Social Services "missed signs of abuse," Commissioner Harry Spence called Haleigh's experience "a classic case of conscientious error," stating that, "[w]e did what we were supposed to do. Everyone misread the data before us." Patricia Wen, *DSS Sought Early End to Life Support*, BOS. GLOBE, Jan. 20, 2006, at A1. Haleigh's case file recorded the following incidents and their "resolutions":

> 9/27/02 Child Abuse/Neglect Report. Allegations of neglect and physical abuse of [Haleigh] Screened Out.
>
> 10/24/02 Child Abuse/Neglect Report. Screened in for allegations of neglect and physical abuse of [Haleigh]. Reporter saw bruises on child, concerns about how child is disciplined and child out of school for eight days.
>
> 10/25/02 Child Abuse/Neglect Investigation. Unsupported with no reasonable cause to believe that a condition of neglect or physical abuse exists.
>
> 1/6/03 Child Abuse/Neglect Report. Initially screened in for neglect because mother is unable to keep child safe from harm then screened out as care and protection referral made.
>
> 12/30/03 Child Abuse/Neglect Report.
>
> 1/13/04 Child Abuse/Neglect Report. Allegations of neglect screened out.
>
> 2/23/04 Child Abuse/Neglect Report. Screened in on allegations of neglect. [Ten] year old [Haleigh] missing for two hours and finally located in bathroom at Noble Hospital which is not close to her home.
>
> 2/23/04 Child Abuse/Neglect Investigation. Unsupported. Child did run away from home but mother acted appropriately.
>
> 6/11/04 Child Abuse/Neglect Report. Screened in because [Haleigh] had bruises, not in school and does not look as well cared for as other children in the home.
>
> 6/14/04 Child Abuse/Neglect Investigation. Allegations of physical abuse and neglect unsupported. [Haleigh] reports that she bruised her face diving into a pool. Mother

absences from school, unexplained bruises on Haleigh's face that were chalked up to "diving into a pool," and headaches and vomiting from being "left . . . alone at a softball game [where] she was hit in the head with a baseball bat," all culminated in Haleigh being thrown down the stairs, leaving her unconscious.[21] When Haleigh arrived at the hospital a day later, "Haleigh was barely breathing, unresponsive[,] and covered

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

In re Sharlene, 840 N.E.2d at 921-22 (alterations in original) (footnote omitted).

21. *Id.* at 921-22; Patricia Wen, *Sister, Stepfather to Testify in Poutre Case*, BOS. GLOBE, Nov. 5, 2008, at B2. According to prosecutor Laurel Brandt, Haleigh's sister, Samantha Poutre, would testify that:

> She saw her stepfather, Jason Strickland, "push Haleigh down the stairs" in the autumn of 2005 and that after her violent fall, Haleigh "did not get up," . . . that her mother, Holli[,] . . . was near the stairs at the time[,] and that the couple "tried to wake Haleigh" without success . . . .
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> . . . [Samantha will also testify that Jason] later took Haleigh's unconscious body from the bottom of the basement steps and put her in an empty tub in a first-floor bathroom.

Id.

with bruises, sores and scabbed-over burns."[22] Haleigh's "teeth were broken, her face was swollen," and she was "extremely thin, [and] her abdomen was sunken."[23] Dr. Christine Barron, a child-abuse specialist, would later say that "many of the wounds were telltale signs of cigarette burns, ligature marks, and severe whippings with a cord or beltlike object."[24] A jury ultimately agreed and convicted Jason of five counts of battering Haleigh. In two instances, Jason struck Haleigh with a "'wand, stick or tube'" and hit her "on the head with his hand."[25] In the remaining instances, he permitted Holli to inflict injuries on Haleigh while he stood by.[26] On December 18, 2008, "a judge sentenced [Jason] . . . to 12 to 15 years in state prison for participating in a horrific pattern of child abuse, saying he had deprived [Haleigh] of the 'most precious gift' of a normal childhood."[27]

In the days and weeks immediately after Haleigh's traumatic injury, glimmers of Jason's role began to appear. Given Haleigh's grim prognosis, the Massachusetts Department of Social Services ("DSS") asked the Hampden County Juvenile Court to enter a do-not-resuscitate ("DNR") order in Haleigh's medical record, a move strenuously opposed by Jason. He asked to make decisions for Haleigh as her de facto father at the DNR hearing, but exercised his Fifth Amendment prerogative not to speak.[28] DSS opposed Jason's request.[29]

In denying Jason's claim to make medical decisions for Haleigh, the trial judge concluded that Jason had "not . . . met the specific[] test" set forth in *Youmans*, and that his assertion of the Fifth Amendment warranted "a negative inference."[30] The Massachusetts Supreme Judicial

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22. Buffy Spencer, *Haleigh Lifeless, 'Freezing Cold,' Nurse Testifies*, REPUBLICAN, Nov. 6, 2008, at A1 (quoting testimony of registered nurse Joanne Ghazil, who was "on duty at Noble Hospital when Haleigh was brought in").

23. *Accused Abuser Seeks to Keep Victim Alive*, *supra* note 4.

24. Patricia Wen, *Stepfather Convicted in Poutre Abuse Case*, BOS. GLOBE, Nov. 27, 2008, at A1.

25. Buffy Spencer, *Sentencing Delayed for Jason Strickland, Convicted of Allowing Assault on His Stepdaughter, Haleigh Poutre*, REPUBLICAN NEWSROOM, Dec. 8, 2008, http://www.masslive.com/news/index.ssf/2008/12/sentencing_delayed_for_jason_s.html.

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

27. Wen, *supra* note 5.

28. *See In re* Care & Prot. of Sharlene, 840 N.E.2d 918, 920, 923 (Mass. 2006); Transcript of Hearing, *supra* note 7, at 24, 28 (DSS argued that Jason "was either participating in the infliction of [Haleigh's] injuries or totally ignoring the fact").

29. Transcript of Hearing, *supra* note 7, at 20-24. Obviously, Jason had a conflict of interest. By insisting that Haleigh remain on life support, Jason could avoid a potential murder charge. Wen, *supra* note 3.

30. Transcript of Hearing, *supra* note 7, at 27-28.

Court affirmed.[31] The court first acknowledged that Massachusetts had embraced the ALI's test for de facto parenthood, which measures chores performed for a child and time spent in residence, not the quality of the adult's relationship with the child.[32] The court concluded, however, that "[t]o recognize [Jason] as a de facto parent, in order that he may participate in medical . . . decision [making for Haleigh] . . . would amount to an illogical and unprincipled perversion of the doctrine."[33] Although Massachusetts's cases "have focused explicitly on the existence of a significant preexisting relationship," that "standard *presumes* that the bond between a child and a de facto parent will be, above all, loving and nurturing."[34] Faced with the ludicrousness of giving Haleigh's abuser parental rights, the court concluded that the gravamen of a parent-child relationship—a loving, bonded, dependent relationship between the child and that adult—should count.

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31. *In re Sharlene*, 840 N.E.2d at 926, 930; *see* E.N.O. v. L.M.M., 711 N.E.2d 886, 890-91 (Mass. 1999).

32. *In re Sharlene*, 840 N.E.2d at 926 (noting that the court adopted the concept of de facto parenthood proposed by the ALI in 1999 but that the court later, in 2003, "noted (without adopting) further refinements to the concept"); *see E.N.O.*, 711 N.E.2d at 891 (referencing the de facto parenthood factors proposed by the ALI in 1998); *infra* app. C, Code 1, at 1174.

33. *In re Sharlene*, 840 N.E.2d at 927.

34. *Id.* at 926 (emphasis added). The day after the court upheld the trial judge's order permitting the removal of Haleigh's ventilator and feeding tube, Haleigh began to show signs of recovery, and the doctors halted plans to let her die. Patricia Wen, *The Little Girl They Couldn't See*, BOS. GLOBE, July 6, 2008, at A1 ("[Doctors] announced that [Haleigh] was breathing on her own and responding to commands."); *see* Buffy Spencer, *Injured Girl Could Testify*, REPUBLICAN, July 2, 2008, at A1. Haleigh now lives with severe, permanent retardation. *See* Noel Young, *Coma Girl Comes Back From the Dead to Testify Against the Stepfather Who Nearly Beat Her to Death*, DAILY MAIL (Feb. 29, 2008, 08:53 AM), http://www.dailymail.co.uk/news/article-522432/Coma-girl-comes-dead-testify-stepfather-nearly-beat-death.html.

Haleigh's tragic story certainly does not mean that live-in partners[35] should never receive parental rights. However, Haleigh's experience drives home the fact that a thinned-out conception of parenthood, measured by chores and time-in-residence, will sometimes permit bad risks to remain in a child's life.[36] Although Haleigh's case is unusual because Jason was the only adult decision-maker left in the vacuum created by Holli's death,[37] far more often this thinned-out conception of parenthood as primarily a function of co-residence would give former live-in partners access to a child "over the opposition of the legal parent"[38]—nearly always a child's mother.[39] Mothers are disproportionately affected by the extension of new parental rights to live-in partners because most non-marital children and children of

35. This Article uses the term "live-in partner" to describe the population of adults on whom the ALI would confer significantly expanded parental rights. The common denominator among this group is their previous status as co-residents of the child's legal parent—nearly always a child's mother—together with their performance of certain "caretaking functions." *See infra* Part II. For reasons explained *infra*, this Article's critique of the *Principles*' thinned-out test for parental rights for former live-in partners is limited to heterosexual male cohabitants. *See infra* Part III.

The *Principles* would also extend parent-like rights to another category of adults who live with a child—parents by estoppel. The defining characteristic of members of this group is that they accept responsibility for the child. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. b(ii), at 122 (2000) [hereinafter PRINCIPLES]. The legal recognition of parents by estoppel is justified in part by expectations of the parties. *Id.* at 122-23 ("When this reasonable good faith [that the individual is the parent] exists, the individual is seeking status based not solely on his functioning as a parent but on the combination of the parental functions performed and the expectations of the parties."). Legal recognition is also predicated on actions that are sufficiently clear and unambiguous to indicate parental status was contemplated by all. *Id.* § 2.03 cmt. b(iii), at 125. Parents by estoppel will often have lived with the child since birth and believed themselves to be the child's biological parent. *Id.* § 2.03(1)(b)(ii)–(iii), at 122-24; Seger v. Seger, 547 A.2d 424, 425, 428 (Pa. Super. Ct. 1988) (granting partial custody and visitation to step-father who lived with child's mother for two years when she informed him she was pregnant with his child and who raised and supported the child after she revealed he was not the father, until the couple's break-up). While this Article's critique is limited to the *Principles*' proposed treatment of de facto parents, the fact that an adult believes himself to be a child's biological parent is important from a risk assessment perspective and may also influence the benefits to children of continuing contact. *See infra* Part III.

36. While the "constitutionally protected status" of the relationship between legal parents and their children can and should be policed for child abuse or neglect, until such a showing is made, society should be chary to encroach on those relationships by giving parental rights to former live-in male partners. Heatzig v. MacLean, 664 S.E.2d 347, 351 (N.C. Ct. App. 2008). As the *Principles* recognize, legal parents exhibit "maximum commitment to the parenting enterprise." PRINCIPLES ch. 1, topic 1, intro. note (I)d, at 5.

37. Haleigh's biological father's parental rights had been terminated, as had the rights of her biological mother upon Haleigh's adoption. *See* Transcript of Hearing, *supra* note 7, at 5, 7, 12-13.

38. PRINCIPLES § 2.03 reporter's notes cmt. b, at 141 (discussing the use of equitable doctrines to give parental rights to live-in partners). The *Principles* define legal parents as biological and adoptive parents. *Id.* cmt. a, at 140.

39. *See infra* note 56 and accompanying text.

divorce live with their mothers.[40] Indeed, among divorced and separated couples with children, mothers maintain over five times as many households as fathers.[41]

This Article argues that in cases in which a mother lives with a heterosexual man who is not her child's legal father, the ALI's thinned-out test for parenthood overrides the judgment of mothers[42] without sufficient consideration for the risks to children.[43] It first demonstrates that the existence of a loving relationship, so important to denying Jason's claim, is precisely the kind of qualitative test that the drafters of the *Principles* expressly rejected in favor of a more easily administrable test based on chores and time.[44] It then marshals significant social science evidence showing that naïve assumptions about human goodness undergird the drafters' recommendations. This evidence shows that the performance of "caretaking" chores, central to the ALI's test, will do little to discern how protective live-in partners have been, or will be.[45] Moreover, countless studies document that unrelated rules are significantly over-represented among the population of child sexual abusers, as well as those who commit child physical abuse. While it is

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40. Of the children who live with either their mother or father, 87% live with the mother. U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2009, at tbl.C3, http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html (follow "Excel" hyperlink). Minority women may have their parental prerogatives overridden more often than white women. *See* Sarah H. Ramsey, *Constructing Parenthood for Stepparents: Parents by Estoppel and De Facto Parents Under the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 285, 287 (2001).

41. *See* U.S. CENSUS BUREAU, *supra* note 40, at tbl.C3.

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

43. At the outset, it is important to recognize that the *Principles* are invoked not only in cases brought by former step-parents and boyfriends, but also by same-sex partners, grandparents, or other relatives seeking visitation or custody. All of these cases grapple with the basic mechanics of the ALI's test, with many evincing deep skepticism. *See infra* Part IV.

44. *See infra* Part II.

45. *See infra* Part III. Gay and lesbian co-parents and female co-residents, such as step-mothers and girlfriends, are not addressed here since their claims for access to children do not raise the same child protection concerns. For example, unlike male live-in partners, we know very little about child sexual abuse by women who are unrelated to a child by biology or adoption, other than that it seems to occur very rarely. Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed By a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 245 & n.13 (2002); *see infra* note 147 and accompanying text. Nor does this critique extend to adoptive parents since they are legal parents and, as such, are entitled to all the prerogatives of legal parents because they have committed to children in this very important way. Instead, this critique focuses exclusively on heterosexual male live-in partners. *See infra* Part III.

certainly true that not every former live-in male partner poses a risk to children,[46] the ALI's formulaic proposal to grant parental rights to former live-in partners leaves judges little discretion to separate the good risks from the bad.

This Article then surveys how courts in the United States have received the ALI's recommendations about de facto parents.[47] While courts have looked to the *Principles* for guidance on this topic more than any other, they have rejected the ALI's approach twice as often as they have accepted it. Even courts that have embraced the idea of parental rights for live-in partners have beefed up the ALI's bare-bones test for de facto parenthood precisely to safeguard a child's welfare and the legal parent's ability to have the last word on who has access to her children.[48] These courts overwhelmingly have refused to grant full parental rights on such narrow grounds.[49] Ultimately, this Article concludes that when society takes love and parental judgments into account and not mere time-in-residence doing chores for a child, we can be more confident that the upside of conferring parental rights on male live-in partners will be significant for children, and that the inherent risks of such an approach will be greatly reduced.

II. THE ALI'S THINNED-OUT CONCEPTION OF PARENTHOOD

Considered the most prestigious law reform organization in the United States, the ALI published its long-awaited *Principles*, an 1183-page volume, in 2002 after eleven years of work and four successive drafts.[50] The ALI's Restatements of the Law and other publications have profoundly shaped the evolution of American law.[51] Given the ALI's considerable influence, the *Principles* seemed to hold the promise of a significant effect on many of the important and controversial questions raised by changes in family forms, both within the United States and outside it.[52]

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

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46. It is equally true that not every biological parent acts protectively towards children. *See* Wilson, *supra* note 45, at 290-91.

47. *See infra* Part IV.

48. *See infra* Part V.C.

49. *See infra* Part V.

50. Robin Fretwell Wilson, *Introduction* to RECONCEIVING THE FAMILY, *supra* note 1, at 1, 1-2.

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

52. Wilson, *supra* note 50, at 1-3, 5.

and domestic partnerships,[53] they have gravitated to the *Principles* for guidance on one topic more than any other: the proposal to confer parental "rights" on live-in partners of a child's legal parent.[54] In the *Principles*, the drafters propose a three-prong test for determining whether a former live-in partner is a de facto parent entitled to a share of custody and other parental rights.[55] This test requires residency, caretaking, and agreement by the child's legal parent (almost always the child's mother).[56]

The first prong, residency, is satisfied when a legal parent's partner lives with the child and the legal parent for as little as two years.[57] The second prong, caretaking, requires that the partner perform at least half of the caretaking functions for the child. Section 2.03(5) defines "caretaking functions" as "tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others."[58] These functions include: grooming, washing, dressing, toilet training, playing with child, bedtime and wake-up, satisfying nutrition needs, protecting child's safety, providing transportation, directing development, discipline, arranging for education, helping to develop relations, arranging for health care, providing moral guidance, and arranging alternate care for the child.[59] The third prong, agreement, is met when the child's legal parent agrees to allow the partner to perform an equal share of the child's caretaking.[60] Because agreement may be implied, this prong is satisfied when a mother acquiesces to the partner's behavior—behavior that virtually any mother would welcome in her partner, such as taking the child to the doctor, reading to the child, helping the child get ready for bed, and making dinner for the family.[61]

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53. *See* Clisham & Wilson, *supra* note 1, at 596, 600, 612 (reporting that across all chapters of the *Principles*, courts reject the ALI's recommendations one-and-a-half times as often as they accept them, but that the overwhelming use of the *Principles* is to reach a result the court would have reached otherwise under its own statutes or precedent).

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

55. *See* PRINCIPLES § 2.03(c), at 118. The *Principles* borrow the term "de facto parent" from case law, but significantly enlarge the rights conferred. *See infra* note 89 and accompanying text (discussing work by Professor Jane Murphy).

56. PRINCIPLES § 2.03 cmt. c, at 130-34.

57. *See id.* cmt. c(i), at 130-31. The drafters seem unwilling to require additional years or to give clear signals that such additional amounts of time should be required. Instead they note that "[i]n some cases, a period longer than two years *may be* required." *See id.* cmt. c(iv), at 134 (emphasis added). The *Principles* also exclude caretakers who are motivated by financial gain rather than "love and loyalty." *Id.* cmt. c(ii), at 131-32.

58. *Id.* § 2.03(5), at 118.

59. *Id.* § 2.03(5)(a)–(h), at 118-19 (setting forth a non-exclusive list).

60. *Id.* cmt. c, at 130.

61. *See id.* cmt. c(iii) & illus. 22, at 130, 133.

Under the ALI *Principles*, de facto parents receive standing to press a claim unilaterally.[62] Once recognized as a de facto parent, the live-in partner receives a share of time with the child after the adults' break-up that is proportional to the "caretaking" performed.[63] This test for custody, known as the approximation standard, functions as a time-in/time-out test.[64] Thus, a person who performs half of the caretaking duties for a child is presumptively entitled to as much as half of the time with the child after the adult union dissolves.[65] Because the de facto parent receives the same physical custody rights as the legal parent, this would normally encompass overnight stays and unsupervised weekends, even over the objection of the mother.[66] Finally, the de facto parent may become the legal decision-maker for the child in certain instances, just as Jason sought to do for Haleigh.[67]

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62. *Id.* § 2.04(1)(c), at 147.

63. *See id.* § 2.08(1), at 197-98 (stating that "the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation," unless an exception applies). Prior to the *Principles*' adoption, the approximation standard had never been adopted by any U.S. jurisdiction. *See* Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, *in* RECONCEIVING THE FAMILY, *supra* note 1, at 446, 448-54 ("[The] *Principles* advocate a radical new approach to determining parenting arrangements after separation."); Mark Hansen, *A Family Law Fight: ALI Report Stirs Hot Debate Over Rights of Unmarried Couples*, A.B.A.J., June 2003, at 20, 20, 23.

64. *See* PRINCIPLES § 2.08(1), at 197-99.

65. *See id.*

66. Supervised visits are reserved for those instances when protecting the child or the child's parent is warranted, for example when the court finds "credible evidence of domestic violence." *Id.* § 2.05, illus. 2, at 163-64. "Credible information" about abuse may also trigger supervision:

> (1) If either . . . parent[] so requests, or upon receipt of credible information that such conduct has occurred, the court should determine promptly whether a parent who would otherwise be allocated responsibility under a parenting plan has done any of the following:
>
> (a) abused, neglected, or abandoned a child . . . ;
>
> (b) inflicted domestic violence, or allowed another to inflict domestic violence . . .
>
> . . . .
>
> (2) If a parent is found to have engaged in any activity specified [above], . . . the court should impose limits that are reasonably calculated to protect the child . . . . The limitations available to the court . . . include . . . :
>
> (a) an adjustment, including a reduction or the elimination, of the custodial responsibility of a parent;
>
> (b) supervision of the custodial time between a parent and the child;
>
> . . .
>
> (f) denial of overnight custodial responsibility;
>
> . . . .

Id. § 2.11(1)–(2), at 284-85.

67. A de facto parent may be made the legal decision-maker for a child but is not presumptively entitled to have this role. *See id.* § 2.09(2) cmt. a, at 264-65 ("Decisionmaking responsibility may be allocated to one parent alone, or to two parents jointly. A de facto parent may be allocated decisionmaking responsibility."); *id.* § 2.09(2), at 264 (giving both legal parents and

The drafters of the *Principles* include some important limits on the rights de facto parents would receive. The de facto parent cannot receive a majority of the time with a child unless there is a grossly disproportionate attachment to the de facto parent over the mother.[68] The share of time allotted to the de facto parent after the break-up can be diminished in cases where giving the de facto parent half or more of the time with the child is unworkable, such as when the *Principles* would recognize five or six different adults as entitled to share time with the child.[69]

Further, the drafters include one key limit on the obligations of de facto parents. Unlike every other category of parent acknowledged in the *Principles*, de facto parents do not have to pay child support for the child for whom they are receiving parental rights.[70] As Professor Katharine Baker has observed, "the *Principles*' expansion of the custody and visitation rights of nontraditional parents, which expands the state's role in child rearing, is not accompanied by greater state responsibility for children."[71] This is remarkable because "[t]raditionally, whoever had

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parents by estoppel, but not de facto parents, a presumption of joint decision-making responsibility); *id.* § 2.18(1), at 434 ("The court should allocate responsibility to a legal parent, a parent by estoppel, or a de facto parent as defined in § 2.03, in accordance with the same standards set forth in §§ 2.08 through 2.12 . . . .").

68.

> *De facto parents*. This section gives priority to a legal parent and a parent by estoppel over a de facto parent . . . . [A]n allocation of the majority of custodial responsibility to a de facto parent is ordinarily precluded when there is a legal parent or a parent by estoppel who is fit and willing to care for the child. A de facto parent may still obtain an allocation of custodial or decisionmaking responsibility, under the criteria set forth in §§ 2.08 through 2.12.

