NOTE

REDEFINING THE LEGAL FAMILY: PROTECTING THE RIGHTS OF COPARENTS AND THE BEST INTERESTS OF THEIR CHILDREN

I. INTRODUCTION

What makes a family? Perhaps biological relation determines family. But, are two parents and their adopted child a family? Surely, the answer to this inquiry shows that family is not necessarily based on biology. Perhaps, then, an interactive, loving, caretaking relationship between parents and children makes a family. However, if a person were separated at birth from his or her biological parents only to be reunited with them later in life, would anyone deny that those individuals were family? Certainly, no one would.

This, of course, is a trick question. There is no easy answer. Indeed, the concept of "family" is something we all simply accept during the course of our daily lives. A family is a family because they act like a family. Mothers, fathers, and children make families. But what happens when the parents separate and begin individual lives? Does the adults' decision to end their relationship terminate their roles as parents? Do the separate lives that the parents begin cause the children to no longer be their children? The answer seems clear: of course not.

But, the law often leads to that exact result when a relationship ends between two same-sex coparents.[1] Despite the coparents' intent to conceive and raise a child together, and despite long-standing, nurturing, supporting, and loving parental roles, a same-sex coparent is often a third party in the eyes of the law.[2] Because of a lack of biological

1. I am acutely aware of the sensitivity surrounding the terminology used throughout this Note. I prefer to use the term "coparent" to refer to a nonbiological and frequently nonadoptive parent who planned with his or her partner to have a child who is biologically related to the partner. I prefer to use the term "legal parent" to describe the biological parent because I feel that the concentration on biological connection is inappropriate. However, at times I am forced to use terminology relating biological relation for the sake of clarity. Also, I often use "coparents" to describe the parenting pair, which should be clear in context. Additionally, I prefer the term "nontraditional" to "alternative." Whatever the terms, I do not intend to be discriminatory, dismissive, or diminutive to anyone at any time. It is also important to recognize that I believe that the arguments put forward in this Note are equally applicable to gay parenting couples and lesbian parenting couples.

2. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991); *see infra* notes 240-46 and accompanying text (discussing the standard for standing established in *Alison D.*).

connection, a coparent becomes a nonparent and, thus, a stranger.[3] The child is no longer his or her child. The legal parent's fundamental rights easily trump all claims that the coparent may have as a mere third party to the coparent-child relationship.[4] The child, having known the coparent as his or her parent for his or her whole life, has no protected relationship with the coparent.

However, as "a mosaic of modern living arrangements has displaced the nuclear family as the predominant American form,"[5] many states have attempted to soothe these inequities by acknowledging the validity of the bond between a same-sex coparent and his or her child. To protect that bond, and thereby protect the best interests of the child by ensuring the continuance of a healthy parental relationship, courts and legislatures have used several methods to allow a same-sex coparent to assert varying degrees of parental rights over his or her former partner's biological child, whom both parties wanted and planned to raise together.[6] Those methods include second parent adoption and private ordering mechanisms called coparenting agreements.[7] Also, courts have employed de facto parenthood, *in loco parentis*, and equitable estoppel doctrines to determine that a coparent is a parent in the context of a legal dispute.[8] Additionally, some legislatures have enacted same-sex marriage and other statutory relationships, such as civil unions and domestic partnerships, which can serve to formalize the relationship both between the adults and between the coparent and the child.[9] Finally, all legislatures have enacted some variation of a third

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3. *See, e.g.*, *Alison D.*, 572 N.E.2d at 28; *see* discussion *infra* Part III.A (discussing *Alison D.* and other cases that treat coparents as third parties to the parent-child relationship).

4. *See, e.g.*, Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987); *see* discussion *infra* Part III.A (discussing *Ronald FF.* and other cases which hold that coparents may not interfere with the legal parent-child relationship).

5. Craig W. Christensen, *Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO L. REV. 1299, 1316 (1997).

6. *See* discussion *infra* Part II (discussing in detail second parent adoption, coparenting agreements, judicial remedies, and legislative solutions).

7. *See, e.g.*, Margaret S. Osborne, Note, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 368-71 (2004); *see* discussion *infra* Parts II.A-B, III.B.1-2 (explaining second parent adoption and coparenting agreements).

8. *See, e.g.*, Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 491-92 (1990) (discussing equitable estoppel); Osborne, *supra* note 7, at 378, 382 (defining de facto parenthood and *in loco parentis*, respectively); *see* discussion *infra* Parts II.C, III.B.3-4 (reviewing the judicial remedies of de facto parenthood, *in loco parentis*, and equitable estoppel).

9. *See* Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties, or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23, 44-45 (2006) (identifying states' attempts to achieve parental equality through same-sex marriage and alternative institutions); *see* discussion *infra* Parts II.D.1, III.B.6 (exploring marriage and alternative institutions).

party statute, which entitles a nonparent to bring suit regarding the custody or visitation of a child.[10]

Like other states, New York seeks to protect and foster the continuation of healthy parent-child relationships in order to serve a child's best interests after the dissolution of his or her parents' relationship.[11] However, if that child's parents are of the same sex, the law does not provide the same protection and encouragement to the coparent-child relationship as it does to the child of opposite-sex parents.[12] In fact, in the absence of a second-parent adoption or an argument of equitable estoppel after a determination that the coparent stands *in loco parentis* to the child, a coparent-child relationship may not be legally acknowledged, let alone protected, by the state.[13] Therefore, New York State must recognize and protect nontraditional families through each possible mechanism, including second-parent adoption, coparenting agreements, judicial resolutions, and legislative action in order to foster and preserve loving parenting relationships and to truly serve the best interests of a child.

Part II of this Note begins by explaining the ways in which a gay or lesbian coparent can claim some degree of parental rights over his or her former partner's biological child, who was planned for, conceived, and raised within the context of a committed same-sex relationship. The

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10. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 64 (2000); *see* discussion *infra* Parts II.D.2, III.B.7 (discussing third party statutes).

11. *See, e.g.*, N.Y. DOM. REL. LAW § 70 (McKinney 1999) (stating that neither parent has a prima facie right to custody, but that the court will determine custody solely on analysis of what is in the best interest of child); Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987) (holding that the state may not interfere with parent-child relationship without compelling state purpose furthering child's best interests); John Bowe, *Gay Donor or Gay Dad?*, N.Y. TIMES, Nov. 19, 2006, § 6 (Magazine) at 66 (stating courts are charged with protecting the child's best interests above all else).

12. *See, e.g.*, N.Y. DOM. REL. LAW § 70 (failing to define "parent"); Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (ignoring a private visitation agreement and forcing coparent to bring suit as a third party under Domestic Relations Law); Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002), *appeal dismissed*, 754 N.Y.S.2d 203 (2002) (foreclosing the availability of de facto parenthood); *see* discussion *infra* Part IV (pointing out the flaws in current New York law with regard to same-sex coparents and suggesting solutions); *cf.* Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) (holding "that the Domestic Relations Law's limitation of marriage to opposite-sex couples" is constitutional).

13. *See, e.g.*, *Alison D.*, 572 N.E.2d at 28 (ignoring a private visitation agreement and forcing coparent to bring suit as a third party under Domestic Relations Law); *Janis C.*, 742 N.Y.S.2d at 383 (foreclosing the availability of de facto parenthood); *see* discussion *infra* Part IV (pointing out the flaws in the current New York law with regard to same-sex coparents and suggesting solutions); *see also In re* Jacob, 660 N.E.2d 397, 398, 405 (N.Y. 1995) (allowing for second parent adoption for both same-sex and opposite-sex couples); Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *28 (Sup. Ct. Oct. 2, 2008) (allowing for a combination of *in loco parentis* and equitable estoppel); *cf. Hernandez*, 855 N.E.2d at 12.

benefits and weaknesses of every method are examined in each section of this Part. Section A details second-parent adoption. Section B describes coparenting agreements. Section C discusses the judicial doctrines of de facto parenthood, *in loco parentis*, and equitable estoppel. Section D expounds the legislative solutions of same-sex marriage, alternatives to marriage, and third party statutes. Part III turns to the evolution of the rights of coparents in New York State, examining the past in Section A and detailing the transition to the present in Section B. Section B reviews New York State's approach to each method of asserting parental rights. Part IV identifies changes that need to be made in the law of New York in order to suit the needs of the modern family. Part V concludes that each remedy must be available to same-sex coparents to protect the best interests of the children of same-sex couples.