See id. § 2.18 cmt. b, at 435. The sections of this Chapter afford priority to a legal parent and a parent by estoppel in other ways. *See, e.g.*, *id.* § 2.08(1)(a), at 197-98. (legal parents and parents by estoppel, but not de facto parents, entitled to presumptive allocation of custodial responsibility); *id.* § 2.09(4), at 264 (legal parents and parents by estoppel, but not de facto parents, have presumptive access to school and health records of the child).

69. *See* David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY, *supra* note 1, at 47, 51.

70. *See* Katharine K. Baker, *Asymmetric Parenthood*, *in* RECONCEIVING THE FAMILY, *supra* note 1, at 121, 133. This choice is perplexing since live-in partners benefit children by providing them with additional financial support during the intact adult relationship and presumably could do so to some degree afterwards. *See* Sarah H. Ramsey, *Stepparents and the Law: A Nebulous Status and a Need for Reform*, *in* STEPPARENTING: ISSUES IN THEORY, RESEARCH, AND PRACTICE 217, 218 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1994). The decision to give live-in partners parental rights without requiring child support may also represent a missed child-protection opportunity. The drafters could have limited standing to seek rights as a de facto parent to those adults who assume a child support obligation to a child, which would serve an important screening function. It would promote continuing contact between children and those adults who have committed to a child in concrete, palpable ways—where continuing contact is likely to create the greatest gains for a child—while helping to screen out "bad risks." *See infra* Part III.

71. Baker, *supra* note 70, at 122.

rights had responsibilities and only the people who had rights and responsibilities were parents. The *Principles* now suggest a very different structure. People can now have rights without having responsibilities, and a determination of legal parentage really only matters for the imposition of responsibility."[72]

In many ways, the ALI's proposed reforms are admirable. The *Principles* seek to provide children with enduring contact with the "only father [a] child ha[d] known,"[73] a former live-in partner.[74] The drafters believe that maintaining this relationship is "critically important to the child's welfare."[75] Further, disregarding this relationship after the break-up "ignores child-parent relationships that may be fundamental to the child's sense of stability."[76] In short, the drafters assume that continuing contact will nearly always be an unadulterated good because the "division of past caretaking functions correlates well with other factors associated with the child's best interests."[77]

The beneficial effects posited by the drafters come at a price, however: limiting the parenting prerogatives of legal parents. As is the case with any right, handing out new parental rights is a zero-sum game: where a right is enlarged for one party, it is diminished for the other.

Historically, courts have made custody determinations using the "best-interests-of-the-child" standard.[78] Doctrines of standing precluded

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72. *Id.* at 127 (footnote omitted).

73. *See* PRINCIPLES § 2.03 reporter's notes cmt. b, at 142 (discussing equitable-parent cases).

74. Although this Article critiques the use of the *Principles*' test to confer parental rights on heterosexual male live-in partners, that test would be equally available to heterosexual and same-sex partners. As explained above, the child-protection concerns articulated in this Article do not extend to gay and lesbian co-parents or female co-residents. *See supra* note 45.

75. PRINCIPLES ch. 1, topic 1, intro. note I(d), at 6.

76. *Id.* at 5.

77. *Id.* § 2.08 cmt. b, at 201. The presumption that residential time with the child should approximate past caretaking may be overcome in instances where it is necessary "to avoid substantial and almost certain harm to the child." *Id.* § 2.08(1)(h), at 197-99.

> [T]he court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or . . . before the filing of the action, except to the extent required . . . to achieve . . . the following objectives:
>
> . . . .
>
> (h) to avoid substantial and almost certain harm to the child.

Id. § 2.08(1); *see id.* § 2.09(2), at 264 ("The court should presume that an allocation of decisionmaking responsibility . . . is in the child's best interests. The presumption is overcome if there is a history of domestic violence or child abuse . . . .").

78. *See id.* § 2.02 cmt. c, at 105.

> To apply the test, courts must often choose between specific values and views about childrearing. . . . When the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments, or upon experts who have their own theories of what is good for children and what is effective parenting.

unrelated parties from seeking custody,[79] giving parents exclusive say in caretaking matters, at least when abuse and neglect were not present.[80] In jurisdictions that follow the ALI's approach, however, mothers will wind up with less discretion in their parenting choices for two reasons. De facto parents can press claims, something many could not have done in the absence of the *Principles*.[81] De facto parents are also placed on par with legal parents for a share of physical custody that approximates their prior relationship with the child.[82] By definition, this is presumptively half of the time with the child.[83] And while rights generally come with obligations, the child receives no financial support in exchange for this encroachment on the relationship with her mother.[84] This is so because under the ALI's test, as noted earlier, a "[f]unctional relationship does not give rise to obligation."[85]

> The indeterminacy of the best-interests test makes it often difficult for parents to predict the outcome of a case.

Id.

79. *See id.* § 2.04 reporter's notes cmt. d, at 154 (noting the "traditional rule . . . that a nonparent cannot file an action for custody or visitation without a showing that the parents are unfit or unavailable").

80. *See* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, *reprinted in* DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 168, 168-69 (4th ed. 2010).

81. *See supra* notes 62-67 and accompanying text (discussing standing). Very few jurisdictions have permitted unmarried cohabitants to initiate actions for custody or visitation. *See, e.g.*, Engel v. Kenner, 926 S.W.2d 472, 473, 475 (Mo. Ct. App. 1996) (denying joint custody to boyfriend of mother who lived with mother and child for five months and helped support child for three years thereafter); Cooper v. Merkel, 470 N.W.2d 253, 254, 256 (S.D. 1991) (denying visitation to mother's ex-boyfriend who, as a father-figure, had assumed responsibility for raising mother's son for seven years); *see also infra* app. D, category 7, at 1187-88 (summarizing *White v. White* and *Smith v. Gordon*).

82. *See supra* notes 53-56 and accompanying text.

83. A presumption of half of the time arises because to qualify as a de facto parent, the individual must have performed the majority of the caretaking functions, or at least performed a share equal to or greater than the share performed by the legal parent. PRINCIPLES § 2.03 cmt. c, at 130. Because the approximation standard seeks to mirror the previous caretaking arrangement for the child, the de facto parent presumptively would receive at least half of the time with the child. *See supra* note 64-65.

84. *See* Baker, *supra* note 70, at 133; *infra* Part III (discussing studies showing that sole custody with child's mother may be more protective of children than custody split between a mother and her former live-in partner).

85. Baker, *supra* note 70, at 122; *see supra* notes 70-72 and accompanying text.

Like all custody rules,[86] the rights conferred by the *Principles* would only come into play when a child's mother does not willingly grant visitation to her ex-partner.[87] A mother can always decide voluntarily to provide visitation to those men she thinks will enrich her child's life. Importantly, the *Principles* make no inquiry into why mothers do not voluntarily allow former live-in partners to have access to their children. Neither do the *Principles* inquire into how a child will fare as a result of continuing contact *or* as a result of losing contact with a live-in partner. Instead, the drafters blindly assume that the loss of contact will negatively affect a child.

The ALI's treatment of live-in partners unabashedly seeks to both standardize custody decisions by tamping down judicial discretion[88] *and* to open courtrooms to claims that live-in partners would not have been permitted to press in the past.[89] The ALI can propose such drastic changes because its recommendations in the *Principles* are directed at legislators, who have the option to write on a blank slate, as opposed to judges who generally must heed precedent.[90]

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86. Of course, the influence of a custody rule extends beyond those instances in which the legal parent opposes parental rights for her ex-partner in a legal proceeding. By conferring standing and "rights" on live-in partners to seek custody and visitation, the drafters make it all the more difficult for mothers to say no, even when the matter stays out of court. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

87. PRINCIPLES § 2.03 reporter's notes cmt. b, at 141 (discussing custody and visitation rights "over the opposition of the legal parent").

88. *Id.* § 2.02(1)(f), at 104 (describing the primary objective of Chapter 2 as "*expeditious, predictable decisionmaking* and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control") (emphasis added); *see also id.* § 2.02, cmt. c, at 106 ("The question for rule-makers is not whether the law in this area should require determinacy or permit unbridled judicial discretion. It is, rather, what blend of determinacy and discretion produces the best combination of predictable and acceptable results, and what substantive values are most appropriately reflected in the mix. This Chapter attempts to achieve this equilibrium through structured decisionmaking criteria that *limit judicial discretion* and at the same time express widely held societal commitments to children and to family diversity." (emphasis added)).

89. *See supra* notes 78-81 and accompanying test (discussing traditional rules precluding standing by live-in partners). While a live-in partner might receive some limited visitation with the child after the break-up in certain jurisdictions, this limited entitlement does not approach the significant allocations of time and decision-making rights that the *Principles* would confer on de facto parents. *See* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 342-43 & n.78 (2005) (noting in a review of de facto parent cases that a "few states and a number of courts have granted nonbiological, nonmarital caretakers such as stepfathers . . . rights similar to those granted to legal fathers," but that "these cases generally limit the parental rights to visitation" (footnotes omitted)); *infra* app. D, categories 2-7, at 1180-88.

90. Unlike the ALI's *Restatements of the Law*, which have been directed mainly at individual "decision-makers" (courts), the *Principles* were directed largely to "rule-makers" (state legislatures). Ira Mark Ellman, *Chief Reporter's Foreword*, *in* PRINCIPLES, at xv-xvi (noting that some sections of the *Principles* "are addressed to rulemakers rather than decisionmakers"). This focus was deliberate

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

III. EVALUATING THE ALI'S PROPOSED REFORMS

The drafters of the *Principles* assume that "[b]ecause caretaking functions involve tasks relating directly to a child's care and upbringing, [these tasks] . . . are likely to have a special bearing on the strength and quality of the adult's relationship with the child."[91] While courts utilize the ALI's test for de facto parent status in same-sex partner cases,[92] the child-protection critique offered here is limited only to heterosexual male live-in partners. In their zealousness to provide continuing contact with good father-figures, however, the drafters offer an easily administrable caretaking test that fails to screen out even the worst risks to children. As this Part explains, the ALI's test rewards behavior that may portend significant risk to children, is likely to increase the risk of sexual or physical abuse for some children, and does so without assuring that the children in whom parental rights are given will, as a group, benefit from significant financial or other support as a result of the continuing contact.

A. Rewarding Behavior that May Signal Risk

The drafters posit that caretaking tasks reflect a loving and bonded relationship. But those same activities can also indicate a very different type of relationship. As Figure 1 illustrates, child molesters "groom" their victims to gain the child's confidence by engaging in conduct that most people would see as innocent and perhaps even heartwarming. Child molesters read to children, they bathe children, they shower

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because much of what the *Principles* contemplate would require legislative action to make them a reality. Press Release, Michael Greenwald, *American Law Institute Publishes* Principles of the Law of Family Dissolution (May 15, 2002), http://www.ali.org/ali/pr051502.htm.

91. PRINCIPLES § 2.03 cmt. g, at 137.

92. *See infra* notes 191-92 and accompanying text.

children with attention. Indeed, intensive caretaking creates the conditions—time alone, unusual dependence, and the child's acceptance of intimate physical touch—that allow and encourage the child's tolerance of later sexual contact.[93] Not only does the ALI's caretaking test fail to screen out men likely to pose a risk to children, it actually gives those men a "gold star" for behaviors that should raise significant caution flags. Thus, the ALI's assumption that caretaking can only be a good operates as a classic one-sided coin and never allows for the possibility that caretaking may be the means to bad ends.

Figure 1: Molestation or Legitimate Caretaking?

ALI's Caretaking Functions	Grooming Behaviors[94]
Grooming	Bathing
Washing	Dressing
Dressing	Bathroom behavior
Toilet training	Attention and affection
Playing with child	Being around child at bedtime
Bedtime and wakeup	Discipline
Satisfying nutrition needs	Assure child of rightness
Protecting child's safety	
Providing transportation	
Directing development	
Discipline	
Arranging for education	
Helping to develop relations	
Arranging for health care	
Providing moral guidance	
Arranging alternate care for child	

It should surprise no one that predatory men and bad risks like Jason Strickland would capitalize on the possibility of parental rights or continuing contact with a child. Child molesters and others with bad intentions do not just gravitate to single mother households, they hone in

93. John R. Christiansen & Reed H. Blake, *The Grooming Process in Father-Daughter Incest*, *in* THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT 88, 89, 91-92 (Anne L. Horton et al. eds., 1990) (noting that acts of child sexual abuse within the home overwhelmingly use coercion and not outright force, and that offenders within the home use "boundary violations"—bathing, dressing, and bathroom behavior—to "groom" children to participate in sexual activities).

94. DAVID FINKELHOR, CHILD SEXUAL ABUSE: NEW THEORY AND RESEARCH 93 (1984); Christiansen & Blake, *supra* note 93, at 89, 91-92; Jon R. Conte et al., *What Sexual Offenders Tell Us About Prevention Strategies*, 13 CHILD ABUSE & NEGLECT 293, 300 (1989).

on them. In a study of child predators conducted by Jon Conte, one child molester succinctly described his modus operandi this way: find "[s]ome way to get a child living with you."[95] Anna Salter's interviews of sex offenders include a particularly chilling account by a sex offender who deliberately dated women in order to rape their children.[96]

These men are not alone in this approach. Asked about victim selection, fifteen of seventy-two incarcerated child molesters indicated that they deliberately targeted "passive, quiet, troubled, lonely children from broken homes" since these characteristics indicate a child's vulnerability to their advances.[97] As one child molester explained, by selecting a child "who doesn't have a happy home life," it is "easier to groom them and to gain their confidence."[98]

B. Increasing the Risk of Child Sexual Abuse

The ALI's test for awarding parental rights to live-in partners is flawed for another reason. It fails to consider the risks to children that flow from significantly enlarging the parental rights of former male live-in partners. Children who spend time with unrelated males are placed at a significantly higher risk of physical and sexual abuse, as this section and the next document.[99]

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95. Conte et al., *supra* note 94, at 298.

96. Videotape: Truth, Lies, and Sex Offenders (Anna C. Salter 1996) (on file with the Sage College Library).

97. Lee Eric Budin & Charles Felzen Johnson, *Sex Abuse Prevention Programs: Offenders' Attitudes About Their Efficacy*, 13 CHILD ABUSE & NEGLECT 77, 79, 84 (1989). Similarly, one study of twenty adult sexual offenders in a Seattle, Washington treatment program found that offenders selected victims based on the child's vulnerability, with vulnerability "defined both in terms of children's status (e.g., living in a divorced home or being young) and in terms of emotional or psychological state (e.g., a needy child, a depressed or unhappy child)." Conte et al., *supra* note 94, at 293, 299.

98. Conte et al., *supra* note 94, at 298. For those children who have experienced divorce, the emotional void created by the loss of a parent sometimes opens the child up to the abuser's predations, making them less able to say "no" to unwanted sexual advances. Lucy Berliner & Jon R. Conte, *The Process of Victimization: The Victims' Perspective*, 14 CHILD ABUSE & NEGLECT 29, 35 (1990) ("In many cases the sexual abuse relationship filled a significant deficit in the child's life . . . . The children were troubled and/or their parents were not resources for them."). Berliner and Conte suggest that offenders exploited "a child's normal need to feel loved, valued, and cared for." *Id.* at 38; *see* Conte et al., *supra* note 94, at 299 (describing ways in which sexual predators "manipulate . . . [a child's] vulnerability as a means of gaining sexual access").

99. ANDREA J. SEDLAK ET AL., DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 5–20 to 5–22 (2010) (finding that children living with parent's cohabiting partner had the highest rate of abuse under the Harm Standard at 33.6 children being abused per 1000, compared to only 2.9 for children living with two married biological parents; that the rate of sexual abuse for such children was nearly twenty times the rate for children living with married biological parents at 9.9 and 0.5 children per 1000, respectively; and the rate of physical abuse under the Harm Standard was ten times greater at

Incest and molestation occur with much greater frequency when mothers are not present.[100] For example, a study by Jillian Fleming and colleagues found that: "For women abused by someone outside of the family, the significant predictors [included the] . . . mother's death[] and having an alcoholic mother."[101] The mere absence of a girl's mother

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19.6 and 1.9 children per 1000, respectively); *see* notes 110-24 and accompanying text.

100. The only national survey in the United States to examine risk factors for child sexual assault at the time found higher rates of abuse among women who reported living for some period of time without one of their biological parents. David Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT 19, 20, 24-25 (1990) (finding in a national survey of 2626 adult men and women that separation from a natural parent for a major portion of one's childhood is a risk factor for sexual victimization).

This phenomenon is widely acknowledged by child abuse researchers. *See, e.g.*, CHRISTOPHER BAGLEY & KATHLEEN KING, CHILD SEXUAL ABUSE: THE SEARCH FOR HEALING 90 (1990) ("It is not typical for sexual abuse to occur independently of other aspects of family dysfunction. It occurs with greater frequency in homes disrupted by parental absence or separation . . . ."); Christopher Bagley & Richard Ramsay, *Sexual Abuse in Childhood: Psychosocial Outcomes and Implications for Social Work Practice*, *in* SOCIAL WORK PRACTICE IN SEXUAL PROBLEMS 33, 37, 42 (James Gripton & Mary Valentich eds., 1986) (stating that molestation "occurs with greater frequency in homes which are disrupted by the child's separation from one or both parents," but cautioning that "sexual abuse is not[,] in statistical terms, a direct function of family variables"); Ann W. Burgess et al., *Abused to Abuser: Antecedents of Socially Deviant Behaviors*, 144 AM. J. PSYCHIATRY 1431, 1432-33 (1987) (finding, in follow-up studies of two groups of adolescents who participated in sex rings as children, that 70% of adolescents who participated in the sex rings for more than one year were from single-parent families, compared to 47% of the adolescents who were involved for less than a year); David M. Fergusson et al., *Childhood Sexual Abuse, Adolescent Sexual Behaviors and Sexual Revictimization*, 21 CHILD ABUSE & NEGLECT 789, 797 (1997) (finding, in a longitudinal study of 520 New Zealand-born children, that "[y]oung women who reported . . . [child sexual abuse] were more likely [than non-abused children] to have experienced at least one change of parents before the age of [fifteen]"); David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, FUTURE OF CHILD., Summer/Fall 1994, at 31, 48 [hereinafter Finkelhor, *Current Information*] ("In many studies . . . children who lived for extended periods of time apart from one parent have been found to bear elevated risks for sexual abuse."); David Finkelhor, *Epidemiological Factors in the Clinical Identification of Child Sexual Abuse*, 17 CHILD ABUSE & NEGLECT 67, 68 (1993) [hereinafter Finkelhor, *Epidemiological Factors*] ("In general, children who are living without one or both of their natural parents are at greater risk for abuse."); Jean Giles-Sims, *Current Knowledge About Child Abuse in Stepfamilies*, 26 MARRIAGE & FAM. REV. 215, 218 (1997) ("[S]exual abuse literature is more consistent . . . in finding that children not living with both natural parents run higher risks of child sexual abuse both from family members and others, but the exact magnitude of reported risk varies across studies."); Hilda Parker & Seymour Parker, *Father-Daughter Sexual Abuse: An Emerging Perspective*, 56 AM. J. ORTHOPSYCHIATRY 531, 532 (1986) ("Reconstituted families, stepparent[,] and broken families, with mother's male companions in the home, seem to be vulnerable."); Anne E. Stern et al., *Self Esteem, Depression, Behaviour and Family Functioning in Sexually Abused Children*, 36 J. CHILD. PSYCHOL. & PSYCHIATRY 1077, 1080, 1081 tbl.1 (1995) (finding, in a comparison of eighty-four sexually abused children and their families to a non-abused control group, that the abused group had more marital breakdown and change of parents than the non-abused group).

101. Jillian Fleming et al., *A Study of Potential Risk Factors for Sexual Abuse in Childhood*, 21 CHILD ABUSE & NEGLECT 49, 50, 53, 55 (1997) (enumerating factors possibly associated with childhood sexual abuse, including "living apart from their mother at some time during their

heightens her risk for sexual exploitation.[102] Researchers have compared girls who lived without their mother before the age of sixteen to those who remained with their mother throughout childhood.[103] The sexual vulnerability of the estranged girls was nearly two hundred percent greater than that of other girls, leading one researcher to conclude that "missing a mother is the most damaging kind of disruption."[104]

This pattern of a girl's heightened vulnerability in mother-absent households is repeated in multiple studies of children living without one biological parent.[105] In one of the few longitudinal studies of a general

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childhood"). The authors speculate that a birth mother's absence, in the form of her death or mental illness, "may place the child at risk of neglect that involves a lack of supervision." *Id.* at 56.

102. DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 121, 125 (1979).

103. *Id.* at 120-21.

104. *Id.* at 121. Those studies estimating the incidence of sexual abuse find that as many as half the girls in fractured families report sexual abuse as a child. *See, e.g.*, *id.* at 125 (discovering that 58% of the girls who, at some time before the age of sixteen, had lived without their mothers had been sexually victimized, three times the rate for the whole sample, making these girls "highly vulnerable to sexual victimization"); *see also* Bagley & Ramsay, *supra* note 100, at 37, 38-39 tbl.1 (reporting that 53% of women separated from a parent during childhood reported sexual abuse).