II. RECOGNIZING THE RIGHTS OF SAME-SEX COPARENTS

For the most part, the traditional avenues of determining parentage and its rights have not been made available to same-sex coparents. However, the legal system and legislatures have not universally failed to recognize the changing composition of families. In fact, there are a variety of methods used to grant parental rights to same-sex coparents, including second-parent adoption, coparenting agreements, equitable concepts, and legislative solutions.[14] Unfortunately, none of these tactics completely protects the coparent-child relationship. The shortcomings of the various systems undermine or even ignore legal relationships within a nontraditional family, and thus disregard the actual relationship between a child and his or her coparent. To better explore these issues, the following sections will detail the protection and the failings of the means available to legally connect coparents to their children.

A. Second-Parent Adoption

First, second-parent adoption enables a coparent, as a third party, to adopt his or her child without displacing the parental rights of the biological parent.[15] This form of adoption is currently the best way for a

14. *See Troxel*, 530 U.S. at 64 (discussing third party statutes); Forman, *supra* note 9, at 44-45 (discussing state legislation that allows same-sex marriage and alternative institutions). *See generally* Osborne, *supra* note 7 (discussing second-parent adoption, coparenting agreements, de facto parenthood, *in loco parentis* determinations, and equitable estoppel).

15. Osborne, *supra* note 7, at 369; *see* Forman, *supra* note 9, at 43-44; Kris Franklin, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 WM. MITCHELL L. REV. 655, 684 (2006); Polikoff, *supra* note 8, at 524-25; Kyle C.

coparent to fortify the legal parental relationship because it places the coparent in legal parity with the biological parent.[16] On the other hand, a traditional adoption would require the biological parent to terminate all of his or her parental rights before the coparent could adopt.[17] This arrangement strips one parent of his or her rights before the other can be awarded rights, a ridiculous result in a coparenting situation.

Accordingly, some courts and legislatures have recognized the impracticality of imposing this traditional structure on nontraditional families, and have allowed same-sex coparents to adopt their children without requiring the biological parents to relinquish their rights. For example, *In re Adoption of B.L.V.B.* held that a typical adoption statute's general purpose was "to clarify and protect the legal rights of the adopted person . . ., not to proscribe adoptions by certain combinations of individuals."[18] Thus, while state law normally required the termination of parental rights before adoption, the court found that "when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's rights is unreasonable and unnecessary."[19]

However, although second-parent adoption offers the best protection of the legal relationship between a coparent and his or her child, second-parent adoption has a number of weaknesses, such as limited availability[20] and time-consuming, expensive procedures.[21]

Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 252 (2000). *But see* Laura L. Williams, Note, *The Unheard Victims of the Refusal to Legalize Same-Sex Marriage: The Reluctance to Recognize Same-Sex Partners as Parents Instead of Strangers*, 9 J. GENDER RACE & JUST. 419, 430-31 (2005) (discussing the limitations of second-parent adoptions in states that narrowly construe the law to apply only to opposite-sex parents).

16. Osborne, *supra* note 7, at 369.

17. *E.g.*, *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1273 (Vt. 1993) (examining an adoption statute that states "[t]he natural parents of a minor shall be deprived, by the adoption, of all legal right to control of such minor, and such minor shall be freed from all obligations of obedience and maintenance to them" except in the instance of a stepparent adoption, where the biological parent is married to the adopting party). This exception, of course, creates a challenging structural inequity as same-sex coparents are usually prohibited from marrying and thus cannot qualify for the stepparent exception.

18. *Id.* at 1274.

19. *Id.* at 1272.

20. NAT'L GAY & LESBIAN TASK FORCE, ANTI-ADOPTION LAWS IN THE U.S. 1 (2008), http://www.thetaskforce.org/downloads/reports/issue_maps/adoption_laws_07_09_color.pdf [hereinafter ANTI-ADOPTION] (visual representation of the states that restrict gay adoption); NAT'L GAY & LESBIAN TASK FORCE, SECOND-PARENT ADOPTION IN THE U.S. 1 (2007), http://www.outfront.org/files/pg332/Secondparentadoption.pdf [hereinafter SECOND-PARENT ADOPTION] (visual representation of status of second-parent adoption in the United States).

These weaknesses expose the coparent and his or her child to enormous risk, and impose costs on both the family and the courts.

Second-parent adoption is available in twenty-five states and the District of Columbia.[22] However, the legality of second-parent adoption under state statutes is unclear in twenty-one states.[23] Additionally, appellate courts in three states have ruled that state adoption law does not allow for second-parent adoption.[24] Further, six states have laws restricting the ability to adopt based either directly or indirectly on sexual orientation.[25]

Thus, the legitimacy of second-parent adoption is vulnerable to hostile interpretation without clear legislative approval. For example, *In re Adoption of Luke* affirmed that a coparent could not adopt her child because the partner/biological mother had not relinquished her parental rights.[26] Conversely to *In re Adoption of B.L.V.B.*,[27] the court concluded that the statute was "clear that . . . the parents' parental rights must be

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21. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., COSTS OF ADOPTING 2 (2004), http://www.childwelfare.gov/pubs/s_cost/s_costs.pdf [hereinafter GATEWAY] (stating adoption can cost up to $40,000); Dave Thomas Found. for Adoption, Adoption Facts: F.A.Q., http://www.davethomasfoundation.org/Adoption-Facts/F-A-Q- [hereinafter Dave Thomas Found.] (last visited Mar. 24, 2010) (estimating the average adoption proceeding lasts one to two years).

22. Alabama, Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, and Washington. CAL. FAM. CODE § 9000(b) (West 2004); COLO. REV. STAT. ANN. § 19-5-203(d.5) (West 2009); CONN. GEN. STAT. ANN. § 45a-724(3) (West 2004); VT. STAT. ANN. tit. 15A, § 1-102(b) (2007); Sharon S. v. Superior Court, 73 P.3d 554, 561, 570 (Cal. 2003); *In re* M.M.D., 662 A.2d 837, 862 (D.C. 1995); *In re* K.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1995); *In re* Adoption of K.S.P., 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004); *In re* Adoption of M.M.G.C., 785 N.E.2d 267, 270-71 (Ind. Ct. App. 2003); Adoption of Tammy, 619 N.E.2d 315, 321 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 536 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995); *In re* Adoption of R.B.F., 803 A.2d 1195, 1202 (Pa. 2002); SECOND-PARENT ADOPTION, *supra* note 20.

23. Arizona, Florida, Georgia, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. SECOND-PARENT ADOPTION, *supra* note 20, at 1.

24. Nebraska, Ohio, and Wisconsin. *In re* Adoption of Luke, 640 N.W.2d 374, 383 (Neb. 2002); *In re* Adoption of Doe, 719 N.E.2d 1071, 1073 (Ohio Ct. App. 1998); Georgina G. v. Terry M. (*In re* Angel Lace M.), 516 N.W.2d 678, 686 (Wis. 1994).

25. Arkansas, Florida, Michigan, Mississippi, Nebraska, and Utah. ANTI-ADOPTION, *supra* note 20, at 1. *But see In re* Adoption of Doe, 2008 WL 5006172, at *29 (Fla. Cir. Ct. Nov. 25, 2008) (holding Florida's statute prohibiting "homosexual" individuals from adopting violated equal protection rights of the adopting petitioner and children without satisfying the rational basis test).

26. 640 N.W.2d at 382-83.

27. 628 A.2d 1271, 1274 (Vt. 1993) (holding that the adoption statute's general purpose was "to clarify and protect the legal rights of the adopted person . . . , not to proscribe adoptions by certain combinations of individuals").

terminated . . . in order for the child to be eligible for adoption."[28] Here, the court declined to acknowledge that requiring a biological parent to relinquish his or her rights was "unreasonable and unnecessary,"[29] but rather insisted that reading an exception into the statute for same-sex coparents went against the presumption "that the Legislature intended a sensible, rather than an absurd, result."[30]

Unfortunately, a coparent-child relationship is not sufficiently protected even by the explicit availability of second-parent adoption because the process is time-consuming and can be very expensive.[31] Until the adoption is completed, the coparent is a third party to the parent-child relationship, and as such is exposed to a number of risks, including the death of the legal parent or the revocation of the legal parent's consent to the adoption.[32] Relatively little attention has been directed towards the dissolution of same-sex families, perhaps for fear that focus on negative aspects of a same-sex union will only fuel arguments that "gays are an inherently unstable, promiscuous lot."[33] Nevertheless, it is clear that not all couples, whether of the same- or opposite-sex, will last forever.[34] Same-sex couples with children discuss and even pursue adoption, but may fail to complete the lengthy, expensive process before the relationship dissolves, and the biological parent revokes his or her consent.[35] Exactly this scenario led to the dispute in *Lynda A.H. v. Diane T.O.*[36] There, the court found that the coparent did not have standing to petition for custody and visitation after a lower court had dismissed *sua sponte* a petition to adopt when the parties separated and the legal mother revoked her permission.[37] It is crucial here that adoption was foreclosed to the coparent; she was forced to resort to a petition for custody or visitation for which she did not have standing as a third party to the parent-child relationship.[38] Despite the

28. *In re Adoption of Luke*, 640 N.W.2d at 382-83.

29. *In re Adoption of B.L.V.B.*, 628 A.2d at 1272.

30. *In re Adoption of Luke*, 640 N.W.2d at 382.

31. *See* Dave Thomas Found., *supra* note 21 (estimating the average adoption proceeding lasts one to two years); GATEWAY, *supra* note 21, at 2 (stating adoption can cost up to $40,000).

32. *See* Polikoff, *supra* note 8, at 527-42 (discussing the consequences of the biological mother's death and the dissolution of the relationship in lesbian parenting couples).

33. Mary Coombs, *Insiders and Outsiders: What the American Law Institute Has Done for Gay and Lesbian Families*, 8 DUKE J. GENDER L. & POL'Y 87, 88 (2001).

34. *Id.*

35. *See* Forman, *supra* note 9, at 46 (examining the reasons why coparents who can adopt elect not to, including lack of consent).

36. 673 N.Y.S.2d 989, 990 (App. Div. 1998).

37. *Id.* at 990-91.

38. *See id*.

obvious familial relationship[39] and legally manifested intention to adopt, the court actively terminated a petition for adoption the instant the biological parent revoked her consent in the context of a break-up.[40] In this unfortunate situation, the coparent is often left with no legal recourse and an unprotected parent-child relationship.

Thus, second-parent adoption is an adaptation of traditional adoption law that permits a same-sex coparent to be declared a legal parent with all the rights and obligations of traditional parenthood without stripping the biological parent of his or her rights.[41] However, very few states have modified their adoption laws to incorporate second-parent adoption.[42] More states, in fact, have expressly limited the availability of *any* form of adoption on the basis of sexual orientation.[43] However, even where second-parent adoption is allowed, either statutorily or through judicial initiative, the process fails to offer adequate protection to nontraditional families.[44] Before the protracted and costly adoption process is complete, there may be no legal acknowledgement whatsoever of an already well-formed, loving, and nurturing parental relationship.[45]

B. Coparenting Agreements

Next, the second method coparents employ to document a parent-child relationship is a coparenting agreement. These agreements are statements coparents make to express their understanding of their parental rights and obligations.[46] For example, a pre-birth decree is a

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39. *See id.* at 990 (listing facts that make clear that petitioner and child shared a parent-child bond).

40. *See id*.

41. *See, e.g.*, *In re* Adoption of B.L.V.B., 628 A.2d 1271, 1272 (Vt. 1993); Forman, *supra* note 9, at 43-44; Franklin, *supra* note 15, at 684; Polikoff, *supra* note 8, at 522-27; Velte, *supra* note 15, at 252; Osborne, *supra* note 7, at 369; Williams, *supra* note 15, at 430-31.

42. *See* SECOND-PARENT ADOPTION, *supra* note 20, at 1 (noting that only California, Colorado, Connecticut, and Vermont have expressly authorized by statute second-parent adoption).

43. *See* ANTI-ADOPTION, *supra* note 20 (indicating that Arkansas, Florida, Michigan, Mississippi, Nebraska, and Utah have statutes restricting adoption based either directly or indirectly on sexual orientation).

44. *See, e.g*., *Lynda A.H.*, 673 N.Y.S.2d at 990-91; *see* Polikoff, *supra* note 8, at 527-42; *see supra* notes 31-40 and accompanying text.

45. *See* Polikoff, *supra* note 8, at 527-42.

46. *See* Christensen, *supra* note 5, at 1352 (arguing in favor of coparenting agreements because "[t]he planned lesbian family ought to be the ideal setting in which to give legal force to private ordering"); Forman, *supra* note 9, at 47 (suggesting that written agreements can help in a de facto determination, even if not per se enforceable); Osborne, *supra* note 7, at 370 ("Co-parenting agreements are legal documents that a lesbian couple uses to explain the rights and responsibilities of each co-parent.").

filed document that names the coparents as the legal parents of a child before the child is born.[47] Also, visitation agreements outline parental rights and responsibilities after a relationship has dissolved.[48] These agreements may be enforceable in court.[49] However, their enforceability is questionable, and they may only serve, at best, as evidence of the parties' intent.[50]

When honored, a coparenting agreement can give standing to a coparent for a lawsuit, and may even be enforced when the agreement is in the best interests of the child.[51] For example, in *A.C. v. C.B.*, the court held that a settlement agreement between coparents gave the coparent standing to assert her legal right to maintain an ongoing relationship with the child.[52] The court found that a parent could enter into an agreement regarding the custody of his or her child, which can be enforceable if that agreement is the best interests of the child.[53] Similarly, *Rubano v. DiCenzo* held a written agreement in the form of a "consent order previously entered by the court" enforceable so as to give the coparent visitation with the child.[54] However, the court expressly limited its holding by differentiating the consent order from a private agreement, noting that "a mere private agreement between two consenting adults cannot of itself confer jurisdiction upon the Family Court to modify or enforce the . . . agreement."[55]

As *Rubano* hinted, coparenting agreements are of questionable enforceability because some consider the agreements to be against

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47. Osborne, *supra* note 7, at 371-72; *see also* Bowe, *supra* note 11 (discussing the cautionary function of pre-birth coparenting agreements in the context of a nonanonymous sperm donation).

48. Osborne, *supra* note 7, at 372.

49. *See* A.C. v. C.B., 829 P.2d 660, 663 (N.M. Ct. App. 1992) (stating that a parent may enter into an agreement regarding the custody of her child); *In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) (finding a shared custody agreement between lesbian coparents enforceable if in the best interests of the children); Rubano v. DiCenzo, 759 A.2d 959, 972 (R.I. 2000) (determining that a lower court had jurisdiction to enforce visitation agreement between lesbian coparents); Forman, *supra* note 9, at 35-36 (discussing *Rubano v. DiCenzo*); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 383-89 (2002) (discussing *Rubano v. DiCenzo*).

50. Bowe, *supra* note 11; *see also* Holtzman v. Knott (*In re* H.S.H.-K.), 533 N.W.2d 419, 436 n.40 (Wis. 1995) ("An agreement between the parties could also indicate an adoptive or biological parent's consent to another to establish a parent-like relationship with the child.").

51. *See A.C.*, 829 P.2d at 664; *In re* Bonfield, 780 N.E.2d at 249; *Rubano*, 759 A.2d at 972; Forman, *supra* note 9, at 35-36; Jacobs, *supra* note 49, at 383-89.

52. *A.C.*, 829 P.2d at 661-62.

53. *Id.* at 663-64; *see In re Bonfield*, 780 N.E.2d at 249; *Rubano*, 759 A.2d at 972; Forman, *supra* note 9, at 35-36; Jacobs, *supra* note 49, at 383-89.

54. 759 A.2d at 961.

55. *Id.* at 962 n.2.

public policy.[56] Some courts simply refuse to uphold private agreements that create marital rights on the basis that unmarried people should not be entitled to the benefits and protections that marriage provides.[57] Under this line of thinking, a coparenting agreement that privately arranges for such "divorce-type remedies" as visitation and child support is not appropriate for unmarried people.[58] Other courts decline to enforce coparenting agreements as immoral contracts for children or "parenthood by contract."[59]

At best, even formal agreements between coparents function merely as evidence of their intent.[60] For example, the parties in *E.N.O. v. L.M.M.* signed a coparenting agreement both before and after the birth of their child that explicitly expressed their intent to share parenting responsibilities.[61] The agreement also stated that the coparent would retain her parental status even if the parties separated.[62] However, the agreement was not determinative in the court's decision to uphold a reinstatement of visitation.[63] Rather, the court relied on a de facto parent determination,[64] and listed the agreement as a factor that supported finding the coparent to be a de facto parent.[65] As this determination shows, the court did not defer to the twice-executed explicit coparenting agreement, but reduced it to an element that bolstered the de facto parent determination as evidence of the coparents' intent.