105. At least a dozen other studies confirm that sexual victimization occurs more often in disrupted families. *See, e.g.*, VINCENT DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS: FINAL REPORT 50, 50 tbl.14 (1969) (finding, in a study of 250 sexual abuse cases, that in 60% of the families the child's natural father or natural mother was not in the home—"an extraordinarily high incidence of broken homes"); DIANA E. H. RUSSELL, THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN 103, 104 tbl.8-1 (1986) ("[W]omen who were reared by both of their biological or adoptive parents were the least likely to be incestuously abused . . . ."); S. KIRSON WEINBERG, INCEST BEHAVIOR 41, 49 (1955) (finding, in a study of 203 incest cases in Illinois, that 40.3% of the fathers were widowed or separated from their wives at the start of incestuous relationships with their daughters); Rebecca M. Bolen, *Predicting Risk to Be Sexually Abused: A Comparison of Logistic Regression to Event History Analysis*, 3 CHILD MALTREATMENT 157, 164 (1998) (finding, in a multivariate analysis of Diana Russell's survey data on 930 adult women in the San Francisco area, that "[r]espondents living with both natural parents prior to the age of 14 had the lowest rates of abuse"); David Finkelhor & Larry Baron, *High-Risk Children*, *in* A SOURCEBOOK ON CHILDREN SEXUAL ABUSE 60, 73, 79 (1986) (noting the "impressive number of studies with positive findings on the question of parental absence," and concluding that "[t]he strongest and most consistent associations across the studies concerned the parents of abused children," and that "[g]irls who are victimized are . . . more likely to have lived without their natural fathers"); Marcellina Mian et al., *Review of 125 Children 6 Years of Age and Under Who Were Sexually Abused*, 10 CHILD ABUSE & NEGLECT 223, 227 (1986) (finding that 67% of the victims of intrafamilial abuse came from families in which parents had separated or divorced, compared to 27% of the children abused by perpetrators outside of the family); P.E. Mullen et al., *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 8-9, 18 (1996) (reporting, in a study of 2250 randomly selected adult women in New Zealand, that sexual, physical, and emotional abuse "occurred more often in those from disturbed and disrupted home backgrounds"); Nancy D. Vogeltanz et al., *Prevalence and Risk Factors for Childhood Sexual Abuse in Women: National Survey Findings*, 23 CHILD ABUSE & NEGLECT 579, 586 (1999) (finding, after using statistical analysis to unravel the effects of multiple risk factors, that not living with both biological parents by the age of sixteen ranked among those factors "significantly associated with increased risk of . . . [child sexual abuse]"); Patricia Y. Miller, Blaming the Victim of Child Molestation: An Empirical Analysis

population, David Fergusson and his colleagues followed 1265 children from birth until the age of eighteen.[106] They found that 66.5% of the victims of sexual abuse came from families that "experience[d] at least one change of parents before age 15," compared to 33.5% of children who did not experience abuse.[107] Fergusson reported, moreover, that 60% of children who experienced intercourse as part of the abuse had been exposed to parental divorce or separation.[108] However, in a regression analysis, investigators found that five factors—gender, marital conflict, parental attachment, parental overprotection, and parental alcoholism—were predictive of reported abuse.[109]

Furthermore, a significant body of research indicates that the presence of a step-father or mother's boyfriend greatly increases the risk of sexual molestation for young girls,[110] although the risk is not limited

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(1976) (unpublished Ph.D. dissertation, Northwestern University) (on file with the Hofstra Law Review) (discovering that a biological father's absence "directly influence[d] molestation" and constituted the "variable [with] the largest direct effect on . . . victimization"); *cf.* Kristin Anderson Moore et al., *Nonvoluntary Sexual Activity Among Adolescents*, 21 FAM. PLAN. PERSP. 110, 113 & tbl.3 (1989) (ascertaining in a study of white female adolescents that having parents who are "separated, divorced or never-married" doubles the likelihood of sexual abuse, although the association was not significant when other factors were controlled).

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

107. *Id.* at 1359 tbl.2.

108. *Id.*

109. *Id.* at 1360 & tbl.3.

110. Obviously, this conclusion is drawn from scientific studies across large groups and says nothing about risks posed by any individual step-father or boyfriend. Nonetheless, a child's exposure to unrelated men in her home plays a crucial role in determining her vulnerability to sexual victimization. In one long-term study, researchers in New Zealand found that children reporting childhood sexual abuse were more likely to live with a step-parent before the age of fifteen. *Id.* at 1356, 1359 tbl.2 (reporting results of a longitudinal study of 1265 children who were studied from birth until age 18). Of those children experiencing intercourse, nearly half (45.5%) were raised in a step-parent household. *Id.* at 1359 tbl.2.

Similarly, Diana Russell found, in a community survey of 930 women in San Francisco, that one out of six girls growing up with a step-father was sexually abused, making these girls over seven times more likely to be sexually victimized than girls living with both biological parents. RUSSELL, *supra* note 105, at 10, 103 (reporting that 2% of respondents reared by biological fathers were sexually abused, while at least 17% of the women in the sample who were reared by a step-father were sexually abused by him before the age of fourteen); *cf.* Parker & Parker, *supra* note 100, at 541 (finding risk of abuse associated with step-father status to be almost twice as high as for natural fathers). Significantly, the risk of sexual assault by father substitutes "who are around for shorter lengths of time . . . may be considerably higher." RUSSELL, *supra* note 105, at 268; *see also* Joseph H. Beitchman et al., *A Review of the Short-Term Effects of Child Sexual Abuse*, 15 CHILD ABUSE & NEGLECT 537, 538, 550 (1991) (observing in a review of forty-two separate publications that "[t]he majority of children who were sexually abused . . . appeared to have come from single or reconstituted families"); Jocelyn Brown et al., *A Longitudinal Analysis of Risk Factors for Child*

only to young girls.[111] Consider some representative studies. Leslie Margolin and John Craft examined 2372 cases of "founded" sexual abuse involving caretakers in Iowa for the identities of the individual directly responsible for a child's sexual abuse.[112] Step-fathers accounted for 41% of the abusers, almost four times what the researchers expected based on the number of children living with step-fathers at that time.[113] In another study, Rebecca Bolen used statistical tools to distinguish the effect of living without both natural parents from other aspects of

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Maltreatment: Findings of a 17-Year Prospective Study of Officially Recorded and Self-Reported Child Abuse and Neglect, 22 CHILD ABUSE & NEGLECT 1065, 1067, 1074 (1998) (finding, in a longitudinal study of 644 families in upstate New York between 1975 and 1992, that disruption of relationships with biological parents and living in the presence of a step-father increased childrens' risk of sexual abuse); Fergusson et al., *supra* note 100, at 791, 797 (finding, in a longitudinal study of 520 New Zealand-born young women, that child sexual abuse was associated with living with a step-parent before the age of fifteen); Finkelhor & Baron, *supra* note 105, at 79 ("The strongest and most consistent associations across the studies concerned the parents of abused children. . . . Girls who lived with stepfathers were also at increased risk for abuse."); John M. Leventhal, *Epidemiology of Sexual Abuse of Children: Old Problems, New Directions*, 22 CHILD ABUSE & NEGLECT 481, 488 (1998) ("Studies have indicated that . . . girls living with step-fathers are at an increased risk compared to girls living with biological fathers . . . .").

In a number of studies, step-fathers actually outnumbered natural fathers as abusers, a telling result given the disproportionately greater number of biological fathers during the time of the study. DE FRANCIS, *supra* note 105, at 69 & tbl.26 (finding that the natural father committed the offense in 13% of the cases, whereas in 14% of cases the offense was committed by a step-father or by the man with whom the child's mother was living); Jean Giles-Sims & David Finkelhor, *Child Abuse in Stepfamilies*, 33 FAM. REL. 407, 408 tbl.1 (1984) (reporting that 30% of abusers in a study were step-fathers, outnumbering natural father abusers, who constituted 28% of the abusers).

Christopher Bagley and Kathleen King estimate that "as many as one in four step-fathers may sexually abuse the female children to whom they have access." BAGLEY & KING, *supra* note 100, at 75-76. The risk of abuse to girls at the hand of former live-in partners is even greater than these comparisons suggest because these girls "are also more likely than other girls to be victimized by other men." FINKELHOR, *supra* note 94, at 25. For example, step-daughters are five times more likely to be abused by a friend of their parents than are girls in traditional nuclear families. *Id.* Thus, step-fathers "are associated with sexual victimization, not just because they themselves take advantage of a girl, but because they increase the likelihood of a nonfamily member also doing so." FINKELHOR, *supra* note 102, at 130; *see also* BAGLEY & KING, *supra* note 100, at 91 (citing a study which found that girls separated from one parent "were also at risk for sexual victimization by more than one adult"). Because the risk of sexual abuse is cumulative, one researcher found that "[v]irtually *half* the girls with stepfathers were victimized by someone." FINKELHOR, *supra* note 94, at 25.

While these studies differ in scope and the strength of their findings, they agree on one essential conclusion: the addition of an unrelated male "to a girl's family causes her vulnerability to skyrocket." FINKELHOR, *supra* note 102, at 122.

111. *See* Wilson, *supra* note 1, at 114; Robin Fretwell Wilson, *Fractured Families, Fragile Children—the Sexual Vulnerability of Girls in the Aftermath of Divorce*, 14 CHILD & FAM. L.Q. 1, 1 (2002).

112. Leslie Margolin & John L. Craft, *Child Sexual Abuse by Caretakers*, 38 FAM. REL. 450, 450 (1989).

113. *Id.* at 452.

household composition.[114] When all other variables were held constant, she found "children living with males in the household after separation [of their parents] were more than 7 times more likely to be abused" than "children living with only females after separation."[115] In hard numbers, "over half of these children were sexually abused."[116] Bolen's findings suggest that the heightened risk to girls does not result from the breakup of a traditional nuclear family itself,[117] but "[i]nstead, living with a male in the household after separation . . . appeared to be the more important predictor."[118]

Multiple studies in North America have found over-representation of step-fathers and boyfriends among abusers.[119] The baseline against

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114. Bolen, *supra* note 105, at 165-66 & tbl.2 (performing multivariate analyses of data from Diana Russell's survey of 930 adult women in the San Francisco area).

115. *Id.* at 167.

116. *Id.* at 163 & tbl.1 (reporting that 53% were sexually abused).

117. Some may see the risks to children in fractured and blended families as a deficit of their family form (i.e., whether they have two parents). *See id.* These statistics would not support such an inference—an intact family does not immunize a child from sexual exploitation. *See, e.g.*, Finkelhor, *Epidemiological Factors*, *supra* note 100, at 68 ("[T]he presence of both natural parents is certainly not an indicator of *low risk* in any absolute sense."); Mullen et al., *supra* note 105, at 18 ("Intact families do not guarantee stability . . . .").

118. Bolen, *supra* note 105, at 167. As Bolen observes, "for children living with a male in the household, rates of abuse appeared to be better explained by (a) living with a stepfather or (b) being separated from one's natural mother." *Id.* at 166. While "the addition of a stepfather to a girl's family causes her vulnerability to skyrocket[,]" FINKELHOR, *supra* note 102, at 122, it is overly simplistic to assume that the mother's remarriage or cohabitation is a necessary predicate to victimization. A girl's long-term separation from her father—a risk factor "strongly associated" with childhood victimization—is sometimes, *but not always*, followed by the introduction of unrelated males into the household. BAGLEY & KING, *supra* note 100, at 91.

119. *See, e.g.*, SEDLAK ET AL., *supra* note 99, at 5–19 (finding that the incidence of sexual abuse for children living with one parent and that parent's live-in partner was nearly twenty times the rate for children living with married biological parents); U.S. DEP'T OF HEALTH & HUMAN SERVS., STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 6, 31 tbl.5-5 (1981) (finding, in a stratified random sample of child protective services agencies in twenty-six counties within ten states, that step-fathers were involved in 30% of the reported sexual abuse cases, while biological fathers were involved in 28% of the cases); Hendrika B. Cantwell, *Sexual Abuse of Children in Denver, 1979: Reviewed with Implications for Pediatric Intervention and Possible Prevention*, 5 CHILD ABUSE & NEGLECT 75, 77 tbl.1 (1981) (finding, in a study of 226 substantiated cases of child sexual abuse in Denver, Colorado during 1979, that 27.5% of children were sexually victimized by a surrogate father, compared to 26.5% who were abused by their natural father); Robert Pierce & Lois Hauck Pierce, *The Sexually Abused Child: A Comparison of Male and Female Victims*, 9 CHILD ABUSE & NEGLECT 191, 192-93, 194 tbl.2 (1985) (ascertaining from a review of 180 substantiated cases of sexual abuse reported to a child abuse hotline between 1976 and 1979 that 41% of the perpetrators against girls were the child's natural father, while 23% were the child's step-father); Edward Sagarin, *Incest: Problems of Definition and Frequency*, 13 J. SEX RES. 126, 133-34 (1977) (concluding from a study of seventy-five cases of heterosexual incest involving thirty-two step-fathers and thirty-four biological fathers, that "it appears that the likelihood of a stepfather-stepdaughter relationship is far greater than [a] father-daughter [relationship]" because the "number of households in which there is a stepfather and stepdaughter is surely many times lesser than those in which there is a father and daughter"); *cf.*

which "over-representation" is measured is the "expected" rate of abuse, that is, the number or percentage of all households at the time of the study that contained step-fathers or boyfriends. A population is over-represented when the number or percentage of step-father or boyfriend abusers exceeds the incidence of households with step-fathers or live-in boyfriends. This over-representation appears to be an international phenomenon, consistent across cultures.[120] A study of child abuse registers in the United Kingdom found that 46% of paternal offenders were non-birth fathers, compared to 54% who were birth fathers.[121]

MARY DE YOUNG, THE SEXUAL VICTIMIZATION OF CHILDREN 16 (1982) (finding, in a study of sixty incest victims, that 39% of the incest offenders were step-fathers, leading the author to conclude "that the introduction of a stepfather into a family does increase the possibility that the stepdaughter will become the victim of incest"); Mark D. Everson et al., *Maternal Support Following Disclosure of Incest*, 59 AM. J. ORTHOPSYCHIATRY 197, 198-99 (1989) (finding, in a sample of eighty-eight children recruited from eleven county social service agencies in North Carolina over a twenty-eight month period to study the effects of maternal support, that 30% of the perpetrators were biological fathers, 41% were step-fathers, and 17% were mothers' boyfriends); Elizabeth A. Sirles & Pamela J. Franke, *Factors Influencing Mothers' Reactions to Intrafamily Sexual Abuse*, 13 CHILD ABUSE & NEGLECT 131, 132, 133 tbl.1 (1989) (finding, in a maternal support study of 193 incest victims receiving counseling services in St. Louis, Missouri, that 64 children were molested by their father, with an equal number abused by a step-father or a mother's live-in partner).

120. *See, e.g.*, Roda Chen, *Risk Factors of Sexual Abuse Among College Students in Taiwan*, 11 J. INTERPERSONAL VIOLENCE 79, 88 (1996) (discovering that those Taiwanese respondents "who did not live with both parents before college faced a higher risk [of childhood sexual abuse] than those who lived with both parents"); Russell P. Dobash et al., *Child Sexual Abusers: Recognition and Response*, *in* CHILD ABUSE AND CHILD ABUSERS: PROTECTION AND PREVENTION 113, 114-15, 124 & fig.6.6 (Lorraine Waterhouse ed., 1993) (finding, in a study of 53 known perpetrators of child abuse in Scotland that, 12.59% of child victims lived with their mother and her cohabitant, while 14.86% lived with their mother and a step-father, leading the authors to conclude that children living with step-fathers and unrelated male cohabitees appear to be more at risk of sexual abuse than children living with both their natural parents); Michael Gordon & Susan J. Creighton, *Natal and Non-natal Fathers as Sexual Abusers in the United Kingdom: A Comparative Analysis*, 50 J. MARRIAGE & FAM. 99, 99-101, 104 (1988) (finding, in a review of data collected by the National Society for the Prevention of Cruelty to Children, that step-fathers and father substitutes "were disproportionately represented among [perpetrators]"); S. Krugman et al., *Sexual Abuse and Corporal Punishment During Childhood: A Pilot Retrospective Survey of University Students in Costa Rica*, 90 PEDIATRICS 157, 157-58 (1992) (finding, in a study of 497 Costa Rican university students, that a step-father caused 6.3% of the female abuse experiences, while natural fathers caused 3.2%); S.N. Madu & K. Peltzer, *Risk Factors and Child Sexual Abuse Among Secondary School Students in the Northern Province (South Africa)*, 24 CHILD ABUSE & NEGLECT 259, 266 (2000) (reporting that having a step-parent in the family during childhood significantly predicted risk of child sexual abuse); Heikki Sariola & Antti Uutela, *The Prevalence and Context of Incest Abuse in Finland*, 20 CHILD ABUSE & NEGLECT 843, 845 (1996) (reporting that 3.7% of Finnish girls living with a step-father reported being sexually abused by him, making step-father/step-daughter abuse fifteen times more common than father-daughter incest); *see also* David Finkelhor, *The International Epidemiology of Child Sexual Abuse*, 18 CHILD ABUSE & NEGLECT 409, 412 (1994) (reviewing international studies of child sexual abuse and debunking the notion that "the problem is more severe in North America").

121. Gordon & Creighton, *supra* note 120, at 99-101.

Given the fact that during the study period only 4% of British children resided with non-birth fathers, father-substitutes appear "substantially overrepresented" among perpetrators.[122] As one researcher concluded, "a stepfather was five times more likely to sexually victimize his stepdaughter than was a . . . [genetic] father."[123] Because studies of child sexual abuse routinely report that girls living with step-fathers are at a high risk, one researcher concluded that the presence of a step-father is "[t]he family feature whose risk has been most dramatically demonstrated."[124]

This heightened vulnerability may stem, in part, from a lack of supervision, as single and separated parents navigate the taxing process of parenting alone and rebuilding their lives.[125] Many custodial mothers and single mothers work outside the home to support their family, diminishing the opportunity to supervise their children.[126] As Judith Wallerstein has explained: "It's not that parents love their children less or worry less about them [after divorce]. It's that they are fully engaged in rebuilding their own lives—economically, socially and sexually."[127]

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122. *Id.* at 101; *see also* SUSAN J. CREIGHTON & NEIL RUSSELL, VOICES FROM CHILDHOOD: A SURVEY OF CHILDHOOD EXPERIENCES AND ATTITUDES TO CHILD REARING AMONG ADULTS IN THE UNITED KINGDOM 45 tbl.14 (1995) (reporting that 8% of respondents in England, Scotland, and Wales were sexually abused by their fathers, while 7% were victimized by a step-father); DAVID THORPE, EVALUATING CHILD PROTECTION 1, 115 (1994) (finding, in a study of social service referrals in the United Kingdom and western Australia, that parents were responsible for 27.7% of the sexual abuse cases; in contrast, step-parents and de facto parents accounted for 24.8% of cases); Dobash et al., *supra* note 120, at 120 (finding, in an analysis of 501 sexual abuse case files taken from Scottish police and child protection agencies, that 23% of identified abusers were the child's natural father, while 23% were the victim's step-father or father substitute); Patricia J. Mrazek et al., *Sexual Abuse of Children in the United Kingdom*, 7 CHILD ABUSE & NEGLECT 147, 148, 150 (1983) (noting, in a survey of 1599 family doctors, police surgeons, pediatricians, and child psychiatrists in the United Kingdom, that "[w]ithin the family, the natural father was most likely (48%) to be the perpetrator, with step-parents the next most common (28%)").

123. David Finkelhor, *Risk Factors in the Sexual Victimization of Children*, 4 CHILD ABUSE & NEGLECT 265, 265, 269 (1980) (reporting results of a study of college undergraduates).

124. Finkelhor, *Epidemiological Factors*, *supra* note 100, at 68.

125. FINKELHOR, *supra* note 102, at 124 (speculating that the custodial parent's new relationship may take "time and energy and actually mean less supervision of the child").

126. *See, e.g.*, Ross Finnie, *Women, Men, and the Economic Consequences of Divorce: Evidence from Canadian Longitudinal Data*, 30 CANADIAN REV. SOC. & ANTHROPOLOGY 205, 206 (1993) (reporting that the income-to-needs ratio for women drops just over 40% in the first year of divorce, followed by a moderate rise in subsequent years); Saul D. Hoffman & Greg J. Duncan, *What* Are *the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 644 (1988) (showing a decline in economic status of about one-third for women and children after divorce); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 528 (1996) (noting one study of women in Los Angeles that estimated that women's standard of living declined 73% after divorce).

127. JUDITH WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY, at xxix (2000).

Although there is scant research on the risks to girls in father-custody households,[128] the available research underscores the significance of a mother's absence, both temporary and long-term. One national survey in the United States found significantly elevated risk of molestation for girls following divorce, "particularly when living alone with [their] father[s]."[129] In that study, 50% of female children residing solely with their father reported sexual abuse by someone, although not necessarily their father.[130] Similarly, a 1995 poll of fathers about child maltreatment found an annual rate of child sexual abuse for boys and girls in single-father households equal to forty-six victims per thousand children.[131] By comparison, parents in two-parent households reported a rate of eleven victims per thousand children.[132]

It is unclear how much weight should be given to the studies of mothers' absence since under the ALI's proposal, a child's legal parent would be presumptively entitled to half of the custodial responsibility for a child. In one sense, the mother remains present because the child returns home after visits with the de facto parent. In another sense, however, the mother is absent for those periods when the child is in the custody of the de facto parent.

There are good reasons to avoid contexts that permit illicit desires to gain ground and manifest themselves. Many abused children never disclose the abuse and outwardly display no telltale symptoms.[133] In fact,

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128. The absence, until recently, in child sexual abuse studies of "raised by father only" and "raised by father and stepmother" categories reflects the historical preference for maternal custody. *See, e.g.*, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19-4, at 797, 799 (2d ed. 1988).

129. Finkelhor et al., *supra* note 100, at 24-25 & tbl.7; *see also* Giacomo Canepa & Tullio Bandini, *Incest and Family Dynamics: A Clinical Study*, 3 INT'L J.L. & PSYCHIATRY 453, 459 (1980) (discussing the recurrence of several factors in nine case histories of father-daughter incest, with a step-mother's presence occurring in two of the nine case histories).

130. *See* Finkelhor et al., *supra* note 100, at 25 tbl.7.

131. *See* THE GALLUP ORG., DISCIPLINING CHILDREN IN AMERICA: A GALLUP POLL REPORT 16 (1995) (reporting results of poll of one thousand parents); *see also* Desmond K. Runyan, *Prevalence, Risk, Sensitivity, and Specificity: A Commentary on the Epidemiology of Child Sexual Abuse and the Development of a Research Agenda*, 22 CHILD ABUSE & NEGLECT 493, 495 (1998) ("An obvious area of research is to sort out the additional risk of children being victimized in single parent households and why the rate is higher in male-headed households.").

132. THE GALLUP ORG., *supra* note 131, at 16.

133. Mian et al. found that the rate of purposeful (as opposed to unintentional) disclosure by the child decreased significantly when the perpetrator was intrafamilial. Mian et al., *supra* note 105, at 226 tbl.5 (illustrating that disclosure rates for purposeful abuse decreases significantly for children between the ages of five and six). In fact, a greater proportion of children victimized by family (17.7%) never tell; by contrast, 10.9% of children who are the victims of extrafamilial abuse never disclose. *See* Donald G. Fischer & Wendy L. McDonald, *Characteristics of Intrafamilial and Extrafamilial Child Sexual Abuse*, 22 CHILD ABUSE & NEGLECT 915, 926 (1998).