Thus, a coparenting agreement does little to ensure a coparent's parental rights. A court may find the agreement is not enforceable on public policy grounds.[66] Or, a court may have jurisdiction to enforce the agreement, particularly if it is in the form of a court order, but the

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56. Williams, *supra* note 15, at 428 (arguing that "most courts consider" coparenting agreements "abhorrent to public policy"); *see also Rubano*, 759 A.2d at 962 n.2.

57. *See* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 16 (2005); *see also* Christensen, *supra* note 5, at 1326 ("[M]arriage remains a legal structuring device that cannot be significantly altered nor fully replicated by private arrangement.").

58. Bonauto, *supra* note 57, at 16 (discussing *Collins v. Guggenheim*, 631 N.E.2d 1016, 1017 (Mass. 1994)).

59. T.F. v. B.L., 813 N.E.2d 1244, 1246 (Mass. 2004); *see* Williams, *supra* note 15, at 428-30 (discussing courts that have declined to uphold coparenting agreements).

60. Bowe, *supra* note 11; *see also* Holtzman v. Knott (*In re* H.S.H.-K.), 533 N.W.2d 419, 436 n.40 (Wis. 1995) (holding that an agreement between coparents can indicate a legal parent's consent to coparent to establish a parent-like relationship with the child).

61. 711 N.E.2d 886, 889 (Mass. 1999); *see* Forman, *supra* note 9, at 41 (discussing *E.N.O. v. L.M.M.*); Velte, *supra* note 15, at 262 (discussing *E.N.O. v. L.M.M.*).

62. *E.N.O.*, 711 N.E.2d at 889.

63. *Id.* at 890-91 (stating that the court should determine whether visitation is in the best interest of the child).

64. *See* discussion *infra* Parts II.C.1, III.B.3 (explaining the de facto parent standard in detail).

65. *E.N.O.*, 711 N.E.2d at 892.

66. *See, e.g.*, Williams, *supra* note 15, at 428; *see supra* notes 56-59 and accompanying text.

agreement is still subject to the court's best interests analysis.[67] Otherwise, agreements between consenting adults are reduced to evidence of intent.[68] Perhaps the biggest pitfall of a coparenting agreement is simply the idea of contracting upon the decision to have a child; formal agreements in harmonious familial settings are infrequent and impractical.[69] It takes tremendous foresight and levelheadedness to reduce the emotional and personal decision to have a child to a written agreement, particularly one that provides for separation.[70] As one commentator noted, "people in love and planning to enter a life together rarely expect to break up."[71]

C. Judicial Remedies

As a third method, in addition to the relatively non-litigious options of second-parent adoption and coparenting agreements, nonlegal coparents may turn to the courts for judicial remedies.[72] In the past, a coparent was a legal stranger who had no standing to interfere with the biological parent's right to make autonomous decisions regarding the upbringing of the child absent a showing of parental unfitness.[73] The decision in *Nancy S. v. Michele G.* is an example of a classic denial to expand the definition of "parent" to include a same-sex coparent.[74] There, the court found that the litigants had been in a committed relationship, decided to create a family, and had children.[75] But, the court declined to define a coparent as a parent by equitable principles for fear of exposing "natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family."[76] The court deferred to the legislature, claiming that it was "not telling the parties that the issues they raise are

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67. *See, e.g.*, *In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) (finding a shared custody agreement between lesbian coparents enforceable if in the best interests of the children); *see supra* notes 51-55 and accompanying text.

68. *See, e.g.*, Bowe, *supra* note 11; *see supra* notes 60-65 and accompanying text.

69. *See* Coombs, *supra* note 33, at 88.

70. *See id.*

71. *Id.*

72. *See also* Polikoff, *supra* note 8, at 483-86 (discussing equitable parenthood).

73. *See, e.g.*, Nancy S. v. Michele G., 279 Cal. Rptr. 212, 216-17 (Ct. App. 1991).

74. *Nancy S.*, 279 Cal. Rptr. at 219; *see also* Jacobs, *supra* note 49, at 380 (discussing the court's refusal to expand the definition of parent to include the mother's partner in *Nancy S. v. Michele G.*); Polikoff, *supra* note 8, at 539-40 (discussing *Nancy S. v. Michele G.*); Velte, *supra* note 15, at 259 (discussing *Nancy S. v. Michele G.*); *see also* Peggy Orenstein, *The Other Mother*, N.Y. TIMES, July 25, 2004, § 6 (Magazine), at 24 (describing courts' fears concerning psychological parent doctrine).

75. *Nancy S.*, 279 Cal. Rptr. at 214.

76. *Id.* at 219.

unworthy of legal recognition," but rather it intended "only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue."[77]

However, despite some courts' disinclination to craft equitable remedies for nontraditional familial disputes,[78] courts have more recently employed equitable principles to accommodate the reality of childrearing and parenthood in recognition of the mutable structure of the modern family.[79] These equitable doctrines include de facto parenthood, *in loco parentis*, and equitable estoppel. However, these judge-made remedies are often denounced as inadequate "judicial activism," and courts are chastised for failing to defer to the legislature.[80]

1. De Facto Parenthood[81]

A de facto, or psychological, parent is a common law concept that defines a parent "by virtue of a parent-like, caretaking role in relation to the child."[82] This test defines nonbiological parenthood by functionality. If the coparent acts like a parent, meaning he or she cares physically and emotionally for the child in a parental capacity without an expectation of compensation,[83] the court may find him or her to be a de facto parent. This definition of parenthood takes the emphasis off of genetic connection, and focuses on real-life interaction; a parent is a person who parents a child.

Working with this general definition in mind, courts have created several bifurcated analysis tests of standing and best interests of the child to determine who qualifies as a de facto parent.[84] In particular, the Wisconsin Supreme Court formulated a popular analysis in *Holtzman v.*

77. *Id.*

78. *See id.*

79. *See* Polikoff, *supra* note 8, at 491-502 (discussing equitable estoppel and *in loco parentis*); Osborne, *supra* note 7, at 378-85 (reviewing de facto parent and *in loco parentis* doctrines).

80. *See* Franklin, *supra* note 15, at 657-58 (exploring courts' decisions "to extend legal recognition to new family forms, especially in . . . queer contexts, [and] face charges of overstepping their authority," or "of engaging in 'judicial activism'"); *see infra* notes 149-60 and accompanying text.

81. The terms "de facto parent" and "psychological parent" are used interchangeably depending on jurisdiction. For the purposes of this Note, I will use the term "de facto parent."

82. Osborne, *supra* note 7, at 378; *see* Polikoff, *supra* note 8, at 510 (comparing *in loco parentis* to de facto parental standards); Velte, *supra* note 15, at 258 (explaining de facto parent doctrine); Williams, *supra* note 15, at 431-37 (discussing different courts' use of the de facto parent concept).

83. *See, e.g.*, Holtzman v. Knott (*In re* H.S.H.-K.), 533 N.W.2d 419, 435-36 (Wis. 1995).

84. Osborne, *supra* note 7, at 376.

Knott,[85] which combines a four-prong test for de facto parenthood with a requirement for a "triggering event," in which the legal parent substantially interferes with the coparent's relationship with the child.[86] Justifying the exercise of its equitable powers, the court noted that

> [w]hen a non-traditional adult relationship is dissolving, the child is as likely to become a victim of turmoil and adult hostility as is a child subject to the dissolution of a marriage. Such a child needs and deserves the protection of the courts as much as a child of a dissolving traditional relationship.[87]

Under this test, the petitioner must demonstrate his or her "parent-like relationship with the child" by proving the following four elements:

> (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[88]

The court concluded that its use

> of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent. It also protects a child's best interest by preserving the child's relationship with an adult who has been like a parent.[89]

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85. 533 N.W.2d at 435-36; *see* William B. Turner, *The Lesbian De Facto Parent Standard in* Holtzman v. Knott*: Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135, 141-45 (2007).