Physical manifestations one might expect are also frequently absent. One-third of sexually

the abuse most likely to remain shrouded in secrecy often occurs at the hands of a father-figure,[134] even as violations by father-figures are among the most depraved.[135]

C. Increasing the Risk of Physical Abuse

Like the risk of sexual abuse, the risk of physical abuse also soars when a child lives with an unrelated male. Consider the 2005 study published in *Pediatrics* by Patricia Schnitzer and Bernard Ewigman.[136] The researchers examined the household composition of all children in Missouri under the age of five who died between January 1, 1992 and December 31, 1999.[137] The study compared the household structure for children who died due to inflicted injury with those who died by natural causes.[138] Nearly three-fourths (71.2%) of the perpetrators were male and, of those, 34.9% were the child's father, and 24.2% were the child's mother's boyfriend.[139] Because very few children in Missouri lived with their mother's boyfriend at this time, "[c]hildren living in households with an adult unrelated to them were almost 50 times as likely to die of an inflicted injury than children living in households with 2 biological parents."[140] Significantly, the study did *not* find elevated risk in households in which children lived only with their mothers, suggesting that older studies finding elevated risk in single-mother households likely captured the actions of men with whom the mothers lived.[141] The authors concluded that "it is the presence of adults (usually male) in the household who are unrelated to the child victim that accounts for the

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abused children have no apparent symptoms. Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 168 (1993). Roughly half fail to display the classic, most characteristic symptom of child sexual abuse: "Sexualized behavior." *Id.* at 167 tbl.2.

134. "The more severe cases [are] . . . the ones most likely to remain secret." RUSSELL, *supra* note 105, at 373. Russell reports that in 72% of the cases in which mothers were unaware of the abuse, more severe abuse had occurred. *Id.* at 372.

135. Abuse by father-figures occurs with greater frequency, over a longer time frame, and is more likely to include penetration, physical contact, force, and threats of force than abuse by others, surpassing the "norm" for child sexual abuse. *See* Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 274-76 (2001).

136. *See* Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 PEDIATRICS e687 (2005).

137. *See id.* at e688.

138. *Id.* "Inflicted-injury death" includes death resulting from intentional abuse, but not neglect (unlike maltreatment death, which would include both causes of death). *Id.* at e687.

139. *Id.* at e690.

140. *See id.* at e689-90, e692.

141. *Id.* at e690.

increased risk of fatal maltreatment in single-parent households, not single parenthood per se."[142]

Likewise, the most recent National Incidence Study of Child Abuse and Neglect ("NIS"), a congressionally-mandated, periodic effort of the U.S. Department of Health and Human Services to provide updated estimates of the incidence of child abuse and neglect[143] found that children "living with a single parent who had a cohabitating partner in the household had the highest rate in all maltreatment categories."[144] These children experienced more than eight times the rate of maltreatment generally, over ten times the rate of abuse, and nearly eight times the rate of neglect.[145] A physically abused child was more likely to sustain a serious injury when the abuser was not a parent.[146] "[M]ale perpetrators were more common for children maltreated by nonbiological parents or parents' partners (64%) or by other persons (75%)."[147]

This over-representation of unrelated males appears routinely in studies of child physical abuse, as well as maltreatment. Unrelated males are over-represented in all reports of maltreatment death,[148] reports of child maltreatment,[149] and studies of the risk of physical abuse.[150]

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142. *Id.*

143. SEDLAK ET AL., *supra* note 99, at 1, 12 (classifying children into six categories: "living with two married biological parents, living with other married parents (e.g., step-parent, adoptive parent), living with two unmarried parents, living with one parent who had an unmarried partner in the household, living with one parent who had no partner in the household, and living with no parent"). The NIS collected data in 2005 and 2006 to provide updated estimates of the incidence of child abuse and neglect in the United States. *Id.* at 1. "The NIS serves as the nation's needs assessment on child abuse and neglect." *Id.* While the NIS includes children "investigated by CPS agencies, it also obtains data on other children who were not reported to CPS or who were screened out by CPS without investigation." *Id.* Thus it captures "both abused and neglected children who are in the official CPS statistics and those who are not." *Id.*

144. *Id.* at 12. The lowest rate of overall maltreatment under the Harm Standard was for children living with two married biological parents, at 6.8 per 1000 children, while children living with one parent living with an unmarried partner in the household experienced the highest rate at 57.3 per 1000 children, or "more than 8 times greater than the rate for children living with two married biological parents." *Id.* at 5–19.

145. *Id.* at 12. The rate of abuse under the Harm Standard for children living with one parent and the parent's unmarried partner was 33.6 per 1000 children, and the rate of neglect under the Harm Standard was 27.0 per 1000 children, compared with 2.9 and 4.2 children per 1000 children who lived with two married biological parents, respectively. *Id.* at 5–20 to 5–21.

146. *See id.* at 12.

147. *Id.* at 14. "Among all abused children . . . those abused by nonbiological parents or parents' partners, or by other perpetrators were much more likely to be abused by males (74% or more by males versus 26% or less by females)." *Id.* at 15.

148. *See* Michael N. Stiffman et al., *Household Composition and Risk of Fatal Child Maltreatment*, 109 PEDIATRICS 615, 617-18 (2002). "Maltreatment death" means death that occurs due to neglect or intentional injury. *See id.* at 616.

149. *See* Aruna Radhakrishna et al., *Are Father Surrogates a Risk Factor for Child*

D. Potential Gains May Not Warrant Increased Risk

The potential downside of granting parental rights to former male live-in partners is not all that should be considered. The potential upside also matters. Two features of the ALI's thinned-out conception of parenthood suggest that the upside may be more muted across groups of children than the drafters presume. First, the *Principles* do not impose a duty of child support on de facto parents, even as the *Principles* confer rights on former live-in partners who meet its three-pronged test for de facto parenthood.[151] Second, studies of parental investment show that step-parents and boyfriends, as a group, do not invest as heavily in children as do legal parents.[152]

Consider, for example, a study by Sandra Hofferth and Kermyt Anderson of parental investment in children. The researchers compared levels of residential-father involvement with children by married, biological fathers, step-fathers (married, non-biological parents), and mother's cohabitant family (unmarried, non-biological parents), all of whom resided with the child.[153] They measured "[p]arental

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Maltreatment?, 6 CHILD MALTREATMENT 281, 282 (2001) ("Children who had a father surrogate living in the home were twice as likely to be reported for maltreatment after his entry into the home than those with either a biological father . . . or no father figure in the home.").

150. *See* ROBERT WHELAN, BROKEN HOMES AND BATTERED CHILDREN: A STUDY OF THE RELATIONSHIP BETWEEN CHILD ABUSE AND FAMILY TYPE 29 tbl.12, 31 tbl.14 (1994) (reporting a risk of physical abuse for children living with two natural married parents of 0.23, compared to a risk of 7.65 for children living with their natural mother and a cohabitant, and a risk of fatal abuse for children living with both natural, married parents of 0.31, compared to a risk of fatal abuse of 22.9 for children living with their natural mother and a cohabitant); *see also* SEDLAK ET AL., *supra* note 99, at 5–21, 5–22 fig.5–2 (finding that the risk of physical abuse for a child living with one parent and that parent's live-in partner was nearly ten times the rate for a child living with her married biological parents).

151. *See supra* notes 70-72 and accompanying text (describing the ALI's "asymmetrical" notion of parenthood, which grants full parental rights with none of the requisite financial duties).

152. Wilson, *supra* note 1, at 104-05. Men who believe themselves to be a child's biological father may act protectively toward that child and invest in them more heavily than would a man who knows himself not to be the father. *See* Steven J. C. Gaulin & Alice Schlegel, *Paternal Confidence and Paternal Investment: A Cross Cultural Test of a Sociobiological Hypothesis*, 1 ETHOLOGY & SOCIOBIOLOGY 301, 306 (1980) ("In essence we are asking whether, society by society, such rules seem to vary together such that a 'genetically rational' relation exists between sexual practices and male investment strategies. As we show, the answer is a qualified affirmation."); Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?*, 42 SAN DIEGO L. REV. 847, 860-63 (2005) (discussing the role of uncertainty of paternity in parental-investment studies). Paternity-disestablishment cases pose thorny problems about whether to treat the duped party as a parent or as a third party. *See, e.g.*, Stitham v. Henderson, 2001 ME 52, 768 A.2d 598. Such men may qualify for parental rights under the *Principles* as parents by estoppel. *See supra* note 35.

153. Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal?: Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 219 (2003). Hofferth and Anderson used data from the 1997 Child Development Supplement to the Panel Study of

[i]nvolvement" in terms of time children spent actively engaged with their father;[154] weekly hours when the father was available to the child but not actively engaged with the child;[155] number of activities in which the father participated with the child in the past month;[156] and "warmth" toward the child, as reported by fathers themselves.[157]

Hofferth and Anderson found that the investments fathers make in their children are significantly influenced by biological-relatedness.[158] Children spent significantly more time actively engaged with a married, biological father than with a non-biological father, whether a step-father or mother's cohabitant.[159] Children engaged in significantly fewer activities with non-biological fathers, whether step-fathers or mother's cohabitants.[160] Finally, with regard to warmth, biology correlated positively with fathers' own assessment of the warmth they felt toward the children with whom they lived.[161] The increased investment in

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Income Dynamics, a thirty-year longitudinal survey of a representative sample of U.S. men, women, children, and the families with whom they resided. The study sample represented 2522 children who were reported by the primary caregiver to be living with an adult male, "either their biological father, a stepfather who is a nonbiological father married to the mother, or their mother's cohabiting partner." *Id.* For a more in-depth discussion of outcomes for children in non-marital households and the impact of parental investment, see Wilson, *supra* note 152, at 859-64.

154. Hofferth & Anderson, *supra* note 153, at 219. This figure was obtained using a time diary of the child's activities, as answered by the child and or the child's mother, including the question "[w]ho was doing the activity with [the] child?" The diary captured one weekday and one weekend day. Figures for the weekday (multiplied by five) were added to the figure for the weekend day (multiplied by two) to arrive at a weekly figure. *Id.* at 220.

155. *Id.* at 219. This was also accomplished using the time diary, with the additional question, "[w]ho else was there but not directly involved in the activity?" *Id.*

156. *Id.* at 220. The researchers analyzed thirteen activities:

> [G]oing to the store; washing or folding clothes; doing dishes; cleaning house; preparing food; looking at books or reading stories; doing arts and crafts; talking about the family; working on homework; building or repairing something; playing computer or video games; playing a board game, card game, or puzzle; and playing sports or outdoor activities.

Id. These questions were only asked with respect to children three years and older, with the result that the sample sizes are lowest for this variable. *Id.*

157. *Id.* The study measured warmth by the father's responses to six items: "how often in the past month the father hugged each child, expressed his love, spent time with child, joked or played with child, talked with child, and told child he appreciated what he or she did." *Id.*

158. *Id.* at 214-15.

159. Specifically, married biological fathers spent 15.63 hours per week engaged with their child, compared to 9.15 hours for step-fathers and 10.10 hours for mother's cohabitants. *Id.* at 223 & tbl.3 (findings significant at a high level of confidence, with $p < .001$).

160. Married, biological fathers engaged in 9.13 activities with their biological child over the course of a month, while step-fathers engaged in 8.22 activities, and mother's cohabitants engaged in 7.43 activities. *Id.* at 223 tbl.3, 224 (findings were significant at a high level of confidence, with $p < .05$).

161. *Id.* at 223 tbl.3 (findings were significant at a high level of confidence, with $p < .001$).

biological children persisted after controlling for socioeconomic factors.[162]

Hofferth and Anderson concluded that biology affects a father's level of engagement,[163] noting that "fathers will not invest as much cognitively or emotionally in nonbiological as in biological offspring."[164] They suggest several possible explanations for this difference: (1) particularly with regard to step-fathers, the adults may expect the step-father to be less involved with children, and (2) particularly with regard to boyfriends, "parental" behavior toward their partner's child is "so new that norms have not developed to guide nonmarital partners in parenting children."[165] While non-biological fathers do make investments in children, Hofferth and Anderson believe they do so in part because it gains them favor with the child's mother, or "reproductive access."[166] If this is so, the benefits gained by children living with non-biological fathers may recede or disappear once the relationship between the child's mother and the live-in partner ends. Therefore, Hofferth and Anderson would predict that even if non-biological fathers perform well in ongoing relationships, their performance may not be as strong when that relationship dissolves.[167]

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162. The researchers note, however, that differences between groups on some measures shrank so that "[b]iology explains less of father involvement than anticipated once differences between fathers are controlled." *Id.* at 213. Specifically, non-biological fathers spent over five hours less per week on average with their children than married, biological fathers. *Id.* at 224 & tbl.5, 225 (reporting that step-fathers spent 4.79 hours fewer per month engaged with their child than married, biological fathers, $p < .01$, while mother's cohabitants spent 3.60 less hours, $p < .05$). Differences persisted for the second factor (hours available) only for step-fathers, who were available to the children 4.63 less hours than married, biological fathers. *Id.* at 224 tbl.5 ($p < .01$). Mothers' cohabitants were available for slightly more hours every month than married, biological fathers, 0.80 hours, but the increase was not statistically significant. *Id.*

Step-fathers and mother's cohabitants performed significantly fewer activities with a child than married, biological fathers, 4.35 fewer and 5.79 fewer, respectively. *Id.* at 224-25 tbl.5 (reporting p values for both findings as $p < .001$).

When it came to warmth, significant differences emerged for mothers' cohabitants but not for step-fathers. Mothers' cohabitants rated themselves less warm toward their children than did married, biological fathers and step-fathers, although with the latter the difference was not statistically significant. *Id.* (reporting that mother's cohabitants rated themselves as less warm, -1.16, with a significance value of $p < .01$; while step-fathers also rated themselves as less warm, -0.38, but this was not statistically significant).

163. *Id.* at 224.

164. *Id.* at 229.

165. *Id.* at 229-30.

166. *Id.* at 215.

167. Although the *Principles* lump step-parents and unmarried, live-in partners together, whether a mother and her partner choose to marry matters greatly to the level of investment that he makes in her child. Manning and Lamb and Hofferth and Anderson found "marriage advantages" for marital children over non-marital children. *See* Wilson, *supra* note 152, at 859-64.

In short, this study and others like it[168] suggest that biology produces real differences in investment by adults in children.[169] Certainly, selection effects may explain the results in any correlational study.[170] Nonetheless, this emerging literature on non-biological caretakers suggests that, as a group, the gains children would realize from living with non-genetic caretakers[171] may not be as great as we would otherwise suppose, and may represent at best modest welfare increases over living alone with their mothers.

All of this suggests the upside of continuing contact between children and former live-in partners may not be as great as the drafters thought. Indeed, in order to be willing to expand dramatically the rights that male former live-in partners receive, one must assume that time taken from the mother will be better spent with her ex-partner. Yet, findings of no elevated risk in single-parent households suggest that a child who spends all of his or her time with only the mother may actually be better off.[172]

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168. *See, e.g.*, Anne Case et al., *How Hungry is the Selfish Gene?*, 110 ECON. J. 781, 797 (2000) (finding that the presence of a child's biological mother "appears to increase expenditure on an important input into the [development] of healthy children—food"); Kory Floyd & Mark T. Morman, *Human Affection Exchange: III. Discriminative Parental Solicitude in Men's Affectionate Communication with Their Biological and Nonbiological Sons*, 49 COMM. Q. 310, 323 (2001) ("[A]ffectionate communication should be subject to the same adaptive drives that cause parents to invest discriminately in their children, and [predicting that fathers] . . . would express greater affection to their children (in this case, sons) if they were biological children than if they were step-children."). Floyd and Morman found that "[t]his prediction received support in both studies for verbal and nonverbal forms of affection, as well as for supportive affection in the first study." *Id.* Further, "the prediction was supported even after we covaried out the effects of relational involvement (and tested for potential error variance as a function of closeness, relationship satisfaction, and fathers' and sons' ages, all of which have previously shown associations with the amount of affection fathers communicate to their sons)." *Id.* at 324.

169. Importantly, biology alone does not fully explain or predict parental investment. Multiple studies of adoptive parents report that they invest as heavily in children as biological parents. *See* Laura Hamilton et al., *Adoptive Parents, Adaptive Parents: Evaluating the Importance of Biological Ties for Parental Investment*, 72 AM. SOC. REV. 95, 95 (2007).

> In this study, we compare two-adoptive-parent families with other families on . . . parental investment. Using data from the Early Childhood Longitudinal Study, Kindergarten-First Grade Waves (ECLS-K), basic group comparisons reveal an adoptive advantage over all family types. This advantage is due in part to the socioeconomic differences between adoptive and other families. Once we control for these factors, two-adoptive-parent families invest at similar levels as two-biological-parent families but still at significantly higher levels in most resources than other types of families.

Id.; Robin Fretwell Wilson, *Uncovering the Rationale for Requiring Infertility in Surrogacy Arrangements*, 29 AM. J.L. & MED. 337, 348 (2003).

170. *See* Wilson, *supra* note 169, at 350.

171. *See supra* notes 63-66 and accompanying text (discussing shared residential responsibility as a result of the approximation test).

172. *See supra* notes 141-42 and accompanying text. The ALI's failure to acknowledge this social science research exemplifies a broader blind spot throughout the *Principles*. For example,

E. Synthesis of Social Science Evidence

Time-in-residence performing caretaking duties does not meaningfully capture what should be the central, animating consideration: the quality of the child's relationship with the mother's former partner. A prominent child abuse researcher, Russell Dobash, notes that both de facto parents and cohabitants are "over-represented [among child abusers and] as such these relationships constitute risk factors."[173] Dobash concluded that "knowledge of the status of the relationship—biological or de facto—is not enough, rather it is necessary to investigate the *quality* of the relationship in order to better understand and evaluate risk."[174] The ALI misses this crucial point. As the next two Parts demonstrate, this intuition underpins the decision by many courts to reject the *Principles*' thinned-out conception of parenthood.

IV. COURTS EXPRESS SKEPTICISM

In the only comprehensive empirical study of the *Principles*' impact since their adoption in 2000, Michael Clisham and I, in 2008, examined databases in Westlaw and LexisNexis for any legislation or court cases referencing the *Principles* since the project's inception in the early 1990s.[175] This Part updates that study of court cases and presents a new

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Professor Marsha Garrison questions the ALI's basis for treating unmarried cohabitants as if they are married, especially when cohabitants do not view their relationships in the same way and would never expect this result. *See, e.g.*, Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY, *supra* note 1, at 305, 306-10.

173. E-mail from Russell Dobash, Professor of Criminology, Univ. of Manchester Sch. of Law, to author (Aug. 7, 2006, 07:00 AM) (on file with the Hofstra Law Review).

174. *Id.* (emphasis added).

175. This analysis found scant impact with the two groups at which the *Principles* were directed, rule-makers (legislators) and decision-makers (judges). Clisham & Wilson, *supra* note 1, at 611. Although a single state, West Virginia, borrowed from the *Principles* in enacting child custody legislation, no state code section or proposed legislation has referenced the *Principles* since 1990. *Id.* at 608. Even in the custody realm, no legislature appears to have followed West Virginia in adopting the *Principles*' custody proposals, and neither has any legislature enacted legislation to effect the *Principles*' parent by estoppel proposals. While this empirical analysis cannot definitively establish that the *Principles* have not had some legislative influence somewhere, if legislatures are borrowing from the *Principles*, they are certainly not tipping their hands.

The *Principles* found more success with the courts, yet even this impact is slight and mixed. By 2008, a mere one hundred cases had cited to the *Principles* since 1990 (although the *Principles* were not published until 2002, courts previously cited to draft versions of the *Principles*), less than half of the number of cases that cite to two treatises published contemporaneously with the *Principles*. *Id.* at 576. While the cases citing the *Principles* come from twenty-nine states and the U.S. Supreme Court, courts in six New England states account for almost half (forty-eight) of those citations. *Id.* at 576, 598, 599 fig.13. How the courts use the *Principles*' recommendations tells an even starker story. Courts reject the *Principles*' recommendations more often than they accept them, by a ratio of 1.5 to 1. *Id.* at 576. But by far and away, courts use the *Principles* most often to "bolster the court's holding in a case that would have come out the same way in the absence of the

empirical analysis of the *Principles*' impact with judicial decision-makers through June 29, 2010.[176] By this date, 120 cases in total cited to the *Principles*.[177] Of these, sixty-five cases concerned Chapter 2, which proposes custody and parentage rules—making this the topic cited by courts more than any other portion of the *Principles*.[178] Among the sixty-five cases, some discuss more than one provision of the *Principles*, yielding eighty discrete treatments of the *Principles*. As Figure 2 shows, while courts look to Chapter 2 for guidance on a range of issues from relocation to the best interests test, a plurality of the cases citing Chapter 2, twenty-five, revolved around de facto parenthood, more than any other topic grappled with in these cases.[179]

Principles" (24% of cases). *Id.* at 576, 597 & fig.11.

176. We searched the "Federal & State Cases, Combined" and the "All State and Federal Cases" electronic databases in LexisNexis and Westlaw on June 29, 2010, for references to the *Principles*. Recognizing that not every reference to the *Principles* would be in the form of a proper *Bluebook* citation, we deliberately searched for mis-cited instances of the *Principles*, as well as mis-cites to the ALI. This decision was warranted. For example, in *Cullum v. Cullum*, 160 P.3d 231 (Ariz. Ct. App. 2007), the *Principles* are cited as "the American Family Institute's comprehensive study, *Principles of the Law of Family Dissolution* (1997)." *Id.* at 235. To capture as many permutations of the work's title as possible, five different searches were performed, the search logic for which appears below. These searches produced 120 cases on LexisNexis and 122 cases on Westlaw.

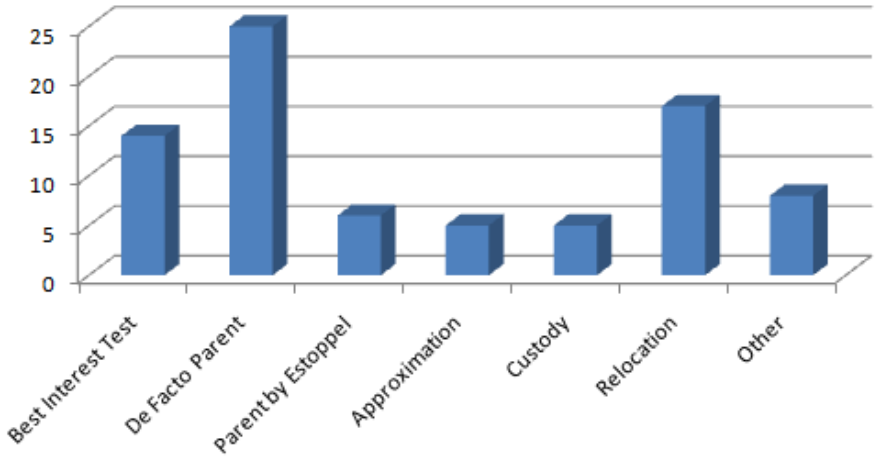
Finding References to the *Principles*
Search Term/Logic
"American Law Institute" & "Principles of the Law of Family Dissolution"
"ALI" & "Principles of the Law of Family Dissolution"
"Principles of the Law of Family Dissolution"
"ALI Principles of Family Dissolution"
"Principles of Family Dissolution"

177. *See infra* app. A.