86. *Holtzman*, 533 N.W.2d at 435; *see also* Forman, *supra* note 9, at 28-29; Jacobs, *supra* note 49, at 358; Velte, *supra* note 15, at 262-63 (explaining *Holtzman v. Knott*); *see also* Turner, *supra* note 85, at 139 ("[S]tate supreme courts should recognize the visitation rights of de facto parents, thus giving trial judges the leeway to order visitation with the co-parent where the facts demonstrate that doing so is in the best interest of the child.").

87. *Holtzman*, 533 N.W.2d at 421; *see* Turner, *supra* note 85, at 143 ("[T]he court justified its use of equitable power to grant permission to petition for visitation in a circumstance that the statute did not expressly address by reference to the legislature's frequent repetition of the child's best interest as the paramount policy priority in all cases of custody and visitation.").

88. *Holtzman*, 533 N.W.2d at 421 & n.2 ("A petitioner's contribution to a child's support need not be monetary.").

89. *Id.* at 436; *see* Turner, *supra* note 85, at 144-45 (discussing the importance of the first element of the *Holtzman* test).

In addition to proving the four above elements, the petitioning coparent also must prove that the legal parent has substantially interfered with the coparent's relationship with the child, and that the coparent pursued "court ordered visitation within a reasonable time after" the legal parent's interference.[90] The court required this "triggering event" because of a "continuing legislative concern with identifying the triggering events that warrant state interference in an otherwise protected parent-child relationship."[91] With this requirement, the court recognized and respected the strength of the presumption in favor of the legal parent's constitutionally protected autonomy, even in the face of the legal parent's fostering of a parental relationship between the child and the coparent.[92] Thus, a court applying this standard will not declare a coparent to be a de facto parent until there is a substantial conflict between the legal parent and the coparent, in which the legal parent restricts the coparent-child relationship.[93]

Other courts have adopted and refined the Wisconsin test.[94] For example, the Washington Supreme Court adopted the *Holtzman v. Knott* standard, but "dropped the need for a 'triggering event'"[95] and placed the de facto parent in parity with the legal parent, subject to the best interests of the child.[96] Instead of requiring a triggering event to justify state intervention in the parent-child relationship, the court does not characterize its action as "intervention" at all:

> The State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to *de facto* parents; a status that can be achieved only through the active encouragement of the biological or adoptive parent by affirmatively establishing a family unit with the *de facto* parent and child or children that accompany the family. In sum, we find that the rights and responsibilities which we recognize as attaching to *de facto* parents do not infringe on the fundamental liberty interests of the other legal parent in the family unit.[97]

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90. *Holtzman*, 533 N.W.2d at 421.

91. *Id.* at 427.

92. *See id*. at 429-30; Turner, *supra* note 85, at 144 (discussing triggering event requirement of the *Holtzman* standard).

93. *See Holtzman*, 533 N.W.2d at 436.

94. *See, e.g.*, V.C. v. M.J.B, 748 A.2d 539, 551-54 (N.J. 2000) (adopting the *Holtzman* test, giving more specific guidelines and explaining the significance of the prongs); *see also* Forman, *supra* note 9, at 32-33 (discussing *V.C. v. M.J.B.*); Jacobs, *supra* note 49, at 359-63 (discussing *V.C. v. M.J.B.*).

95. Turner, *supra* note 85, at 149.

96. *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005).

97. *Id.* at 179 (footnote omitted).

Thus, the holding rendered "the crux of" the legal parent's "constitutional arguments moot" because it established that a de facto parent and the legal parent would "*both* have a 'fundamental liberty interest[]' in the 'care, custody, and control'" of the child.[98]

However, there are other variations in de facto standards across jurisdictions, such as the broader definitional standard enunciated in *E.N.O. v. L.M.M.*[99] There, Massachusetts forewent an enumerated test, and opted rather to define a de facto parent as follows:

> A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. . . . The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide [for reasons other than financial compensation].[100]

In determining de facto parentage, the court stated that "the best interests calculus must include an examination of the child's relationship with both his legal and de facto parent," and suggested that courts consider the factors previously set forth in the context of heterosexual parenting couples in examining the child's relationship with the de facto parent.[101]

Similarly, the court in *In re E.L.M.C.* expressly declined to adopt any fixed standard for determining a de facto parent.[102] The court noted that the narrower definitions of de facto parenthood were "useful to restrict the class of nonparents who may seek parental rights," but found that even under its jurisdiction's broader definition,[103] the "denial or significant limitation of contact with a [de facto] parent creates an

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98. *Id.* at 178 (alteration in original) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

99. 711 N.E.2d 886, 891 (Mass. 1999).

100. *Id.*; *see* Jacobs, *supra* note 49, at 363-66 (discussing *E.N.O. v. L.M.M.*).

101. *E.N.O.*, 711 N.E.2d at 891; *see also* Elisa B. v. Superior Court, 117 P.3d 660, 662, 670 (Cal. 2005) (applying the Uniform Parentage Act to two women as it would a man and a woman, and holding a person "who agreed to raise children with her lesbian partner, supported her partner's [conception], and received the resulting . . . children into her home and held them out as her own, is the children's parent"); Forman, *supra* note 9, at 36-39 (discussing *Elisa B.* and using the Uniform Parentage Act to achieve parental equality).

102. 100 P.3d 546, 561 (Colo. App. 2004); *see* Forman, *supra* note 9, at 26-28 (discussing *In re E.L.M.C.*).

103. *In re E.L.M.C.*, 100 P.3d at 559, 561 (defining psychological parent as "'someone other than a biological parent who develops a parent-child relationship with a child through day-to-day interaction, companionship, and caring for the child'" (quoting *In re* Marriage of Martin, 42 P.3d 75, 77-78 (Colo. App. 2002))).

inherent risk of harm to a young child's emotional well-being."[104] "Accordingly, and without precisely defining all attributes of a [de facto] parent," the court concluded "that emotional harm to a young child is intrinsic in the termination or significant curtailment of the child's relationship with a [de facto] parent under any definition of that term."[105] This holding, which made the restraint or termination of a de facto parent-child relationship harmful as a matter of law, silenced the legal parent's constitutional challenges to the court's interference in the parental relationship.[106]

Thus, de facto parenthood is an equitable concept that courts can use to find a coparent to be a parent.[107] There are a variety of tests, ranging from the very particularized standard enunciated in *Holtzman v. Knott*[108] and its manifestations in other jurisdictions,[109] to the definitional standard of *E.N.O. v. L.M.M.*,[110] to the explicit rejection of any definition, as in *In re E.L.M.C.*[111] No matter what test is used, the court must grapple with the parent's constitutional right to direct his or her child's upbringing free from the interference of the state.[112] In *Holtzman*, the triggering event justified state inference.[113] On the other hand, the court in *In re Parentage of L.B.* found that the status of de facto parent entitled the coparent to an equal fundamental parental right, and thus the court's intervention was not interference at all.[114] *In re E.L.M.C.* took an even different approach, making the deprivation of a de facto parental relationship harmful to the child as a matter of law, justifying the interference.[115]

In sum, a de facto determination is a judicial attempt to give legal significance to an important and actual parenting relationship that would be otherwise ignored by an unsympathetic legal system. While the *Holtzman* test is useful because it offers concrete criteria to better assess the existence of a de facto relationship, it is troubling that a court cannot

104. *In re E.L.M.C.*, 100 P.3d at 561.
105. *Id.*
106. *See id.* at 562.
107. *See* Velte, *supra* note 15, at 258 (explaining de facto parent concept); *see supra* notes 81-106 and accompanying text.
108. 533 N.W.2d 419, 435-36 (Wis. 1995).
109. *See, e.g.*, V.C. v. M.J.B, 748 A.2d 539, 551-54 (N.J. 2000); *In re* Parentage of L.B., 122 P.3d 161, 176-77 (Wash. 2005).
110. 711 N.E.2d 886, 891 (Mass. 1999).
111. 100 P.3d 546, 561 (Colo. App. 2004).
112. *Id.* at 562; *E.N.O.*, 711 N.E.2d at 893; *see also Holtzman*, 533 N.W.2d at 435.
113. *See Holtzman*, 533 N.W.2d at 421, 427, 435.
114. *See In re Parentage of L.B.*, 122 P.3d at 178.
115. *See In re E.L.M.C.*, 100 P.3d at 561.

find a coparent to be a de facto parent before there is serious conflict.[116] This arrangement does not seem to be in the best interests of the child, as his or her relationship with the coparent will have already been interrupted.[117] More practically, the courts in *E.N.O.* and *In re E.L.M.C.* entreat the legal system to look at the reality of the situation, and determine if a coparent-child relationship exists by considering factors used in any such determination, regardless of the sexual orientations of the parents.[118] Perhaps a combination of the two justifications, that the coparent has constitutional rights equal to those of the legal parent[119] and that interference in the child's relationship with the coparent is harmful as a matter of law,[120] form the best basis for court intervention without requiring that the damage already be done.[121]

2. *In Loco Parentis*

The legal doctrine of *in loco parentis*, meaning "in the place of the parent," implicates that a coparent has assumed parental status by accepting and executing the obligations of a parent with the consent of the legal parent.[122] For example, the Pennsylvania Supreme Court explained that *in loco parentis* "refers to a person who puts oneself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption."[123] The court stated that the doctrine requires "first, the assumption of a parental status, and, second, the discharge of parental duties."[124] The status of *in loco parentis*, which carries with it exactly the same "rights and liabilities . . . as between parent and child," cannot be achieved "in defiance of the parents' wishes and the parent/child relationship."[125] In *T.B. v. L.R.M.*, the Pennsylvania court rebuffed the litigant's challenge to the common law doctrine as interfering with her parental rights and as being outside of the court's province, more properly left to the legislature:

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116. *See Holtzman*, 533 N.W.2d at 421, 436.

117. *See, e.g.*, *id.* at 436.

118. *See In re E.L.M.C.*, 100 P.3d at 561; E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999).

119. *See In re Parentage of L.B.*, 122 P.3d at 178.

120. *In re E.L.M.C.*, 100 P.3d at 561.

121. *E.g.*, *Holtzman*, 533 N.W.2d at 436.

122. Osborne, *supra* note 7, at 382-83; *see* Polikoff, *supra* note 8, at 502 (explaining *in loco parentis*); Velte, *supra* note 15, at 285 (defining *in loco parentis*).

123. T.B. v. L.R.M., 786 A.2d 913, 916 (Pa. 2001); *see also* Forman, *supra* note 9, at 30-31 (discussing *T.B. v. L.R.M.*); Velte, *supra* note 15, at 260-61(discussing *T.B. v. L.R.M.*).

124. *T.B.*, 786 A.2d at 916-17.

125. *Id.* at 917.

> The *in loco parentis* basis for standing recognizes that the need to guard the family from intrusions by third parties and to protect the rights of the natural parent must be tempered by the paramount need to protect the child's best interest. Thus, while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a natural parent's objections.[126]

Thus, the child's best interest in maintaining a parental relationship may trump the parent's constitutional right to autonomy. The court also noted that a "biological parent's rights 'do not extend to erasing a relationship between her partner and her child which she voluntarily created and actively fostered simply because after the parties' separation she regretted having done so.'"[127]

While *in loco parentis* has doctrinal similarities to de facto parenthood,[128] *in loco parentis* does not legally empower the coparent nearly as much as de facto status.[129] Clearly, there is little difference between the broader definitional standards of a de facto parent and the principle of *in locos parentis*; both require a showing of day-to-day involvement in the child's life so as to fill the role of a parent with the approval of the legal parent.[130] However, whereas the de facto status places the coparent in legal parity with the legal parent,[131] *in loco parentis* merely awards standing to a coparent to bring suit as a third party.[132] Thus, *in loco parentis* provides very little protection to a coparent because of the high evidentiary burden he or she will be forced

126. *Id.* at 917 (quoting J.A.L. v. E.P.H., 682 A.2d 1314, 1319-20 (Pa. Super. Ct. 1996)).

127. *Id.* at 919 (quoting *J.A.L.*, 682 A.2d at 1322).

128. *See* discussion *supra* Part II.C.1.

129. *See* Osborne, *supra* note 7, at 384-85 (explaining disadvantages of *in loco parentis* status).

130. *See T.B.*, 786 A.2d at 916 (defining *in loco parentis*); Polikoff, *supra* note 8, at 510 (comparing *in loco parentis* and de facto parenthood); Osborne, *supra* note 7, at 378 (defining de facto parenthood).

131. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (holding de facto parent in legal parity with legal parent).

132. *See, e.g.*, *T.B*, 786 A.2d at 914 (applying *in loco parentis* as a method for standing); Osborne, *supra* note 7, at 384-85.

to carry as a third party intruding on the private parent-child relationship.[133]

3. Equitable Estoppel

In addition to the de facto parent and *in loco parentis* doctrines, courts have also employed equitable estoppel in custody and visitation proceedings to affirm the parentage of a coparent.[134] The use of the equitable estoppel doctrine in this context turns on the idea that acts by the legal parent that hold out the family as headed by the two same-sex coparents, such as hyphenating the child's last name, accepting child support, or signing a coparenting agreement, should prevent a biological coparent from disclaiming the nonlegal coparent's relationship to their child.[135]

For example, the court in *Kristine H. v. Lisa R.* held the legal parent estopped from attacking the validity of a stipulation she filed with the court while she was pregnant that named her then-partner as the child's coparent.[136] The court concluded that because she "enjoyed the benefits of that judgment for nearly two years, it would be unfair both to Lisa and the child to permit Kristine to challenge the validity of that judgment."[137] The court reasoned that allowing the challenge would permit the legal parent to "'trifle with the courts'" and "contravene the public policy favoring that a child has two parents rather than one."[138] While the court was primarily concerned with "'the functioning of the courts,'" and secondarily with "'other considerations of public policy,'"[139] it is important to note that the court came to the proper resolution; it did not allow a biological coparent to curtail or dissolve a parental bond that she fostered and encouraged simply because the adult relationship had ended.[140]

However, equitable estoppel offers little to no protection to coparents because use of the doctrine is truly up to the ruling court.[141] While this court exercised its equitable powers to indirectly protect the

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133. Osborne, *supra* note 7, at 385.

134. *See* Polikoff, *supra* note 8, at 491 (exploring equitable estoppel theories); Velte, *supra* note 15, at 284-85 (explaining doctrine of equitable estoppel).

135. Polikoff, *supra* note 8, at 499.

136. 117 P.3d 690, 692 (Cal. 2005).

137. *Id.* at 696.

138. *Id.* (quoting Nancy B. v. Charlotte M. (*In re* Adoption of Matthew B.-M.), 284 Cal. Rptr. 18, 34 (Ct. App. 1991)).

139. *Kristine H.*, 117 P.3d at 695 (quoting *In re* Griffin, 431 P.2d 625, 629 (Cal. 1967)).

140. *Kristine H.*, 117 P.3d at 693, 696.

141. *Compare id.* at 693 (holding legal parent estopped from challenging the validity of the judgment), *with* Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123, 126 (Ct. App. 2004) (invalidating judgment).

coparent's rights and duties and the child's best interests, other courts may not have behaved the same way.[142] For example, the Supreme Court of California in *Kristine H. v. Lisa R.* reversed the Court of Appeal, which previously found the stipulated judgment to be void.[143] In addition to being subject to a court's discretion, access to the doctrine at all depends on a series of fortuitous circumstances.[144] First, there must be a judgment or perhaps other acts of the legal parent that are now in the coparent's favor.[145] Then, the legal parent must challenge the coparent's rights.[146] Next, the court must be sympathetic to the coparent.[147] If all these factors align, then perhaps a favorable judgment will be upheld.[148] This kind of gamble is no way to ensure that coparent-child bonds will be legally protected.

For this reason and others, the exercise of judicial equitable powers is subject to strong criticisms and weaknesses as inappropriately infringing upon legislative province and fashioning insufficient solutions.[149] To critics, the exercise of judicial equitable powers is "judicial activism," with judges legislating from the bench, and thus exceeding their authority.[150] Take, for example, Judge Bellacosa's dissent in *In re Jacob*, which criticized the majority for exceeding its authority and violating legislative intent when it interpreted state adoption law to allow for second-parent adoptions:[151]

> [I]f the Legislature had intended to alter the definitions and interplay of its plenary, detailed adoption blueprint to cover the circumstances as presented here, it has had ample and repeated opportunities, means and words to effectuate such purpose plainly and definitively as a matter of notice, guidance, stability and reliability. It has done so

142. *Compare Kristine H.*, 117 P.3d at 693 (holding legal parent estopped from challenging the validity of the judgment), *with Kristine Renee H.*, 16 Cal. Rptr. 3d at 126 (invalidating judgment).

143. *Kristine H.*, 117 P.3d at 693.