178. *See infra* app. A, at 1159-64. Other chapters address alimony, property distribution, child support, pre-marital agreements, domestic partnerships, and the role of fault.

179. For cases discussing the best interests test, parents by estoppel, approximation standard, custody, relocation, and other matters, see *infra* app. B.

Figure 2: Chapter 2 Cases by Subject Matter[180]



What courts do with the ALI's recommendations is revealing. Using the coding protocol created for the 2008 empirical study of the *Principles*, which is reproduced in Figure 3,[181] we coded the courts'

180. "Other" questions for which courts have cited Chapter 2 of the *Principles* include visitation, visitation modification, reliance on division of caretaking functions rather than the child's wishes, family structure, domestic partners, parenting plans, and interference with visitation rights. *See, e.g.*, Schmitz v. Schmitz, 88 P.3d 1116, 1123 (Alaska 2004) (parenting plan); Riepe v. Riepe, 91 P.3d 312, 326 (Ariz. Ct. App. 2004) (domestic partners); Young v. Hector, 740 So. 2d 1153, 1157 (Fla. Dist. Ct. App. 1999) (caretaking functions performed by legal mother); Jacobs v. Jacobs, 2007 ME 14, ¶ 9, 915 A.2d 409, 411 (family structure); R.S. v. M.P., 894 N.E.2d 634, 639 (Mass. App. Ct. 2008) (visitation modification); McAllister v. McAllister, 2010 ND 40, ¶ 35, 779 N.W.2d 652, 666 (visitation); Sweeney v. Sweeney, 2005 ND 47, ¶ 35, 693 N.W.2d 29, 38 (interference with visitation rights).

181. While many of the coding categories are self-explanatory, such as concurrence cited *Principles* (Code 3), and *Principles* cited by dissent (Code 7), several categories deserve elaboration. Code 1 (adopted *Principles*' subsection) includes cases that simply adopted a legal rule borrowed from the *Principles*, as well as lower court decisions affirmed as not being an abuse of discretion and which rested on a section of the *Principles*. Code 2 (adopted *Principles*' rule with some modification) includes cases that borrowed heavily from the *Principles*, but added additional elements to the *Principles*' test, as the Massachusetts Supreme Judicial Court did in *In re* Care & Prot. of Sharlene, 840 N.E.2d 918, 926 (Mass. 2006). *See infra* Part V.C. Code 5 (used *Principles* as a "pile-on" when the case would have come out the same way anyway) gauges the degree of reliance on the *Principles*. A case is coded as a "5" when the court relied on existing state code sections or case law that was on point and pre-dated the *Principles*, or when they borrowed from the law of a sister jurisdiction and only in passing noted that the borrowed approach was also consonant with the *Principles*. Code 6 (made reference to *Principles*, but otherwise declined to adopt the *Principles*' rule) relies on explicit statements by a court that it is not adopting the *Principles*' approach, or a court's references to the *Principles*' approach while affirming a different approach. For example, in *C.E.W. v. D.E.W.*, 2004 ME 43, 845 A.2d. 1146, two female same-sex partners cohabited in a long-term relationship during which they had a child together via artificial insemination. *Id.* ¶ 2, 845 A.2d at 1147. After their relationship ended, C.E.W. sought and received

treatments of the *Principles* in de facto parent cases.[182] Where a given case includes more than one treatment of the *Principles*—that is, the case discusses multiple subsections of the *Principles*—each treatment was coded separately.[183]

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parental rights and responsibilities for the child as a de facto parent. *Id.*, 845 A.2d at 1147. The Maine Supreme Judicial Court affirmed the lower court's judgment, but decided the case on other grounds, concluding that that the lower court erred, stating, "Although both opinions cite to the [ALI's *Principles*], neither adopts its standard, nor do we do so today." *Id.* ¶ 14, 845 A.2d at 1152 & n.13; *see infra* Part V.A. Code 8 (declined to adopt the *Principles*' rule because the question is a legislative one), and Code 9 (flat out rejected the *Principles*' rule), rely on explicit statements by the court. Code 10 (*Principles* argued by a party but not reached by the court for procedural reasons) is best illustrated by the case of *In re Parentage of M.F.*, 170 P.3d 601 (Wash. Ct. App. 2007). There, a step-father attempted to receive residential time with his step-daughter by being named a de facto parent. *Id.* at 602-03. The court stated that "[w]e have no reason . . . to either adopt or reject" the *Principles*. *Id.* at 605. While declining to address the issue further, the court noted that even if Section 2.04(1)(c) of the *Principles* was adopted, the step-father would not have a cause of action. *Id.* As Figure 4 shows, no de facto parent cases fell into Codes 4, 11, and 12. For examples of non-de facto parent cases that fall into these codes, see Clisham & Wilson, *supra* note 1, at 584, 588.

182. Two of the research assistants who worked on this Article (William Bridges and Merilys Huhn) independently coded the courts' treatments of the *Principles* using the coding protocol contained in Figure 3. In order to measure inter-rater reliability, we used Jacob Cohen's calculation of kappa coefficient. *See generally* Jacob Cohen, *A Coefficient of Agreement for Nominal Scales*, 20 EDUC. & PSYCHOL. MEASUREMENT 37 (1960). We tallied the agreement of the two raters over the twelve coding categories for each of the twenty-five discrete de facto parent cases citing the *Principles*. In three instances, there was initial disagreement among the coders. This yielded a kappa coefficient for our raters of 0.3333. According to Richard Landis and Gary Koch, a kappa value between 0.21 and 0.40 should be interpreted as fair agreement. *See* J. Richard Landis & Gary G. Koch, *The Measurement of Observer Agreement for Categorical Data*, 33 BIOMETRICS 159, 165 (1977).

183. An example of this occurred in *E.N.O. v. L.M.M.*, 711 N.E.2d. 886 (Mass. 1999). There, both the majority and the dissenting opinions cited the *Principles*. The majority used the *Principles* to bolster the opinion they would have reached regardless of the existence of the *Principles* (Code 5), while the dissent also referenced the *Principles* (Code 3). *Id.* at 896-97 (Fried, J., dissenting).

Figure 3: Lines of Cases Broken Down by Treatment[184]

Code	Treatment	Tally	% of Tally
1	Adopted the *Principles*' subsection	1	4.00
2	Adopted the *Principles*' rule with some modification	2	8.00
3	Concurrence cited the *Principles*	3	12.00
4	Used the *Principles* to inform existing tests	0	0.00
5	Used the *Principles* as a "pile-on" when the case would have come out the same way anyway	6	24.00
6	Made reference to the *Principles*, but otherwise declined to adopt the *Principles*' rule	4	16.00
7	*Principles* cited by dissent	5	20.00
8	Declined to adopt the *Principles*' rule because the question is a legislative one	1	4.00
9	Flat out rejected the *Principles*' rule	1	4.00
10	*Principles* argued by a party but not reached by the court for procedural reasons	2	8.00
11	Cited the *Principles* as evidence of a social phenomenon	0	0.00
12	Cited the *Principles* for a description of the majority rule	0	0.00
Total		25	100

In order to tease out the impact of the *Principles*, we also constructed discrete lines of cases using Keycite searches of each case.[185] Under the doctrine of stare decisis, a rule can only be adopted once in a given jurisdiction.[186] Thus, subsequent cites to the initial case that announced the rule are as much a function of stare decisis as they are of the *Principles*' influence.

184. Some lines of cases are counted more than once. For example, the majority in *E.N.O.* adopted the *Principles*, but the dissent also cited the *Principles*. *See id.*

185. Using the Keycite results in Westlaw's database, we also examined whether an opinion was subsequently withdrawn after a rehearing en banc, legislatively abrogated, or otherwise overturned. We found no negative history for the twenty-five de facto parent cases citing the *Principles*. *See infra* apps. A & B.

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

Figure 4: Lines of Cases by Treatment

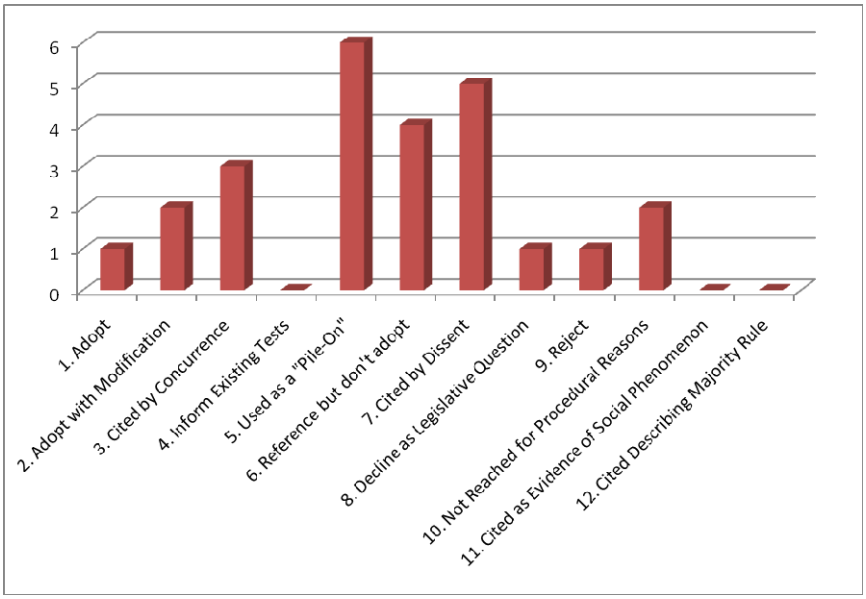


Figure 4 graphically depicts the treatment by judges of the *Principles*, when analyzed by lines of cases. The dissent cited the *Principles* (Code 7) in one in five cases (20%), while in 12% of the cases a concurrence cited the *Principles* (Code 3).[187] The remaining citations occur in majority opinions. Some of these cases embrace the *Principles* (Code 1, 4%),[188] while others use the *Principles* as a starting point for more refined tests (Code 2, 8%).[189] Others decline to accept the *Principles*' test (Code 6, 16%), decline to adopt the rule because such questions are best addressed by the legislature (Code 8, 4%), or reject the ALI's approach outright (Code 9, 4%).[190]

The overwhelming use of the *Principles* by courts is as a "pile-on" to support an outcome the court would have reached anyway under its own precedent or state law (Code 5, 24%).[191] A case that best illustrates this phenomenon is *Miller-Jenkins v. Miller-Jenkins*.[192] There, the court

187. Instances in which concurrences cited the *Principles* include *Stitham v. Henderson*, 2001 ME 52, 768 A.2d 598, 605-06 (Saufley, J., concurring); *Rideout v. Riendeau*, 2000 ME 198, ¶ 40, 761 A.2d 291, 306-07 (Wathen, C.J., concurring); and *McAllister v. McAllister*, 2010 ND 40, ¶ 35, 779 N.W.2d 652, 666 (Crothers, J., concurring). *See infra* app. C.

188. *See supra* Figure 3; *infra* app. C, at 1174.

189. *See supra* Figure 3; *infra* app. C, at 1175.

190. *See supra* Figure 3; *infra* app. C, at 1177-78.

191. *See supra* Figure 3; *infra* app. C, at 1176.

192. 2006 VT 78, 912 A.2d 951. Other instances in which courts used the *Principles* as a "pile-on" include: Osterkamp v. Stiles, 235 P.3d 178, 187 (Alaska 2010); Eccleston v. Bankosky, 780

referenced the *Principles* as additional support for its recognition of parental rights for a "same-gender partner of a person who adopts a child or conceives through artificial insemination,"[193] but made no reference to the *Principles*' test for de facto parenthood. The *Principles* would not have changed the outcome because the court looked at the legal nature of the live-in partners' relationship *to each other* when a child was born to one of them—not the partner's relationship to the child, as the *Principles* would do. Like *Miller-Jenkins*, in nearly a quarter of cases, the *Principles* serve as an obligatory footnote—used by judges, as Judge Robert Sack once quipped, "like drunks use lampposts . . . more for support than for illumination."[194]

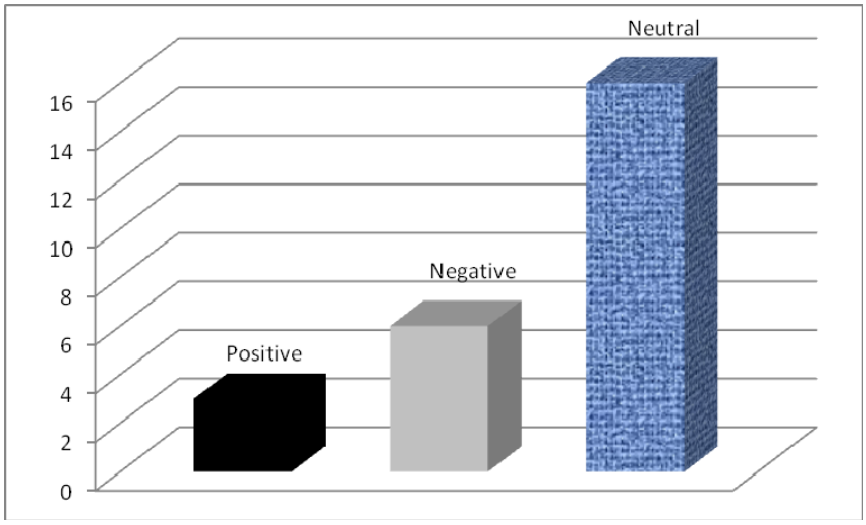
Grouping the lines of cases into positive treatments (Codes 1, 2, and 4) and negative treatments (Codes 6, 8, and 9) is especially revealing. The six negative treatments exceed the positive treatments by a ratio of two-to-one, as Figure 5 shows. Cases citing the *Principles* in a more neutral manner (Codes 3, 5, 7, 10, 11, and 12) eclipse both the positive and negative treatments.

N.E.2d 1266, 1274 n.16 (Mass. 2003); Blixt v. Blixt, 774 N.E.2d 1052, 1061 n.15 (Mass. 2002); *Rideout*, 2000 ME 198, ¶ 27, 761 A.2d at 302; and Rubano v. DiCenzo, 759 A.2d 959, 974-95 (R.I. 2000). *See infra* app. C. In *Miller-Jenkins*, a same-sex couple, Janet and Lisa Miller-Jenkins, entered into a civil union in Vermont in 2000, then moved to Virginia where Lisa gave birth to a child, IMJ, via artificial insemination in 2002. *Miller-Jenkins*, 2006 VT 78, ¶ 3, 912 A.2d at 956. When IMJ was four months old, Lisa and Janet moved to Vermont. *Id.* ¶ 3, 912 A.2d at 956. They separated in 2003, at which point Lisa moved back to Virginia with IMJ and sought custodial rights for herself and parent-child contact for Janet, which the court granted temporarily. *Id.* ¶ 3-4, 912 A.2d at 956. Lisa subsequently refused to give Janet contact with IMJ in violation of the court order, touching off a custody battle involving the courts of both Virginia and Vermont. *Id.* ¶ 5-6, 912 A.2d at 956-57. While the case dealt with a number of jurisdictional issues, on the question of Janet's parental rights, the Supreme Court of Vermont ultimately resolved the question in Janet's favor. *Id.* ¶ 56, 72, 912 A.2d at 970, 974. The law granted Janet a presumption of parentage because she was Lisa's legal spouse at the time of birth. *Id.* ¶ 56, 912 A.2d at 970.

193. *Id.* at 972.

194. Adam Liptak, *When Rendering Decisions, Judges are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8 (internal quotation marks omitted).

Figure 5: Lines of Cases by Coding



This empirical snapshot suggests that, on the whole, the judicial response to the ALI's proposal for de facto parenthood has been tepid at best. As the next Part shows, an in-depth examination of the decisions citing the *Principles*' test reveals that modern courts are generally unwilling to grant full parental rights on the basis of only time and caretaking. These courts refuse to accept the ALI's test without adding more demanding requirements to safeguard the welfare of children and preserve the prerogatives of legal parents. Indeed, many courts still exhibit a preference for the rights of legal parents to raise and care for their children.

V. PRESERVING THE GOOD WITHOUT REWARDING THE BAD

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

- Recognizes a live-in partner as a de facto parent entitled to full parental rights;

- Recognizes a live-in partner as a de facto parent who receives less than full parental rights;
- Recognizes a live-in partner as a de facto parent but remands for a determination of the partner's rights;
- Recognizes a live-in partner as a de facto parent but concludes that such a person is entitled to no parental rights;
- Concludes that the live-in partner is not a de facto parent;
- Awards parental rights to a live-in partner on some other basis, even when cognizant of the ALI's less-demanding approach;
- Rejects the idea of parental rights for live-in partners; or
- For some reason does not reach the issue of whether a live-in partner was a de facto parent.

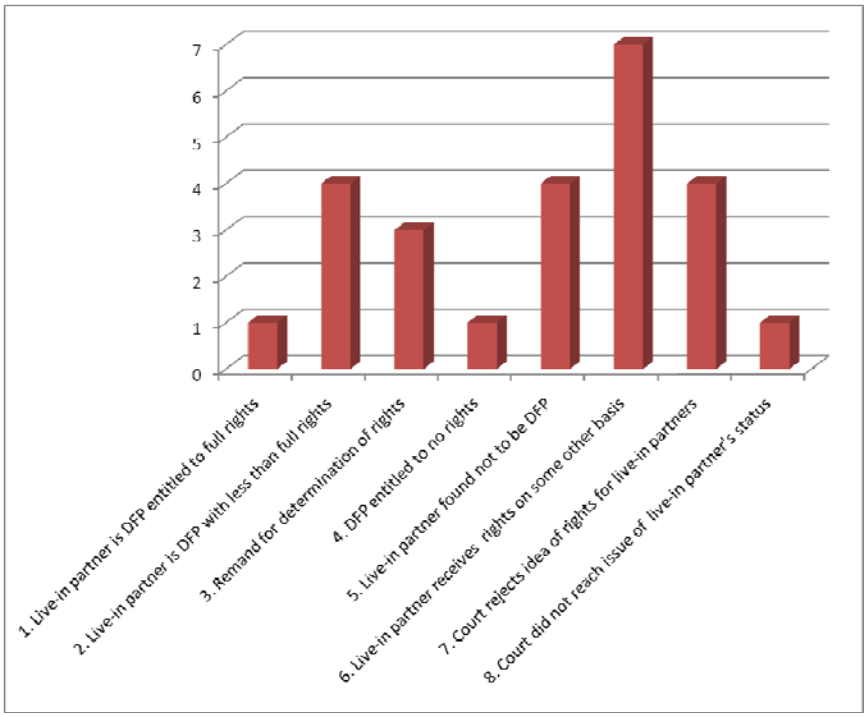
At the outset, it is important to note that the set of litigants asserting rights as de facto parents is by no means limited to the group of individuals about which this Article is concerned: heterosexual men who previously lived with a child and his or her mother. Indeed, much of the courts' resistance to the ALI's thinned-out test for parental rights has occurred in cases involving same-sex partners;[195] former husbands who were duped into believing they were a child's biological father, only to learn later that they are genetic strangers;[196] and relatives of a child who step forward to provide care when the legal parent cannot.[197] While many courts see these claims as sympathetic, the courts are reluctant nonetheless to embrace full-blown parental rights based only on the bare showing of time-in-residence and chores performed for a child.