144. *See, e.g.*, *Kristine H.*, 117 P.3d at 695-96 (listing all of the fortuitous factors).

145. *See, e.g.*, *id.* at 696 (stipulated judgment that both women were parents of the child).

146. *See, e.g.*, *id.* at 692 (biological parent challenging validity of stipulated judgment).

147. *See, e.g.*, *id.* at 696 (unfair to coparent to allow biological parent to challenge judgment).

148. *Compare id*. at 693 (legal parent estopped from challenging the validity of the judgment), *with* Kristine Renee H. v. Lisa Ann R., 16 Cal. Rptr. 3d 123, 126 (Ct. App. 2004) (invalidating judgment).

149. *See* Jacobs, *supra* note 49, at 355 ("Equitable principles alone are not sufficient to adequately address the lesbian coparent dilemma."); *see also id.* at 366-68.

150. *See, e.g.*, *In re* Jacob, 660 N.E.2d 397, 414 (N.Y. 1995) (Bellacosa, J., dissenting); *see also* Franklin, *supra* note 15, at 657-58 ("Courts deciding to extend legal recognition to new family forms, especially in . . . queer contexts, face charges of overstepping their authority. That is, of engaging in 'judicial activism.'").

151. *In re Jacob*, 660 N.E.2d at 406 (Bellacosa, J., dissenting).

> before . . . . Because the Legislature did not do so here, neither should this Court in this manner.[152]

This dissent echoes the concern of the majority in *Nancy S. v. Michele G.* that the courts are not capable of "fashioning a comprehensive solution to such a complex and socially significant issue."[153] Thus, Judge Bellacosa urged that the court enforce the law as written by the legislature, without stretching the statutes to fit novel circumstances.[154]

Admittedly, critics of the exercise of judicial power without express legislative blessing have a point when they focus on the blurred line between construing and making the law; without a comprehensive solution, the inconsistent individual solutions of each court engender confusion and anxiety.[155] The standards and burdens vary widely across jurisdictions.[156] A litigant does not know, in the absence of clear statutory guidance, if his or her individual case will meet the equitable standards.[157] One commentator has theorized that coparents might hesitate to bring a lawsuit for "fear of a homophobic response and instead force themselves to treat the situation as if their child had died."[158] The coparents who decide to bring suit will no doubt spend large sums of money and years litigating with no guarantees of a favorable result.[159]

D. Legislative Solutions

Unlike the exercise of equitable powers, the fourth method, legislative solutions, can offer structured and universal protection to nontraditional families.[160] In fact, the benefits of legislation directly and

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152. *Id.* at 414 (Bellacosa, J., dissenting).

153. Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991); *see In re* Jacob, 660 N.E.2d at 414 (Bellacosa, J., dissenting).

154. *In re Jacob*, 660 N.E.2d at 414 (Bellacosa, J., dissenting).

155. *See* Velte, *supra* note 15, at 256 ("Instability characterizes the present legal landscape of lesbian-parented family disputes."); Williams, *supra* note 15, at 436 ("Without a clear, legally recognized right such as that conferred by marriage, same-sex co-parents may be apprehensive in petitioning the court in fear of a homophobic response and instead force themselves to treat the situation as if their child had died. The non-legal parents that decide to pursue litigation will sacrifice years of their lives and large amount of money with no definite award.").

156. *See* Velte, *supra* note 15, at 256 ("[T]he protection of the non-legal parent-child relationship depends solely on jurisdictional location of the lesbian-parented family when it dissolves.").

157. *See supra* note 155.

158. Williams, *supra* note 15, at 436.

159. *Id.* at 436.

160. *See id.* at 420 ("The best interests of the child require that legislatures grant legal recognition to same-sex relationships so that children and parents in today's society can all receive the same rights and be subject to the same obligations of the parent-child relationship.").

comprehensively address the inadequacies of judicial responses to this "complex and socially significant issue."[161] With statutory guidance, courts will no longer be forced to fashion individual resolutions to reach equitable results, or to stretch the interpretations of laws that perhaps never contemplated nontraditional family compositions.[162] Thus, legislative articulation of the rights and obligations of same-sex parents can serve to increase the consistency of resolutions, and leaves less up to the discretion of an individual judge.[163] This improved stability can help families headed by same-sex coparents to structure their relationships around articulated universal legal standards, and relieves some of the anxiety and confusion created by the current uncertainty of their rights and obligations.[164]

There are two primary types of legislative solutions that attempt to modernize family law to meet the demands of today's changing family composition: same-sex marriage[165] and third party statutes.[166] However, the statutory provisions that offer recognition to same-sex coparents are flawed in that they are not universally available, vary widely across jurisdictions, and often fail to address the issues without prejudice.

1. Marriage

First, same-sex marriage promises the identical protections to same-sex coparents and their children as traditional marriage affords families headed by opposite-sex parents.[167] If the partners marry before the conception of their child, the coparent will usually be afforded immediate "full parental status"[168] due to both "the common law presumption of legitimacy, that a husband is deemed to be the father of

161. Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (Ct. App. 1991).

162. *See, e.g.*, *In re* Jacob, 660 N.E.2d 397, 405 (N.Y. 1995); Adoption of B.L.V.B., 628 A.2d 1271, 1274 (Vt. 1993) (allowing second-parent adoption as comporting with "the general intent and spirit" of state adoption law); Forman, *supra* note 9, at 44 (discussing *Adoption of B.L.V.B.*).

163. *See supra* notes 141-43 and accompanying text.

164. *See supra* notes 155-60 and accompanying text.

165. *See generally* Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411 (1999) (describing the importance of the institution in American culture and enumerating the many benefits of marriage).

166. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 64 (2000) ("The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family."); *see* discussion *infra* Part II.D.2.

167. *See* Forman, *supra* note 9, at 44; Williams, *supra* note 15, at 420 (noting that the best interests of children require legislative recognition of same-sex relationships "so that children and parents in today's society can all receive the same rights and be subject to the same obligations of the parent-child relationship."); *see generally* Silverman, *supra* note 165 (noting the importance of marriage as an institution in American culture and enumerating its many benefits).

168. Forman, *supra* note 9, at 44.

any child born during a marriage,"[169] and many statutes that follow the common law rule.[170] Thus, both coparents would automatically be on equal footing with regards to their child. Also, divorce remedies formerly foreclosed to same-sex couples would be fully available.[171] Therefore, the methods and principles of marital dissolution developed over the years in the context of traditional families could easily be applied to nontraditional families.[172] Unfortunately, same-sex marriage is available in only five states.[173]

However, several states offer alternatives to marriage to same-sex partners, such as domestic partnerships or civil unions.[174] The extent to

169. Silverman, *supra* note 165, at 430.

170. *Id.*

171. *See* Bonauto, *supra* note 57, at 16 (discussing difficulties in applying marital rules, including divorce remedies, to a non-marital relationship); *see also supra* notes 57-58 and accompanying text.

172. *See* Foreman, *supra* note 9, at 44-45 (discussing enactment of same-sex marriage and marriage alternative statutes in several states); Williams, *supra* note 15, at 437-39 (discussing states' applications of marital principles to same-sex couples).

173. Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008) (holding that the equal protection provision of the state constitution prohibited a bar on same-sex couples marrying); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (holding statutory language limiting marriage to opposite-sex couples invalid and stating that the statute had to be interpreted to allow for same-sex marriage); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."); H.R. 436-FN-Local, 2009 Leg., Reg. Sess. (N.H. 2009) (bill providing for same-sex marriage and conversion of civil unions into marriage and going into effect January 1, 2011); Daniela Altimari, *State Supreme Court Legalizes Same-Sex Marriage*, HARTFORD COURANT, Oct. 11, 2008, http://www.courant.com/news/connecticut/hc-gaymarriage1011.artoct11,0,1107488.story (describing Connecticut high court ruling allowing same-sex marriage); NAT'L GAY & LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. 1 (2009), http://www.thetaskforce.org/downloads/reports/issue_maps/rel_recog_11_4_09_color.pdf [hereinafter RELATIONSHIP RECOGNITION] (visual representation of relationship recognition in the United States indicating "full marriage equality" in Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont). *See generally* Bonauto, *supra* note 57 (contextualizing *Goodridge* and updating on events following the ruling).