As this Part documents, and as Figure 6 illustrates, a close reading of the de facto parent cases reveals a deep skepticism about the ALI's test. The single court willing to hand out the full panoply of parental rights envisioned by the ALI did so in *C.E.W. v. D.E.W.*,[198] in which the parties stipulated to de facto parent status; the court otherwise declined to adopt the ALI's test.[199] The handful of cases awarding visitation to former live-in partners make clear that the award must serve the child's best interests, a consideration supplanted by the ALI's mechanical approximation test.[200] Three other cases were remanded for a determination of rights.[201] One case concluded the de facto parents

195. *See supra* note 192; *infra* notes 240-57 and accompanying text.
196. *See infra* notes 294-304 and accompanying text.
197. *See infra* note 248.
198. 2004 ME 43, 845 A.2d 1146.
199. *See infra* Part V.A.
200. *See infra* Part V.B.
201. *See* Figure 6, category 3; *infra* app. D, category 3, at 1182-83.

should receive no parental rights,[202] while a host of others concluded either that a live-in partner failed to carry the burden of proof, or that the legal parent should retain discretion about such matters.[203] Throughout the latter, the courts put a significant thumb on the scale both for safeguarding children using welfare and harm determinations *and* for protecting the prerogatives of legal parents to decide who may, and may not, see their children.[204]

Figure 6: Rights Sought and Received



A. The Rare Case Awarding Full Rights

In the sole case awarding full parental rights, *C.E.W.*, the rights awarded resulted from a crucial stipulation in the litigation by both parties, namely that a former same-sex live-in partner was indeed a child's de facto parent.[205] In that case, C.E.W. filed a complaint in superior court against her former same-sex partner, D.E.W., the child's

202. *See* Figure 6, category 4; *infra* app. D, category 4, at 1183.
203. *See infra* Part V.D.
204. *See infra* Part V.D.
205. C.E.W. v. D.E.W., 2004 ME 43, ¶ 6, 845 A.2d 1146, 1148.

biological mother via artificial insemination.[206] C.E.W. sought a declaration of her parental rights and responsibilities for the child and sought to equitably estop D.E.W. from denying her status as a parent.[207] The two women made the decision to have the child together and signed a parenting agreement outlining their intention to maintain equal parental status with regard to the child.[208] The superior court accepted both parties' stipulation that C.E.W. had acted as the child's de facto parent, and entered a summary judgment declaring C.E.W. eligible for "an award of parental rights and responsibilities."[209]

On appeal, the Supreme Judicial Court of Maine affirmed the lower court's ruling, finding no error of law.[210] Because C.E.W.'s status as a de facto parent was not contested, the court limited itself to "the remedy once . . . de facto parenthood has been [established]."[211] Not to be misunderstood, however, the court noted in a footnote that it was not adopting the ALI's test.[212] Indeed, the court noted that when the term de facto parent is ultimately "fleshed out by the [l]egislature or courts in the future, it must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in [a] child's life."[213] The court's rich, holistic understanding of parenthood is precisely the kind of qualitative assessment envisioned by Professor Dobash in Part II *supra*, but rejected by the ALI in favor of a mechanical test. Moreover, in sharp contrast to the ALI's approach, the live-in partner ultimately provided financial support for the child, who lived primarily with the live-in partner.[214]

B. Visitation Requires a Showing of Best Interests

On the question of the scope of rights de facto parents should receive, the outright adoptions of the ALI's test are as instructive as the cases rebuffing the ALI's approach. All adoptions of the *Principles* occurred in a single line of Massachusetts cases beginning with *Youmans*

206. *Id.* ¶ 2, 845 A.2d at 1147.
207. *Id.* ¶ 5-6, 845 A.2d at 1147-48.
208. *Id.* ¶ 3, 845 A.2d at 1147.
209. *Id.* ¶ 6, 845 A.2d at 1148.
210. *Id.* ¶ 14, 845 A.2d at 1152.
211. *Id.* ¶ 14, 845 A.2d at 1152.
212. *Id.* ¶ 14 n.13, 845 A.2d at 1152 n.13 (noting that two earlier cases in Maine "cite to the ALI *Principles*, [but] neither adopts its standard, nor do we do so today").
213. *Id.* at ¶ 14, 845 A.2d at 1152.
214. E-mail from Mary Bonauto, Civil Rights Project Director, Gay & Lesbian Advocates & Defenders, to Merilys Huhn, Research Assistant to author, Wash. & Lee Sch. of Law (Sept. 8, 2010, 1:59 PM EST) (on file with the Hofstra Law Review) (providing summary from memory because she lacked forwarding address for C.E.W. and explaining that the child ultimately resided with the former live-in partner, who financially supported the child).

v. Ramos.[215] There, Youmans sought custody of his daughter, Tamika E., from Tamika's aunt and permanent guardian, Ramos, with whom Tamika had lived for most of her life.[216] The trial judge vacated Ramos's guardianship and awarded custody of Tamika E. to Youmans, but granted Ramos visitation rights and telephone contact.[217] Youmans appealed, arguing that the trial judge lacked the authority to order visitation with Ramos in the absence of a statute permitting visitation rights for a non-parent.[218] The Massachusetts Supreme Judicial Court upheld the lower court's ruling, adopting verbatim the ALI's definition and treatment of de facto parents.[219] Crucially, this decision garnered Ramos only visitation, not the full panoply of parental rights contemplated by the *Principles*.[220]

Following *Youmans*, Massachusetts courts applied the ALI's test for de facto parent to award visitation in a second case, *E.N.O. v. L.M.M.*,[221] but required a showing that visitation served the child's best interests.[222] There, the plaintiff, E.N.O., filed a complaint seeking visitation rights and seeking to enforce a prior agreement with her former same-sex partner to allow E.N.O. to adopt L.M.M.'s biological child and assume joint custody.[223] The couple made the decision to have a child together, and E.N.O. acted as the family's primary bread-winner.[224] The couple eventually split up, and L.M.M. denied E.N.O. access to their child.[225] After a hearing, a probate court judge applied the "best interests of the child" standard, and awarded E.N.O. temporary visitation rights pending trial.[226] On appeal, the Supreme Judicial Court of Massachusetts affirmed.[227] The court noted the adoption of the *Principles*' test in *Youmans* and applied it.[228] But as with *Youmans*, this netted the mother's former partner only visitation.[229] Moreover, de facto parent status did not trigger an automatic entitlement to parental rights, as it would under the *Principles*.[230] Instead, even granting temporary visitation to the de facto

215. 711 N.E.2d 165, 167 n.3 (Mass. 1999); *see infra* app. C, Code 1, at 1174.
216. *Youmans*, 711 N.E.2d at 166-67.
217. *Id.* at 167.
218. *Id.*
219. *Id.* at 167 n.3, 170 n.15, 171, 173-74.
220. *Id.* at 167, 174.
221. 711 N.E.2d 886, 890 (Mass. 1999).
222. *Id.*
223. *Id.* at 889.
224. *Id.*
225. *Id.*
226. *Id.* (internal quotation marks omitted).
227. *Id.* at 894.
228. *Id.* at 891.
229. *Id.* at 893.
230. *Id.* at 891-93.

parent required a finding that continuing contact would be in the child's best interests.[231]

It is true that in two of the five cases awarding only visitation, the live-in partner sought only visitation and not full custody. Nonetheless, in three cases, the parties sought full parental rights that the courts refused to grant. For instance, in *R.D. v. A.H.*,[232] the former live-in girlfriend of the biological father, R.D., and the child's de facto parent sought permanent guardianship with custody in a contest with the biological father.[233] While the court did not disturb the prior determination that R.D. was the child's de facto parent, it rejected her claim for full custody because she could not prove that the biological father was an unfit parent.[234] R.D. was granted visitation rights only.[235]

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

Just as the outright adoptions are instructive, so too are the modifications of the ALI's test. As the Introduction to this Article chronicled in excruciating detail, the Massachusetts Supreme Judicial Court modified the ALI's test to avoid an unthinkable result in Haleigh's case, that her abuser, Jason Strickland, would step into the shoes of her parent as medical decision-maker.[236] The court clarified that when a child develops a significant, preexisting relationship with a live-in partner or other adult, with the parent's assent, it is that relationship that "would allow an inference, when evaluating a child's best interests, that measurable harm would befall the child on the disruption of that relationship."[237] Far from dispensing with the best interests test in favor of a time-in/time-out entitlement to shared custody, the court emphasized that the child's best interests and welfare remain the driving consideration.[238] Other courts have followed this lead, awarding visitation rights to a live-in partner only when it serves the child's best interests to do so.[239]

In *A.H. v. M.P.*,[240] the same court affirmed a lower court's finding that a same-sex live-in partner did not qualify as a de facto parent.[241] In so doing, the court made clear that harm to the child matters in this

231. *Id.* at 890-93.
232. 912 N.E.2d 958 (Mass. 2009).
233. *Id.* at 961.
234. *Id.* at 968-69.
235. *Id.* at 968.
236. *In re* Care & Prot. of Sharlene, 840 N.E.2d 918, 927 (Mass. 2006).
237. *Id.* at 926.
238. *Id.*
239. *See infra* app. C, Code 2, at 1175.
240. 857 N.E.2d 1061 (Mass. 2006).
241. *Id.* at 1064, 1076.

assessment.[242] Caretaking functions serve as "one means by which to anchor the best interests of the child analysis" in making an "objectively reasonable assessment of whether disruption of the adult-child relationship is potentially harmful to the child's best interests."[243] But the "potential harm to the child is, of course, the criterion that tips the balance in favor of continuing contact with a de facto parent against the wishes of the fit legal parent."[244] Because of the need to demonstrate harm, A.H., the same-sex partner of the child's biological mother, M.P., failed to meet her burden of proof showing that she was a de facto parent.[245] After the two separated, A.H. sued for joint physical and legal custody of, and visitation with, M.P.'s child.[246] The Middlesex Division of the Probate and Family Court Department dismissed her complaint, concluding that "however salutary to the child, [A.H.'s relationship with the child] did not rise[] . . . to that of a parental relationship."[247] On appeal, the Massachusetts Supreme Judicial Court refused to "disturb" the lower court's judgment for a number of reasons, including the judge's "broad discretion to consider the impact of parental activity other than caretaking on forming the crucial parent-child bond."[248] As Figure 6

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242. *Id.* at 1072.

243. *Id.* at 1071.

244. *Id.*

245. *Id.* at 1069.

246. *Id.* at 1067-68.

247. *Id.* at 1068-69, 1072 (alteration in original) (internal quotation marks omitted).

248. *Id.* at 1071-72. Courts have modified the *Principles*' test in other instances. *See In re* Guardianship of Estelle, 875 N.E.2d 515 (Mass. App. Ct. 2007); Smith v. Jones, 868 N.E.2d 629 (Mass. App. Ct. 2007) (recognizing the earlier application of the *Principles* in *A.H. v. M.P.*); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (en banc).

In the case of *In re Parentage of L.B.*, the plaintiff, Carvin, and defendant, Britain, were in a same-sex relationship for a little more than a decade, during which time they decided to have a child, L.B., and Britain was artificially inseminated. 122 P.3d at 163-64. The couple split up when L.B. was nearly six years old, and Britain cut Carvin off from all contact with L.B. *Id.* at 164. Carvin filed petition for the establishment of parentage in King County Superior Court, seeking to be declared either a parent by estoppel or a de facto parent. *Id.* The family court commissioner dismissed the petition, and the trial judge affirmed the ruling and held that Carvin lacked standing under the Uniform Parentage Act ("UPA") and as a de facto parent. *Id.* On appeal, the court of appeals reversed the superior court's decision, determining that because the legislature had not addressed relationships like the one at hand, the matter was left to be resolved under the common law. *Id.* at 165. The court looked to other state courts, recognized the common law rights of de facto parents, and held that such rights exist in Washington aside from the UPA. *Id.* at 165. The Supreme Court of Washington affirmed the court of appeals with regard to de facto parenthood, but remanded the case for a determination of whether or not Carvin met the conditions for de facto parenthood. *Id.* at 179-80. To be recognized as a de facto parent required a showing that "(1) the natural or legal parent consented to and fostered the parent-like 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." *Id.* at 176. Even if so recognized, a "de facto parent is not entitled to any parental

shows, *A.H. v. M.P.* is not alone in rejecting de facto parent status on the facts before the court. Indeed, this formed the second largest group of cases when analyzed by rights sought and those received.[249]

Other cases that fail to find that a live-in partner qualified as a de facto parent also emphasize best interests and harm considerations. For example, in *Smith v. Jones*,[250] Smith and Jones began a same-sex relationship in 1995.[251] In 2002, Jones adopted the child in dispute, Liza.[252] After their relationship ended in 2004, Smith and Jones arranged for visitation with Liza as well as Smith's adopted daughter, but soon Smith filed for joint legal and physical custody of both children.[253] The trial judge denied Smith's petition, finding she did not reach de facto parent status because she lacked four criteria: "intent, time, harm, and 'best interests.'"[254] The Appeals Court of Massachusetts affirmed.[255] Although harm may come to Liza from severing her relationship with Smith, that harm would be mitigated by Liza's relationship with Jones.[256] Further, Smith failed to demonstrate intent to co-parent Liza while the couple was together because Jones made major decisions about Liza's well being without consulting Smith—for instance, when she made the final decision to adopt Liza, and when she failed to authorize Smith to make medical decisions for Liza.[257] As with the modification cases, *Smith* restates the centrality of an affirmative finding that no

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privileges, as a matter of right, but only as is determined to be in the best interests at the child." *Id.* at 177. The supreme court referred to the *Principles* twice in footnotes, first when determining that the UPA did not preclude the common law with regard to de facto parenthood since the UPA did not address such situations, and again when discussing cases from other jurisdictions recognizing the ALI's concept of de facto parenthood. *Id.* at 175 n.23, 176 n.24.

In the case of *In re Guardianship of Estelle*, Estelle's biological father, who had previously been uninvolved in her life, filed a motion to terminate the guardianship of the child's aunt and uncle. 875 N.E.2d at 516. The Worcester Division of the Probate and Family Court Department created a co-guardianship, finding that removing the child from the aunt and uncle's home would not be in the child's best interests, but that the father was not entirely unfit as a parent. *Id.* at 516-17. The Supreme Judicial Court of Massachusetts reversed and remanded the case, instructing the trial court to consider whether or not the aunt and uncle should be considered de facto parents in accordance with the *Principles* and prior state case law. *Id.* at 520-21. The court stressed, however, that "[a]t a minimum, the fitness of a particular parent cannot be judged without consideration of that parent's willingness and ability to care for the child, as well as the effect on a child of being placed in the custody of that parent." *Id.* at 519.

249. *See infra* app. D, category 5, at 1183-84.

250. 868 N.E.2d 629 (Mass. App. Ct. 2007).

251. *Id.* at 630.

252. *Id.*

253. *Id.* at 631.

254. *Id.* at 630 (internal quotation marks omitted).

255. *Id.*

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

257. *Id.* at 634-35.

further contact will harm the child in ways that cannot be compensated for by the legal parent.

D. Courts Place a Thumb on the Scale for Mothers' Prerogative to Decide

Just as the cases modifying the *Principles*' test emphasize the welfare-protecting best interests test, so, too, do the cases that outright reject the ALI's approach. These cases go a step further, however, and place a thumb on the scale for the mother's prerogative to decide what happens with her child. Consider *Janice M. v. Margaret K*,[258] in which the court unambiguously rejected the *Principles*.[259] During the eighteen years in which Janice M. and Margaret K. were in a committed, same-sex relationship, Janice M. adopted a daughter, Maya.[260] Following their break-up, Janice M. first imposed restrictions on Margaret K.'s visits with Maya, then denied visitation altogether.[261] Margaret K. sued for visitation rights claiming that she qualified as a de facto parent.[262]

The court refused to accept de facto parenthood as a legal status in Maryland, noting that even in jurisdictions that recognize the status, "where visitation or custody is sought over the objection of the [biological] parent . . . the *de facto* parent must establish that the legal parent is either unfit or that exceptional circumstances exist."[263] Exceptional circumstances are not determined by a rigid test; instead all the factors before the court in a given case come into play.[264] The court acknowledged that while meeting "the requirements [for] . . . *de facto* parent status [may be] . . . a strong factor to be considered in assessing whether exceptional circumstances exist[,]" it would not be "determinative as a matter of law."[265] Clearly, the requirement of exceptional circumstances erects a higher bar to awarding parental rights over the objection of the legal parent than the ALI's chores and time-in-residence test.

As Figure 6 illustrates, many courts take a hard, in-depth look at the quality of the relationship between the child and the live-in partner, requiring that the live-in partner fulfill the child's psychological needs for a parent and be seen by the child as a parent.[266] Some of these courts

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258. 948 A.2d 73 (Md. 2008).
259. *See id.* at 100-02.
260. *Id.* at 75.
261. *Id.* at 76.
262. *Id.* at 75-77.
263. *Id.* at 87.
264. *Id.* at 92.
265. *Id.* at 93.
266. *See infra* app. D, category 7, at 1187-88.

require a showing entirely absent from the ALI's test.[267] Once a live-in partner meets the de facto parent standard, he must overcome the presumption that the child's biological parent is acting in the child's best interests by denying access.[268] He must also show that ending the child's ongoing relationship with the de facto parent would affirmatively injure the child.[269] Consider *McAllister v. McAllister*.[270] Robin McAllister met and moved in with Mark McAllister while she was pregnant with E.M., her child by another man.[271] Mark was the only father E.M. knew growing up. Thus, Mark sought custody of E.M. after he and Robin divorced in 2008.[272] The court recognized the role of a psychological parent, noting that "[a] person who provides a child's daily care and who, thereby, develops a close bond and personal relationship with the child becomes the psychological parent to whom the child turns for love, guidance, and security."[273] Because Mark McAllister provided E.M.'s daily care, had raised her from birth, and developed a close bond and personal relationship with E.M., the court considered Mark her psychological parent.[274] Nevertheless, with regard to custody, the court concluded that a finding of psychological parenthood was not dispositive.[275] Instead, in situations where

> a psychological parent and a natural parent each seek a court-ordered award of custody, the natural parent's paramount right to custody prevails unless the court finds it in the child's best interests to award custody to the psychological parent to prevent serious harm or detriment to the welfare of the child.[276]

Thus, psychological parenthood alone was not enough. Mark ultimately received reasonable visitation and communication rights, but Robin retained decision-making responsibility and primary-residential responsibility of E.M.[277] A special concurrence by Justice Crothers cited to the *Principles* for his contention that it is the legislature, and not the court, that is best "equipped to gather broad public input and distill

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267. *See infra* app. D, category 6, at 1185-87.

268. *See, e.g.*, *In re* Guardianship of Victoria R., 2009-NMCA-007, ¶ 16, 201 P.3d 169, 177; McAllister v. McAllister, 2010 ND 40, ¶ 15, 779 N.W.2d 652, 658.

269. *See, e.g.*, *McAllister*, 2010 ND 40, ¶ 15, 779 N.W.2d at 658; *In re Victoria R.*, 2009-NMCA-007, ¶ 16, 201 P.3d at 177.

270. 2010 ND 40, 779 N.W.2d 652.

271. *Id.* ¶ 2, 779 N.W.2d at 655.

272. *Id.*, 779 N.W.2d at 655.

273. *Id.* ¶ 15, 779 N.W.2d at 658 (quoting Hamers v. Guttormson, 2000 ND 93, ¶ 5, 610 N.W.2d 758 (internal quotation marks omitted)).

274. *See id.* ¶ 16, 779 N.W.2d at 658-59.

275. *Id.* ¶ 15, 779 N.W.2d at 658.

276. *Id.* ¶ 15, 779 N.W.2d at 658.

277. *Id.* ¶ 27, 779 N.W.2d at 662.

public preferences for handling the hard choices and complex issues involved in determining third-party custody and visitation from the many options available."[278] Although the court was clearly aware of the *Principles*, the ALI's test had little traction.

In re Guardianship of Victoria R.[279] provides a second illustration of a court placing significant weight on protecting the prerogatives of mothers to decide matters for their children, this time in a case involving third parties. There, a biological mother, Galadriel R., gave her daughter, Victoria R., to the petitioners, Debbie and Francisco L., in an informal placement after she found herself unable to care for her daughter.[280] When Galadriel R. sought Victoria R.'s return, the couple refused and commenced proceedings seeking legal recognition of their relationship with Victoria under New Mexico's Kinship Guardianship Act ("KGA").[281] The KGA provides that a guardian may be appointed "'only if . . . the child has resided with the petitioner without the parent for a period of ninety days or more immediately preceding the date the petition is filed and . . . there are extraordinary circumstances.'"[282] The court held that the weight of the evidence showed that the couple had assumed the role of Victoria's "psychological parents" such that she would "suffer a significant degree of depression if the relationship with the psychological parents is abruptly terminated," and that this sufficed to "establish extraordinary circumstances within the meaning of the KGA."[283] In reaching its result, the court acknowledged the *Principles* as providing support for the concept of de facto parenthood, but primarily cited to numerous legislative enactments and judicial decisions that have adopted variations of the concept.[284] The court ultimately found that psychological parents may rebut the presumption that a birth parent acts in the best interests of a child if they can show that the child will suffer a "significant degree of depression."[285] Obviously, such a requirement demands the kind of case-by-case inquiry expressly rejected by the ALI.

Other courts jealously protect the prerogatives of legal parents to police who receives access to their children, using the doctrine of standing. For example, in a case involving a same-sex couple, *White v. White*,[286] Leslea and Michelle White began a same-sex relationship in 1999, which concluded in 2004 after each had given birth to a child via

278. *Id.* ¶ 35, 779 N.W.2d at 666 (Crothers, J., concurring).
279. 2009-NMCA-007, 201 P.3d 169.
280. *Id.* ¶ 1-2, 201 P.3d at 169-70.
281. *Id.* ¶ 3, 201 P.3d at 170.
282. *Id.* ¶ 5, 201 P.3d at 170-71 (quoting N.M. STAT. ANN. § 40-10B-8(B)(3) (West 2003)).
283. *Id.* ¶ 16, 201 P.3d at 177 (internal quotation marks omitted).
284. *Id.* ¶ 14-15, 201 P.3d at 175-77.
285. *Id.* ¶ 16, 201 P.3d at 177 (internal quotation marks omitted).
286. 293 S.W.3d 1 (Mo. Ct. App. 2009).

artificial insemination: Michelle to C.E.W. and Leslea to Z.A.W.[287] Beginning in 2006, Michelle refused to let Leslea and Z.A.W. have any contact with C.E.W., so Leslea filed a petition for a declaration of maternity, custody, and child support.[288] The trial court dismissed Leslea's petition, and the Court of Appeals of Missouri affirmed because, most significantly, Leslea lacked standing to bring a suit.[289] Because C.E.W. already had an identified natural mother, Leslea could not sue to declare a mother-child relationship under Missouri's Uniform Parentage Act ("MoUPA").[290] Furthermore, although MoUPA was not the sole means of establishing parentage in Missouri, even if Leslea did act *in loco parentis* or as a de facto parent while she and Michelle were together, the status terminated when they broke up.[291] Finally, Leslea could not pursue a claim of equitable estoppel because it is a defensive claim and not a basis for standing.[292] Leslea cited the *Principles* for a definition of de facto parenthood, but the court declined to adopt the rule.[293]

E. Courts that Pass Over the ALI's Test for Another Approach

As Figure 6 demonstrates, the greatest bulk of de facto parent cases citing the *Principles* dispatch the claim by a live-in partner or other third party on a different basis than the ALI's test—often over the urging of a concurrence or dissent that the ALI's test would provide the better decisional tool.[294] This occurred, for example, in *Stitham v. Henderson*.[295] There, during the course of Henderson's marriage to Norma, Norma gave birth to a child, K.M.H.[296] The couple subsequently

287. *Id.* at 6.
288. *Id.*
289. *Id.* at 6, 11.
290. *Id.* at 9.
291. *Id.* at 16.
292. *Id.* at 16-17.
293. *Id.* at 14-16.
294. In *Rideout v. Riendeau*, 2000 ME 198, 761 A.2d 291, the Rideouts petitioned the district court for visitation with their three grandchildren under the Grandparents Visitation Act, ME. REV. STAT. tit. 19-A, §§ 1801–05 (1998). *Id.* ¶ 2, 761 A.2d at 294. The district court found that the Rideouts met the statutory requirements to be entitled to visitation rights, but held that the Act was an unconstitutional violation of the Fourteenth Amendment. *Id.* ¶ 6, 761 A.2d at 295. On appeal, the Supreme Judicial Court of Maine vacated the judgment and remanded with instructions to apply the Act, concluding that the state has a compelling interest in allowing grandparents who have acted as parents to pursue the right to have continued contact with their grandchildren. *Id.* ¶ 2, 761 A.2d at 294. The concurrence cited the *Principles* in support of the court's ruling as evidence of a trend to recognize de facto parenthood and bestow visitation rights upon such adults. *See id.* ¶ 40, 761 A.2d at 306-07.
295. 2001 ME 52, 768 A.2d 598.
296. *Id.* ¶ 2, 768 A.2d at 599.

divorced, and Henderson was awarded contact with K.M.H. and ordered to pay child support.[297] After the divorce, Norma married Stitham, and a DNA test showed that Stitham was K.M.H.'s biological father.[298] Norma filed a motion in district court seeking a declaration that Henderson was not K.M.H.'s biological father, but the court denied the motion on the ground of res judicata.[299] Stitham subsequently filed an action in superior court against Henderson requesting that Stitham be declared K.M.H.'s biological father.[300] Court-ordered DNA testing showed that Henderson was not K.M.H.'s biological father.[301] Henderson then moved to counterclaim in order to establish his parental rights. Stitham objected and moved for summary judgment, which was granted by the court.[302] On appeal, the Supreme Judicial Court of Maine affirmed the lower court, but left it up to the district court in the pending post-divorce action to decide whether Henderson's continued participation in K.M.H.'s life was in K.M.H.'s best interest.[303] The concurrence referred to the *Principles*, urging that the district court had the authority to recognize Henderson as K.M.H.'s de facto parent.[304]

The court in *In re Parentage of M.F.*[305] also passed on the ALI's test, although it clearly was aware of the *Principles*' recommendation. There, the child's former step-father, John Corbin, sued to be declared a de facto parent of the child, M.F.[306] While the state of Washington recognized the common law classification of de facto parent, the court held that the designation was not available in this case because as the child's step-father, Corbin had other statutory remedies available to him to request parenting time when he divorced M.F.'s mother.[307] Thus, the court refused to fashion a separate equitable remedy.[308] While the court acknowledged the *Principles*' existence, it refused explicitly to adopt or reject them.[309] The court noted, however, that even under the *Principles*'

297. *Id.*, 768 A.2d at 599-600.
298. *Id.* ¶ 3, 768 A.2d at 600.
299. *Id.*, 768 A.2d at 600.
300. *Id.* ¶ 4, 768 A.2d at 600.
301. *Id.*, 768 A.2d at 600.
302. *Id.* ¶ 5, 768 A.2d at 600.
303. *Id.* ¶ 17, 768 A.2d at 603. Ultimately, the case settled, resulting in liberal visitation for Henderson but no further child support. *See* Telephone Interview with Hal Stewart, Attorney for John Henderson (Sept. 2, 2010).
304. 2001 ME 52, ¶ 25-26 & n.16, 768 A.2d at 605-06 & n.16.
305. 170 P.3d 601 (Wash. Ct. App. 2007).
306. *Id.* at 602-03.
307. *Id.* at 603.
308. *Id.* at 605.
309. *Id.*

test for de facto parenthood, Corbin's claim would have been barred because he failed to raise it within six months of living with M.F.[310]

Some courts deliberately pass on the ALI's test, believing that the legislature is the appropriate body to determine whether and when live-in partners should receive parental rights. For example, in *Smith v. Gordon*,[311] the court declined to adopt the *Principles*, stating that it was the legislature's duty to determine the answers to crucial questions like time limitations concerning de facto parenthood. There, a lesbian couple sought to adopt a child together, A.N.S., but because of Kazakhstani law, only one woman, Smith, was able to legally adopt A.N.S.[312] From A.N.S.'s adoption in March 2003, Smith and Gordon shared child care expenses.[313] Gordon did not seek to adopt A.N.S. before the couple broke up in May 2004.[314] Smith permitted Gordon to visit A.N.S. until June 2004, at which time Gordon filed a petition for custody as a legal parent under the Uniform Parentage Act of Delaware ("DUPA"), arguing that she was A.N.S.'s de facto parent.[315] The trial court agreed.[316] The Supreme Court of Delaware reversed because although the *Principles*

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310. *Id.* Other cases in which the courts resolve claims of parental rights on grounds other than the ALI test include Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002) and Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000). *See infra* app. C, Code 5, at 1176.

In *Blixt*, the plaintiff, the grandfather of the defendant mother's child, sued for visitation rights under MASS. GEN. LAWS ch. 119, § 39D. *Blixt*, 774 N.E.2d at 1055. The Plymouth Division of the Probate and Family Court Department declared the statute unconstitutional and granted a motion to dismiss by the defendant mother. *Id.* at 1056. On appeal, the Supreme Judicial Court of Massachusetts vacated the lower court's ruling and remanded the case for further proceedings. *Id.* The court noted that grandparents are not required to achieve de facto parent status in order to receive visitation rights, but applied past cases using the ALI's de facto parent standards because the de facto parent standards were consistent with the existing standards for granting a grandparent visitation rights. *Id.* at 1061 & nn.15-16.

In *Rubano*, the court was also ultimately guided by something other than the ALI's test. There, Rubano filed a petition in family court seeking de facto parent status and visitation with DiCenzo's biological child (via artificial insemination) whom the couple had decided to have together during the course of their same-sex relationship. *Rubano*, 759 A.2d at 961-62. Rubano and DiCenzo negotiated a compromise giving Rubano visitation rights with the child in exchange for waiving her petition or any similar claims. *Id.* The chief judge of the family court entered their agreement as an order of the court. *Id.* DiCenzo violated the spirit of the agreement by interfering with Rubano's visitation attempts, and Rubano sought enforcement from the court. *Id.* at 962-63. DiCenzo argued that the family court lacked jurisdiction to enter the order or enforce it; Rubano argued that the legislature had given the family court jurisdiction over matters like this and the court should enforce its order. *Id.* at 963. The Supreme Court of Rhode Island ruled that the family court did have jurisdiction over the matter and should enforce the visitation agreement. *Id.* at 965-66, 970-71. The court referred to the *Principles*, noting that the ALI's treatment of de facto parenthood was "in harmony" with the position independently reached by the court. *Id.* at 974-75.

311. 968 A.2d 1 (Del. 2009).

312. *Id.* at 3.

313. *Id.*

314. *Id.*

315. *Id.* at 3-4 (citing DEL. CODE ANN. tit. 13, §§ 8–101 to 8–904 (West 2006)).

316. *Id.* at 4.

would recognize former live-in partners as de facto parents, the Delaware legislature knew of the *Principles* when adopting DUPA but did not embrace the concept.[317] The court concluded that "[p]roviding relief in such situations . . . is a public policy decision for the General Assembly to make."[318]

F. Courts Circumscribe the ALI's Approach

This is not to say that a close reading yields a uniformly negative approach to the *Principles*' test. Some courts appear willing to embrace the test while sharply circumscribing the set of live-in partners who would be eligible. *Killingbeck v. Killingbeck*[319] provides such a example.[320] There, a mother was uncertain whether Killingbeck, whom

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317. *Id.* at 14-15.

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

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

DEL. CODE ANN. tit. 13, § 8–201(c) (West Supp. 2010). Significantly, Delaware's test for recognition as a de facto parent is considerably more demanding than the ALI's. Moreover, once recognized as a de facto parent, the adult then has a duty to provide financial support for a child. *See id.* § 501 (imposing on parents a duty to support minor children).

319. 711 N.W.2d 759 (Mich. Ct. App. 2005).

320. A number of dissenting opinions also cite to the *Principles*. *See* Riepe v. Riepe, 91 P.3d 312, 326 (Ariz. Ct. App. 2004) (Barker, J., dissenting); Janice M. v. Margaret K., 948 A.2d 73, 96 (Md. 2008) (Raker, J., dissenting) (citing to the *Principles*' definition of de facto parenthood); E.N.O. v. L.M.M., 711 N.E.2d 886, 896-97 (Mass. 1999) (Fried, J., dissenting) (criticizing the majority's adoption of the *Principles*' de facto parent standard); *In re* Marriage of Winczewski, 72 P.3d 1012, 1058 (Or. 2003) (Brewer, J., dissenting) (per curiam).

In the case of *In re Winczewski*, the paternal grandparents of two children, A. and J., sought custody of the children after their father's death. *In re Winczewski*, 72 P.3d at 1013. The trial court granted custody, finding that it was in the childrens' best interests. *Id.* at 1013-14. On appeal, the Court of Appeals of Oregon agreed with the childrens' mother that the trial court applied an incorrect standard. *Id.* at 1014. However, the court found that the mother benefitted from a rebuttable presumption of acting in the childrens' best interests, but that the grandparents had successfully overcome this presumption. *Id.* at 1016, 1029. The lower court decision was affirmed by an equally divided court. *Id.* at 1012. The dissent cited the *Principles* when discussing the approach of other states' courts which had granted grandparents who acted as parental figures the right to seek visitation with the child for whom they had cared. *Id.* at 1058 (Brewer, J., dissenting).

In *Riepe*, Cody Riepe, the son of David Riepe, went to live with his biological mother, Brandy Jo Riepe, after Cody's father died. Cody had been living with his father and step-mother, Janet Riepe. *Riepe*, 91 P.3d at 313-14. Janet Riepe filed a petition for visitation rights with Cody. The lower court denied the petition, holding that under Arizona law, Janet was required to "prove that Cody's relationship with her was equal to or superior to the relationship he shared with his legal

she later married, or Rosebrugh, was the father of her child, Devon.[321] Nonetheless, she and Killingbeck signed an acknowledgement of parentage, which stated that Killingbeck was Devon's natural father.[322] After acknowledging Killingbeck's paternity, Devon's mother cohabited with him for four years, eventually marrying him.[323] Six months after marrying Killingbeck, Devon's mother filed for divorce and arranged with Rosebrugh for genetic testing, which revealed that Rosebrugh was Devon's biological father.[324] Rosebrugh intervened in the divorce action with respect to custody of Devon.[325] The trial court revoked the acknowledgement of parentage but ordered parenting time for Mr. Killingbeck as a de facto father.[326] On appeal, the Court of Appeals of Michigan reversed the order for parenting time, concluding that the doctrines of equitable parenthood and estoppel only applied to children born or conceived during the marriage.[327] Because he would not qualify under this sharply circumscribed set of facts, Mr. Killingbeck had no right to parenting time as a de facto parent. However, the court decided that "the acknowledgement of parentage gave Killingbeck status as a parent, eligible to pursue parenting time under the Child Custody Act."[328] The court remanded with instructions to reconsider the revocation of the acknowledgement of parentage.[329] The dissenting opinion cited the *Principles* and *Youmans* with respect to the definition of de facto parenthood.[330]

While it remains to be seen what will ultimately come of the *Principles*, it is evident that the *Principles* have not significantly increased the chances that live-in partners will qualify for full parental rights. A significant number of courts have sided with mothers, preserving their ability to decide who receives access to their children. Even those cases that entertain claims by live-in partners and other

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parents." *Id.* at 313-15. The Court of Appeals of Arizona disagreed with this assessment, and reversed and remanded the case, stating that Arizona law "authorizes the court to award reasonable visitation under such circumstances if the factors set forth in that provision are otherwise satisfied." *Id.* at 313. The dissenting opinion cited to the *Principles* and *E.N.O.* when discussing how courts outside of Arizona have defined "parent." *Id.* at 326 (Barker, J., dissenting).

321. *Killingbeck*, 711 N.W.2d at 762.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 764-66.

328. *Id.* at 765.

329. *Id.* at 769. Furthermore, the trial court's revocation of the acknowledgement was in error because "[r]evocation of an acknowledgement of parentage, even in cases where there is 'clear and convincing evidence . . . that the man is not the father,' must be warranted by the 'equities of the case.'" *Id.* at 766 (quoting MICH. COMP. LAWS § 722.1011(3) (West 2002)).

330. *Id.* at 774 (Cooper, J., dissenting).

adults find that these adults do not qualify as de facto parents for purposes of visitation as often as the courts find that they do.[331]

VI. CONCLUSION

This Article is concerned with one question: whether heterosexual men who previously lived with a child and her mother should recieve unsupervised access to the child after the break-up, over the mother's objections. The ALI's *Principles* advance an easily administrable test based on chores and time-in-residence to decide when former partners would receive parental rights—a test that leaves little room for judicial discretion and judgment. The drafters of the *Principles* simply assume, without substantiation, that continuing contact between a child and a former live-in partner will almost always be an unadulterated good. However, the drafters ignore whether the adult and child have a bonded, dependent relationship of a parental nature. Indeed, in deciding which relationships to preserve, the *Principles* make no inquiry into whether a continuing relationship serves the child's best interests or would safeguard the child's welfare. In the years since the *Principles* were promulgated, courts have been reluctant to embrace full-blown parental rights based only on the bare showing of time-in-residence and chores performed for a child. The courts' muted response to the *Principles* shows that judges have not followed the ALI's lead in abandoning a more nuanced look at adult-child relationships. For many of the children involved, this is a good thing.

331. *See supra* Figure 6; *infra* app. D, categories 2 & 5, at 1180-84.

APPENDIX A: ALL CASES CITING TO THE *PRINCIPLES*

APPENDIX A				
Case:	**Citation:**	**Ch.(s):**	**Treatment Subject(s):**	**Page(s):**
A.H. v. M.P.[332]	857 N.E.2d 1061 (Mass. 2006)	2	De Facto Parent, Parent by Estoppel, Best Interests Test	1064, 1069-74
Abbott v. Virusso	862 N.E.2d 52 (Mass. App. Ct. 2007)	2	Best Interests Test, Relocation, Approximation Standard	55-56, 60-61
Blixt v. Blixt	774 N.E.2d 1052 (Mass. 2002)	2	De Facto Parent	1061 & n.15
Bretherton v. Bretherton	805 A.2d 766 (Conn. App. Ct. 2002)	2	Relocation	772-73
C.E.W. v. D.E.W.	2004 ME 43, 845 A.2d 1146	2	De Facto Parent	1152 & n.13
Dupré v. Dupré	857 A.2d 242 (R.I. 2004)	2	Relocation, Best Interests Test	255, 257-59
Eccleston v. Bankosky	780 N.E.2d 1266 (Mass. 2003)	2, 3	De Facto Parent, Child Support	1274-76 nn.16-17
E.N.O. v. L.M.M.	711 N.E.2d 886 (Mass. 1999)	2	De Facto Parent	891 & n.6, 892 & n.10, 893, 896-97
Evans v. McTaggart	88 P.3d 1078 (Alaska 2004)	2	Best Interests Test	1098 & n.53

332. Our search results returned two additional cases that cited works containing the *Principles* in their title, but not the *Principles* themselves. *See* United States v. Batton, 602 F.3d 1191, 1201 (10th Cir. 2010) (citing Wilson, *supra* note 1); Smith v. Smith, 769 N.W.2d 591, 593 (Mich. 2008) (citing Garrison, *supra* note 172).

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Case:	**Citation:**	**Ch.(s):**	**Treatment Subject(s):**	**Page(s):**
Hauser v. Hauser	No. CVFA 970401065S, 1999 WL 712805 (Conn. Super. Ct. Aug. 27, 1999)	2	Relocation	*1-2 n.5
Hawkes v. Spence	2005 VT 57, 878 A.2d 273	2	Relocation	275, 278-82
Hayes v. Gallacher	972 P.2d 1138 (Nev. 1999)	2	Relocation	1140-41
Heatzig v. MacLean	664 S.E.2d 347 (N.C. Ct. App. 2008)	2	Parent by Estoppel	351
Heide v. Ying Ji	No. 2008-270, 2009 WL 2411561 (Vt. May 29, 2009)	2	Relocation	*2
Hoover v. Hoover	764 A.2d 1192 (Vt. 2000)	2	Relocation	1195-96 n.6, 1202-08
In re Audrey S.	182 S.W.3d 838 (Tenn. Ct. App. 2005)	2	Best Interests Test	877
In re Care & Prot. of Sharlene	840 N.E.2d 918 (Mass. 2006)	2	De Facto Parent	926
In re Custody of Kali	792 N.E.2d 635 (Mass. 2003)	2	Best Interests Test, Approximation	641 & n.9, 642, 644 n.13
In re E.L.M.C.	100 P.3d 546 (Colo. App. 2004)	2	Best Interests Test	558
In re Farag	No. V-09449/99, 2001 WL 1263324 (N.Y. Fam. Ct. Sept. 28, 2001)	2	Best Interests Test	*1
In re Giorgianna H.	205 S.W.3d 508 (Tenn. Ct. App. 2006)	2	Best Interests Test	523

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Case:	**Citation:**	**Ch.(s):**	**Treatment Subject(s):**	**Page(s):**
In re Guardianship of Estelle	875 N.E.2d 515 (Mass. App. Ct. 2007)	2	De Facto Parent	521
In re Guardianship of Victoria R.	2009-NMCA-007, 201 P.3d 169	2	De Facto Parent	175
In re Marr	194 S.W.3d 490 (Tenn. Ct. App. 2005)	2	Best Interests Test	498
In re Marriage of DeLuca	No. A110788, 2006 WL 1349348 (Cal. Ct. App. May 17, 2006)	2	Custody	*8
In re Marriage of Waller	123 P.3d 310 (Or. Ct. App. 2005)	2	Relocation	315 n.6
In re Marriage of Hansen	733 N.W.2d 683 (Iowa 2007)	2	Approximation Standard	695, 697
In re Marriage of Winczewski	72 P.3d 1012 (Or. Ct. App. 2003) (Brewer, J., dissenting) (per curiam)	2	De Facto Parent	1058
In re Parentage of L.B.	122 P.3d 161 (Wash. 2005) (en banc)	2	De Facto Parent, Parent by Estoppel	170 n.15, 175 n.23, 176-77 nn.24-25
In re Parentage of M.F.	170 P.3d 601 (Wash. Ct. App. 2007)	2	De Facto Parent	605 & n.23
In re R.A.	891 A.2d 564 (N.H. 2005)	2	Custody	580
Ireland v. Ireland	717 A.2d 676 (Conn. 1998)	2	Relocation	682 & n.5, 696 n.1

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J.F. v. J.F.	894 N.E.2d 617 (Mass. App. Ct. 2008)	2	Custody	626-27
Jacobs v. Jacobs	2007 ME 14, 915 A.2d 409	2	Family Structure	411
Janice M. v. Margaret K.	948 A.2d 73 (Md. 2008)	2	De Facto Parent, Parent by Estoppel	74 n.1, 85, 91 n.12, 92 n.13, 95 & n.2, 96 & n.3, 101 n.5
Killingbeck v. Killingbeck	711 N.W.2d 759 (Mich. Ct. App. 2005) (Cooper, P.J., dissenting)	2	De Facto Parent	773 n.28
Malenko v. Handrahan	2009 ME 96, 979 A.2d 1269	2	Relocation	1275
Mason v. Coleman	850 N.E.2d 513 (Mass. 2006)	2	Best Interests Test, Relocation	518-19 & n.10
McAllister v. McAllister	2010 ND 40, 779 N.W.2d 652 (Crothers, J., concurring)	2	Visitation, De Facto Parent	666
McGuinness v. McGuinness	970 P.2d 1074 (Nev. 1998)	2	Relocation	1080 n.1
Miller-Jenkins v. Miller-Jenkins	2006 VT 78, 912 A.2d 951	2	De Facto Parent, Parent by Estoppel	972
Nighswander v. Sudick	No. FA 97393793, 2000 WL 157905 (Conn. Super. Ct. Jan. 26, 2000)	2	Relocation	*6
Osmanagic v. Osmanagic	2005 VT 37, 872 A.2d 897	2	Declined to consider on appeal	899
Osterkamp v. Stiles	235 P.3d 178 (Alaska 2010)	2	De Facto Parent	187

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Case:	**Citation:**	**Ch.(s):**	**Treatment Subject(s):**	**Page(s):**
Prenaveau v. Prenaveau	912 N.E.2d 489 (Mass. App. Ct. 2009)	2	Approximation Standard	494 n.7
R.D. v. A.H.	912 N.E.2d 958 (Mass. 2009)	2	De Facto Parent	963
R.S. v. M.P.	894 N.E.2d 634 (Mass. App. Ct. 2008)	2	Visitation Modification	639 n.9
Rideout v. Riendeau	2000 ME 198, 761 A.2d 291	2	De Facto Parent	302, 307
Riepe v. Riepe	91 P.3d 312 (Ariz. Ct. App. 2004) (Barker, J., dissenting)	2, 6	De Facto Parent, Domestic Partners	326, 337 n.19
Rogers v. Parrish	2007 VT 35, 923 A.2d 607	2	Relocation	612, 617, 621-22
Rubano v. DiCenzo	759 A.2d 959 (R.I. 2000)	2	De Facto Parent, Parent by Estoppel	974-75
Schmitz v. Schmitz	88 P.3d 1116 (Alaska 2004)	2	Parenting Plan	1123
Smith v. Gordon	968 A.2d 1 (Del. 2009)	2	De Facto Parent	10 & nn.59-60, 11 & nn.61-65, 16 & n.103
Smith v. Jones	868 N.E.2d 629 (Mass. App. Ct. 2007)	2	De Facto Parent, Best Interests Test	631-33, 634 & n.8, 635 & n.9
Smith v. Smith	769 N.W.2d 591 (Mich. 2008)	2	Custody	593
Stitham v. Henderson	2001 ME 52, 768 A.2d 598 (Saufley, J., concurring)	2	De Facto Parent	605, 606 n.16
Sweeney v. Sweeney	2005 ND 47, 693 N.W.2d 29	2	Interference with Visitation Rights	38

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Case:	**Citation:**	**Ch.(s):**	**Treatment Subject(s):**	**Page(s):**
Thomas v. Arnold	No. FA980546116S, 2002 WL 983343 (Conn. Super. Ct. Apr. 19, 2002)	2	Relocation	*11
Troxel v. Granville	530 U.S. 57 (2000)	2	Best Interests Test	101
White v. Moody	171 S.W.3d 187 (Tenn. Ct. App. 2004)	2	Best Interests Test	193
White v. White	293 S.W.3d 1 (Mo. Ct. App. 2009)	2	De Facto Parent	14
Woods v. Ryan	2005 ND 92, 696 N.W.2d 508	2	Custody	518-19
Youmans v. Ramos	711 N.E.2d 165 (Mass. 1999)	2	De Facto Parent, Best Interests Test	167 n.3, 170 n.15, 172 n.20
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Blanchard v. Blanchard	97-2305 (La. 1/20/99), 731 So. 2d 175	4	Division of Property Upon Dissolution	181

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Martin v. Martin	913 A.2d 451 (Conn. App. Ct. 2007)	3	Child Support	458 n.6
McCleary v. McCleary	822 A.2d 460 (Md. Ct. Spec. App. 2002)	4	Division of Property Upon Dissolution	468 & n.3

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APPENDIX B:
DISCRETE CHAPTER 2 TREATMENTS OF THE *PRINCIPLES*

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Abbott v. Virusso	862 N.E.2d 52 (Mass. App. Ct. 2007)	Relocation	56
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Hauser v. Hauser	No. CVFA 970401065S, 1999 WL 712805 (Conn. Super. Ct. Aug. 27, 1999)	Relocation	*1-2
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Case:	**Citation:**	**Treatment Subject:**	**Page(s):**
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Youmans v. Ramos	711 N.E.2d 165 (Mass. 1999)	Best Interests Test	172-73 & n.20
Young v. Hector	740 So. 2d 1153 (Fla. Dist. Ct. App. 1999)	Approximation Standard	1172 n.3
Young v. Hector	740 So. 2d 1153 (Fla. Dist. Ct. App. 1999)	Caretaking Functions	1172 n.2
Zalot v. Bianchi	No. F598-7-95, 2006 WL 5866285 (Vt. May 25, 2006)	Relocation	*2-3

APPENDIX C:
DE FACTO PARENT CASES

APPENDIX C			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
1	Adopt the *Principles*' subsection	Eccleston v. Bankosky, 780 N.E.2d 1266 (Mass. 2003) (de facto parent requires agreement). Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999) (de facto parent, award of visitation serves child welfare). E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (de facto parent; temporary visitation in best interests of child). Smith v. Jones, 868 N.E.2d 629 (Mass. App. Ct. 2007) (failure to adopt child relevant to agreement to be de facto parent; allows consideration).	4/1

APPENDIX C			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
2	Adopt the *Principles* with some modification	*In re* Care & Prot. Sharlene, 840 N.E.2d 918 (Mass. 2006) (modifies Youmans v. Ramos, 711 N.E.2d 165 (Mass. 1999) and requires that the relationship between the child and adult be "loving and nurturing"). A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006) (de facto parent is threshold showing before best interests test for visitation). Smith v. Jones, 868 N.E.2d 629 (Mass. App. Ct. 2007) (allows consideration of best interests and harm to child apart from de facto parent status). *In re* Guardianship of Estelle, 875 N.E.2d 515 (Mass. App. Ct. 2007) (for visitation by guardians, need de facto parent status and showing of child's welfare). *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (en banc) (de facto parent in full legal parity; best interests must be shown).	5/2
3	Concurrence cites to the *Principles*	Stitham v. Henderson, 2001 ME 52, ¶ 25-26, 768 A.2d 598, 605-606 & n.16 (Saufley, J., concurring) (de facto parent gets continuing contact if in child's best interests). Rideout v. Riendeau, 2000 ME 198, ¶ 40, 761 A.2d 291, 306-07 (Wathen, C.J., concurring) (urging that de facto parents may receive visitation). McAllister v. McAllister, 2010 ND 40, ¶ 35, 779 N.W.2d 652, 666 (Crothers, J., concurring) (de facto parent).	3/3
4	Use the *Principles* to inform their existing tests		0/0

APPENDIX C			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
5	Use the *Principles* as a "pile-on" when the case would have come out this way anyway	Osterkamp v. Stiles, 235 P.3d 178 (Alaska 2010) (custody case referring to de facto parent). Rideout v. Riendeau, 2000 ME 198, 761 A.2d 291 (grandparent visitation case, refers to de facto parent). Eccleston v. Bankosky, 780 N.E.2d 1266 (Mass. 2003) (not deciding if de facto parent owes child support, support owed for other reasons). Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002) (de facto parent definition cited in grandparent visitation case). Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000) (same-sex partner visitation, refers to de facto parent). Miller-Jenkins v. Miller-Jenkins, 2006 VT 78, 912 A.2d 951 (de facto parent/parent by estoppel, same-sex partner visitation in accordance with other cases and ALI).	6/6

APPENDIX C			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
6	Make reference to the *Principles*, but otherwise decline to adopt the rule from the *Principles*	C.E.W. v. D.E.W., 2004 ME 43, ¶ 14, 845 A.2d 1146, 1152 (declines to adopt the ALI's de facto parent standard, but concludes that the adult must have "fully and completely undertaken a permanent, unequivocal, committed and responsible parental role in the child's life," and be in the best interests). R.D. v. A.H., 912 N.E.2d 958 (Mass. 2009) (de facto parent seeks custody but custody belongs to legal parent unless unfit). White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009) (same-sex partner argues de facto parent, court says no authority for this). *In re* Guardianship of Victoria R., 2009-NMCA-007, ¶ 16, 201 P.3d 169, 177 (refers to de facto parent but finds that psychological parent may rebut presumption that biological parent acts in best interests of child and may establish extraordinary circumstances warranting the overriding of parental wishes if the child will suffer a "significant degree of depression").	4/4

APPENDIX C			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
7	*Principles* cited by dissent	Riepe v. Riepe, 91 P.3d 312, 326, 337 n.19 (Ariz. Ct. App. 2004) (Barker, J., dissenting) (de facto parent). Janice M. v. Margaret K., 948 A.2d 73, 95 & n.2, 96 & n.3, 101 & n.5 (Md. 2008) (Raker, J., dissenting) (de facto parent). E.N.O. v. L.M.M., 711 N.E.2d 886, 896-97 (Mass. 1999) (Fried, J., dissenting) (de facto parent). Killingbeck v. Killingbeck, 711 N.W.2d 759, 773 n.28 (Mich. Ct. App. 2005) (Cooper, P.J., dissenting) (de facto parent). *In re* Marriage of Winczewski, 72 P.3d 1012, 1058 (Or. Ct. App. 2003) (Brewer, J., dissenting) (per curiam) (de facto parent).	5/5
8	Decline to adopt the *Principles* because it is a legislative question	Smith v. Gordon, 968 A.2d 1, 14 (Del. 2009) (declining to recognize de facto parent; legislature to decide crucial questions like time limit).	1/1
9	Flat out rejects the *Principles*	Janice M. v. Margaret K., 948 A.2d 73, 92-93 (Md. 2008) (de facto parent status for visitation short-circuits requirement to show unfitness and exceptional circumstances).	1/1
10	*Principles* argued by a party but not reached by the court for procedural reasons	A.H. v. M.P., 857 N.E.2d 1061, 1070-73 (Mass. 2006) (not deciding if de facto parent requires two years). *In re* Parentage of M.F., 170 P.3d 601, 605 (Wash. Ct. App. 2007) (action for de facto parent would be barred for lack of timeliness).	2/2
11	Cite the *Principles* as evidence of a social phenomenon		0/0

APPENDIX C			
Code	**Treatment**	**Number of Cases/Lines of Cases**	**Tally**
12	Cite the *Principles* for a description of the majority rule		0/0

APPENDIX D:
SUMMARY OF RIGHTS SOUGHT AND GRANTED

APPENDIX D		
What was Sought	**The Result**	**Status of De Facto Parent**
1. Determined that the live-in partner or third party is a de facto parent entitled to full rights		
In *C.E.W. v. D.E.W.*, the mother's former same-sex partner sought a declaration of parental rights and responsibilities for the child and to prevent the partner from denying her parental status, while the mother argued that the court should limit the award to reasonable rights of contact. 2004 ME 43, ¶ 5, 845 A.2d 1146, 1147.	The Supreme Judicial Court of Maine found that the partner was the child's de facto parent because the parties stipulated to this status, therefore entitling her to be considered for an award of parental rights and responsibilities. *Id.*	Former same-sex partner stipulated to be child's de facto parent initially shared a residential schedule with the child's mother;[333] later the child moved in with the live-in partner, who provided financial support for the child.[334]
2. Determined that the live-in partner or third party is a de facto parent who receives less than full rights		
In *Youmans v. Ramos*, the trial court granted visitation to maternal aunt without receiving a petition from her after the father sought to terminate the guardianship held by the aunt and the aunt sought to retain custody. The father then sought to terminate the visitation	The Supreme Judicial Court reinstated the aunt's visitation after the court found her to be the child's de facto parent. *Id.*	Aunt is found to be de facto parent and awarded visitation. *Id.*

333. E-mail from Kenneth P. Altshuler, Partner, Childs, Rundlett, Fifield, Shumway & Altshuler, to Merilys Huhn, Research Assistant to author (Aug. 27, 2010, 09:00 AM) (on file with the Hofstra Law Review).

334. E-mail from Mary Bonauto, Civil Rights Project Dir., Gay & Lesbian Advocates & Defenders, to Merilys Huhn, Research Assistant to author (Sept. 8, 2010, 1:59 PM) (on file with the Hofstra Law Review).

APPENDIX D		
What was Sought	**The Result**	**Status of De Facto Parent**
right in the Supreme Judicial Court of Massachusetts. 711 N.E.2d 165, 167 (Mass. 1999).		
In *E.N.O. v. L.M.M.*, the birth mother's former same-sex partner sought specific performance of the couple's agreement to allow her to adopt the child (including joint custody and visitation), as well as a temporary visitation order pending trial. 711 N.E.2d 886, 889 (Mass. 1999).	The Supreme Judicial Court of Massachusetts reinstated the partner's temporary visitation as the child's de facto parent because it served the child's best interests. *Id.* at 893.	Former same-sex partner found to be de facto parent and awarded temporary visitation short-term, but biological mother left the court's jurisdiction so no permanent order was entered. *Id.* at 892-94. The majority cites the *Principles* for the definition of de facto parent. *Id.* at 891. The dissent cites the *Principles* to criticize the lack of limits on de facto parenthood. *Id.* at 896 (Fried, J., dissenting).
In *Rubano v. DiCezno*, the biological mother's former same-sex domestic partner sought only de facto parent status and to enforce her permanent visitation agreement with the biological mother. 759 A.2d 959, 962-63 (R.I. 2000).	The Supreme Court of Rhode Island found that the partner was the child's de facto parent and that the family court could enforce parties' agreement to allow her visitation. *Id.* at 971.	Former same-sex partner recognized as de facto parent and visitation agreement enforced. *Id.*
In *R.D. v. A.H.*, the former live-in girlfriend of the father sought permanent guardianship with custody against the biological father, but the trial court awarded	The Supreme Judicial Court of Massachusetts found that the de facto parent was not entitled to permanent guardianship with custody against the biological father because	Former live-in girlfriend is a de facto parent but is only entitled to visitation. *Id.* at 968.

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sole physical and legal custody to the father. 912 N.E.2d 958, 960 (Mass. 2009).	the father was not an unfit parent. *Id.* at 961.	
3. Remanded for determination of rights		
In the case *In re Guardianship of Estelle*, the father sought sole guardianship after trial court granted co-guardianship with the child's maternal aunt and uncle. 875 N.E.2d 515, 515-16 (Mass. App. Ct. 2007).	The Appellate Court of Massachusetts remanded to determine whether father was fit. *Id.* at 516. If he was not, the aunt and uncle would presumably retain legal guardianship. If he was fit, the father would receive custody and the court would have to determine if the aunt and uncle were de facto parents and had "continuing rights." *Id.* at 520.	Upon remand, father found to be unfit, received only visitation, and was ordered to pay child support, while aunt and uncle retained legal and physical custody.[335]
In the case *In re Parentage of L.B.*, the former same-sex partner of the biological mother sought to establish co-parentage of the child (and sought all the rights and responsibilities of legal parentage available in Washington). 122 P.3d 161, 164-65 (Wash. 2005) (en banc).	The Supreme Court of Washington found that the partner could petition for de facto parent status upon remand but could not receive visitation under Washington's unconstitutional third party visitation statute. *Id.* at 163.	Remanded to determine whether the former same-sex partner met test for de facto parent. *Id.* at 179.

335. Telephone Interview with Roxann C. Tetreau, Partner, Eden, Rafferty, Tetreau & Erlich (Sept. 2, 2010); Telephone Interview with Mark I. Zarrow, Partner, Lian, Zarrow, Eynon, Shea & Spofford (Sept. 2, 2010).

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In *Stitham v. Henderson*, the mother's former husband sought to reverse a declaration that the biological father is the biological father under the doctrine of res judicata because the divorce settlement declared the former husband to be the father. The former husband also pursued a counterclaim of equitable parental rights. 2001 ME 52 ¶ 1-3, 6, 768 A.2d 598, 599-600.	The Supreme Judicial Court of Maine found that the former husband was the child's de facto parent, but res judicata would not bar the biological father from seeking to be declared the biological father and that the former husband was not entitled to a jury trial on equitable parental rights. *Id.* ¶ 9, 16-17, 768 A.2d at 601, 603. The Supreme Judicial Court left it to the district court in the pending post-divorce action to consider if the former husband's continued participation in the child's life was in the child's best interest. *Id.* ¶ 18, 768 A.2d at 603-04.	Former husband recognized as de facto parent but remands to consider what rights to be granted. *Id.* ¶ 17, 768 A.2d at 603. The concurrence cites the *Principles*, urging the court to recognize the former husband as de facto parent. *Id.* ¶ 25, 768 A.2d at 605-06 (Saufley, J., concurring).
4. De facto parent entitled to no rights		
In *Killingbeck v. Killingbeck*, the mother and biological father sought to terminate the alleged father's parental rights but the circuit court awarded the alleged father separate parenting time with the child. 711 N.W.2d 759, 762-63 (Mich. Ct. App. 2005).	The Court of Appeals of Michigan found that the alleged father was not entitled to parenting time as de facto parent, but remanded to consider whether vacating the revocation of the acknowledgement of parentage would grant him parental rights. *Id.* at 769.	Alleged father is a de facto parent but has no rights to custody. *Id.* at 765-68. The dissent cites the *Principles* for the definition of de facto parenthood. *Id.* at 773 n.28 (Cooper, P.J., dissenting).
5. Determined that the live-in partner or third party is not a de facto parent		
In *Smith v. Jones*, the adoptive mother's former same-sex partner sought to be declared the child's de	The Appeals Court of Massachusetts found that the partner did not satisfy the criteria of being a de facto parent	Court rejects de facto parent status. *Id.* at 632-33.

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facto parent, and requested joint legal and physical custody. 868 N.E.2d 629, 630-31 (Mass. App. Ct. 2007).	and awarded no visitation or custody. *Id.* at 631-33.	
In the case *In re Care and Protection of Sharlene*, the step-father sought to be declared the child's de facto parent and participate in medical decision-making. 840 N.E.2d 918, 920 (Mass. 2006).	The Supreme Judicial Court of Massachusetts found that the step-father was not the child's de facto parent and had no right to participate in medical decisions affecting the child. *Id.*	Court rejects de facto parent status. *Id.*
In *A.H. v. M.P.*, the biological mother's former same-sex partner sought parental rights of custody and visitation. 857 N.E.2d 1061, 1064 (Mass. 2006).	The Supreme Judicial Court of Massachusetts found that the partner was not a de facto parent and denied visitation and custody. *Id.* at 1069-70, 1076.	Court rejects de facto parent status. *Id.* at 1070-73.
In *Osterkamp v. Stiles*, the former foster father sought custody and visitation after his former domestic partner and the legal parent of the child began to limit his visitation. 235 P.3d 178, 182 (Alaska 2010).	The Supreme Court of Alaska found that the former foster father was not the child's psychological parent and not entitled to visitation because it would result in "continued exposure to the toxic relationship" between the former domestic partners. *Id.* at 190.	Court rejects de facto parent status and the former foster father may not receive parental rights otherwise. *Id.* at 187.

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6. The live-in partner or third party received parental rights on some other basis		
In *McAllister v. McAllister*, the former step-father was awarded reasonable visitation, including invitation to school events and progress reports, in the divorce judgment as the child's psychological parent. He sought decision-making responsibility and primary residential responsibility, which the district court gave to the mother. 2010 ND 40 ¶ 1, 779 N.W.2d 652, 654.	The Supreme Court of North Dakota held that he was entitled to visitation and communication rights as the child's psychological parent, but not decision-making rights. *Id.* ¶ 27, 779 N.W.2d at 662.	Step-father gets the rights of psychological parent, which included visitation and communication, but not decision-making rights. *Id.*, 779 N.W.2d at 662. The concurrence cites the *Principles* for the idea that legislatures, not courts, should devise grants of third party visitation. *Id.* ¶ 35, 779 N.W.2d at 666 (Crothers, J., concurring).
In *Miller-Jenkins v. Miller-Jenkins*, the biological mother appealed the family court holding that former same-sex civil union partner was the legal parent of the child and thus entitled to visitation pending resolution of the dispute over custody and visitation. 2006 VT 78, ¶ 1, 912 A.2d 951, 955-56.	The Supreme Court of Vermont found that the former same-sex partner was a legal parent of the child and entitled to temporary visitation, pending the resolution of the dispute over custody and visitation. *Id.* ¶ 2, 912 A.2d at 956.	Former same-sex partner found to be actual parent; cites the *Principles* to support the idea of parental rights for former same-sex partners. *Id.* ¶ 61, 912 A.2d at 972.
In the case *In re Victoria R.*, the child's adult caregivers sought legal recognition of their relationship with the child under the Kinship Guardianship Act and were awarded all legal rights and	The court of appeals found that the adult caregivers satisfied the extraordinary circumstances required to sustain their appointment as guardians. *Id.* ¶ 16, 201 P.3d at 177.	The court of appeals cited the *Principles* to support idea of parental rights by child's caregivers but awarded rights under more exacting "psychological parent" test. *Id.* ¶ 14, 201 P.3d at 175.

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duties of a parent, except the right to consent to the child's adoption by the trial court. The mother was awarded substantial visitation, which she appealed in the Court of Appeals of New Mexico. 2009-NMCA-007, ¶ 3 201 P.3d 169, 170.		
In the case *In re Marriage of Winczewski*, the child's grandparents sought custody, which the trial court awarded under the best interests of the child standard. The mother challenged this standard upon appeal to the Court of Appeals of Oregon. 72 P.3d 1012, 1012 (Or. Ct. App. 2003) (per curiam).	The court of appeals awarded custody to the grandparents under OR. REV. STAT. § 109.119 (2001) after finding that mother was unfit and that the grandparent visitation statute was constitutional. *Id.* at 1029, 1039.	The grandparents receive visitation as grandparents. *Id.* at 1039. The dissent cites the *Principles* to support visitation rights for caretakers. *Id.* at 1058 (Brewer, J., dissenting).
In *Riepe v. Riepe*, the widowed step-mother sought *in loco parentis* visitation under ARIZ. REV. STAT. ANN. § 25-415(C) (2000). 91 P.3d 312, 314 (Or. Ct. App. 2004).	The Court of Appeals of Arizona found that the widowed step-mother was entitled to pursue *in loco parentis* visitation on remand while mother remained sole parent with attendant rights and responsibilities. *Id.* at 315.	Step-mother may receive visitation for acting *in loco parentis*. *Id.* The dissent cites the *Principles* for example of courts awarding rights to de facto parents. *Id.* at 326 (Barker, J., dissenting).

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In *Blixt v. Blixt*, the maternal grandfather sought visitation under grandparent visitation statute. 774 N.E.2d 1052, 1055 (Mass. 2002).	The Supreme Judicial Court of Massachusetts remanded to consider whether grandparents could rebut a presumption that the parent's decision not to allow visitation was valid. *Id.* at 1056.	Grandparents may receive visitation on a basis other than being de facto parents; cites the *Principles* to support visitation rights by grandparents ("pile-on"). *Id.* at 1061 n.15.
In *Rideout v. Riendeau*, the child's grandparents petitioned for visitation under the Grandparents Visitation Act, which required a "sufficient existing relationship between the grandparent and the child." ME. REV. STAT. ANN. tit. 19-A § 1803(1)(B) (1998); 2000 ME 198, ¶ 2, 16 n.10, 761 A.2d 291, 294, 298 n.10.	The Supreme Judicial Court of Maine found the Grandparents Visitation Act to be constitutional, but remanded to consider whether visitation was appropriate under the facts. *Rideout*, ¶ 2, 761 A.2d at 294.	Grandparents could receive visitation but not because of de facto parent status, as suggested by concurrence. *Id.* ¶ 40, 761 A.2d at 306-07 (Wathen, C.J., concurring).
7. The court rejects the idea of entitlement by live-in partners or third parties		
In *White v. White*, the mother's former same-sex partner sought a declaration of maternity, joint legal and physical custody, and child support. 293 S.W.3d 1, 6 (Mo. Ct. App. 2009).	The Missouri Court of Appeals found that the partner was not entitled to pursue a claim of joint legal and physical custody because she lacked standing and failed to state a claim upon which relief could be granted. *Id.* at 11.	Court declined to adopt test for de facto parent. *Id.* at 15.
In *Janice M. v. Margaret K.*, the adoptive mother's former domestic partner sought custody of or visitation with the child. The trial court granted only visitation	The Court of Appeals of Maryland found that the partner was not entitled to visitation as a de facto parent because Maryland did not recognize de facto parent status, but	Former domestic partner not de facto parent. *Id.* at 74, 87. The dissent cites the *Principles* arguing for recognition of de facto parenthood on the same level as a legal parenthood. *Id.* at 95 &

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as a de facto parent, which the adoptive mother appealed. 948 A.2d 73, 75 (Md. 2008).	remanded to consider whether exceptional circumstances existed to award visitation otherwise. *Id.* at 87, 93.	n.2, 96 & n.3 (Raker, J., dissenting).
In *Smith v. Gordon*, the adoptive mother's former same-sex partner sought custody and visitation as the child's de facto parent. The trial court granted joint legal and physical custody, which the adoptive mother appealed. 968 A.2d 1, 4 (Del. 2009).	The Supreme Court of Delaware found that the partner did not have standing to pursue custody and that Delaware does not recognize de facto parent status. *Id.* at 14-15.	Former same-sex partner not de facto parent. *Id.* at 16.
In the case *In re Parentage of M.F.*, the former step-father sought to be declared de facto parent of the child and asked for residential parenting time with her. 170 P.3d 601, 602 (Wash. Ct. App. 2007).	The Court of Appeals of Washington found that the former step-father not entitled to residential time with the child because Washington did not recognize a common law cause of action of de facto parenthood and because step-father failed to satisfy statutory requirements for modification of the parenting plan. *Id.* at 603, 607.	Former step-father not de facto parent. *Id.* at 605.

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8. The court did not reach the issue of whether live-in partner or third party was a de facto parent		
In *Eccleston v. Bankosky*, the child's court-appointed guardian sought post-minority child support from the child's father as the child's de facto parent. 780 N.E.2d 1266, 1271 (Mass. 2003).	The Supreme Judicial Court of Massachusetts did not reach the issue of whether to order the father to pay child support to court-appointed guardian as the child's de facto parent, but did order it pursuant to MASS. GEN. LAWS ch. 215, § 6 (2002). *Id.* at 1274-75.	Court did not reach the question whether guardian is de facto parent. *Id.* at 1275 n.17.