174. CAL. FAM. CODE § 297 (West 2004) (establishing domestic partnership between "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring"); D.C. CODE § 32-702 (2001) (domestic partnerships must be registered before the mayor in order to qualify for benefits); HAW. REV. STAT. §§ 572C-1 to -7 (2006) (reciprocal beneficiaries with limited rights); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2008) (allowing for registry of domestic partnership); MD. CODE ANN., HEALTH-GEN. § 6-101 (West 2009) (defining domestic partnership); N.H. REV. STAT. ANN. §§ 457-A:1 to A:8 (Supp. 2008) (defining eligibility for and rights associated with civil unions); N.J. STAT. ANN. § 26:8A-2 (West 2007) (defining domestic partnerships with limited rights); N.J. STAT. ANN. §§ 37:1-28 to -36 (West Supp. 2009) (civil union with coextensive rights); WASH. REV. CODE ANN. §§ 26.60.010-.901 (West Supp. 2009) (defining domestic partnership with most rights); Lewis v. Harris, 908 A.2d 196, 215, 224 (N.J. 2006) (holding that the Domestic Partnership Act "failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples," but leaving to legislature whether or not to change the definition of marriage); RELATIONSHIP RECOGNITION, *supra* note 173, at 1.

which these alternative institutions grant the rights and obligations of marriage varies according to jurisdiction.[175] None of the alternative institutions confer benefits and duties that are coextensive with those of marriage, with the exception New Jersey's civil union.[176] Therefore, they may fail to protect the coparent-child relationship as fully as marriage.[177] Moreover, the alternative institutions remain nonetheless separate from marriage, and are inherently unequal even where accorded the same rights and obligations as marriage.[178] Yet, marriage and similar institutions remain widely unavailable to same-sex couples,[179] as most states "refuse to recognize the validity of the bond between" these individuals and the legitimacy of their families.[180] While "separate but equal" is unacceptable in terms of race,[181] it is permitted in terms of sexual orientation.[182]

Furthermore, the Defense of Marriage Act ("DOMA") aids the refusal of states and the federal government to legally recognize the legitimacy of the commitment of same-sex couples to each other and their families.[183] DOMA prohibits the federal government from

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175. *See* RELATIONSHIP RECOGNITION, *supra* note 173, at 1.

176. Only civil unions available in New Jersey create the same rights and obligations as marriage. *Compare* N.J. STAT. ANN. § 37:1-31 (West Supp. 2009) (defining civil union with coextensive rights), *and Lewis*, 908 A.2d at 224 (holding equal protection requires either same-sex marriage or an institution with coextensive rights), *with* CAL. FAM. CODE § 297.5 (West Supp. 2009) (granting most rights to domestic partnerships), D.C. CODE § 32-702 (2001) (domestic partnership with limited rights), HAW. REV. STAT. § 572C-6 (2006) (reciprocal beneficiaries with limited rights), ME. REV. STAT. ANN. tit. 22. § 2710 (Supp. 2008) (allowing for registry of domestic partnership), MD. CODE ANN., HEALTH-GEN. § 6-101 (West Supp. 2009) (defining domestic partnership), N.H. REV. STAT. ANN. § 457-A:6 (Supp. 2008) (defining rights associated with civil unions), WASH. REV. CODE ANN. §§ 26.60.070-.080 (West Supp. 2008) (defining rights associated with domestic partnerships), B. 16-52 (D.C. 2005) (purpose of bill is to "grant domestic partners similar rights and responsibilities currently held by spousal couples in the areas of spousal immunity, inheritance, surviving spouses and children, spousal support, and public assistance"), *and* H.R. 2839, 75th Legis. Assem., Reg. Sess. (Or. 2009) (enacted bill amending laws to include domestic partnership with most rights).

177. Silverman, *supra* note 165, at 456.

178. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (implicating that denying marriage to same-sex couples creates "second-class citizens"); Williams, *supra* note 15, at 438-39 (discussing *Goodridge*); *see also* Silverman, *supra* note 165, at 453-57 (discussing the inadequacies of alternatives to marriage).

179. *See* RELATIONSHIP RECOGNITION, *supra* note 173 (indicating that the majority of states do not recognize same-sex relationships).

180. Williams, *supra* note 15, at 439.

181. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

182. *See Goodridge*, 798 N.E.2d at 958, 958 n.16 (analogizing the denial of same-sex marriage to the denial of interracial marriage and discussing "the 'separate but equal' doctrine").

183. 1 U.S.C. § 7 (2006) (defining marriage as a union between a man and woman); 28 U.S.C. § 1738C (2006) (declaring that states are not required to recognize same-sex marriages performed pursuant to laws of other states); Defense of Marriage Act, Pub. L. No. 104-199, §§ 2, 3, 110 Stat. 2419 (1996); *see* Williams, *supra* note 15, at 439-40 (discussing DOMA). *But see In re* Golinski,

recognizing same-sex marriage and its alternatives, and suspends the Full Faith and Credit Clause of the Constitution[184] by permitting states to refuse to recognize out-of-state same-sex marriages, civil unions, and domestic partnerships.[185] Thus, a married coparent is at a high risk of losing parental status if the family or a member of the family relocates to a different state.[186] While some scholars advocate for the legalization of same-sex marriage in all fifty states to solve this problem,[187] DOMA would still prohibit the federal government from recognizing these state-sanctioned relationships.[188]

Additionally, marriage is not the decisive solution because not all same-sex coparents will choose to marry.[189] Some same-sex couples may conceptually prefer private ordering, such as coparenting agreements,[190] over public mechanisms like marriage.[191] Simply put, some couples may elect not to organize their rights based on legal models of the nuclear family, which do not properly fit their identities.[192] Also, some couples may feel that the state's approval of their intimate relationship through marriage is unnecessary and even antithetical to their beliefs.[193] Finally, other couples may opt not to marry in an effort

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587 F.3d 901, 904 (9th Cir. 2009) (construing DOMA to allow federal insurance benefits to same-sex spouses to avoid unconstitutionality); *In re* Levenson, 560 F.3d 1145, 1151 (9th Cir. 2009) (holding DOMA unconstitutional if it bars federal insurance benefits); Williams, *supra* note 15, at 439-41 (discussing DOMA); *see also* Posting of Andrew Koppelman to Balkinization, http://balkin.blogspot.com/2009/02/kozinski-and-reinhardt-on-doma.html (Feb. 15, 2009, 10:39 EST) ("[T]wo prominent Ninth Circuit judges . . . declared that DOMA does not preclude the extension of federal insurance benefits to the same-sex spouses of court employees.").

184. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

185. 1 U.S.C. § 7 (defining marriage as a union between a man and woman); 28 U.S.C. § 1738C (declaring that states are not required to recognize same-sex marriages performed pursuant to laws of other states); Defense of Marriage Act §§ 2, 3; *see* Williams, *supra* note 15, at 439-40 (discussing DOMA).

186. Only New York and Washington, D.C. recognize the validity of an out-of-state same-sex marriage. D.C. CODE § 46-405.01 (2009); *see, e.g.*, Beth R. v. Donna M., 853 N.Y.S.2d 501, 506 (Sup. Ct. 2008) (holding out-of-state same-sex marriages are properly recognized under New York law); RELATIONSHIP RECOGNITION, *supra* note 173 (noting that New York and Washington, D.C. recognize same-sex marriages of other states).

187. *See, e.g.*, Williams, *supra* note 15, at 439 (taking the position that same-sex marriage and other institutions are the best and only solution to the problems faced by same-sex couples).

188. 1 U.S.C. § 7 ("In determining the meaning of any Act of Congress . . . , the word 'marriage' means only a legal union between one man and one woman as husband and wife . . . .").

189. *See* Christensen, *supra* note 5, at 1318-20 (discussing why same-sex couples may elect to forgo marriage).

190. *See, e.g.*, Osborne, *supra* note 7, at 370-71; *see supra* Part II.B.

191. Christensen, *supra* note 5, at 1318, 1320-21.

192. *Id.* at 1318-19.

193. *Id.* at 1319-20.

to avoid further marginalizing unmarried same-sex couples.[194] However, without same-sex marriage or a similar statutory relationship, a coparent's standing to bring a lawsuit concerning his or her parental rights and obligations with regards to his or her unadopted child depends on either the equitable principles discussed above or statutes awarding standing to so-called third parties.[195]

2. Third Party Statutes

Second, some legislatures have amended state statutes to award standing to nonlegal parents to better suit the changing composition of families.[196] These "third party statutes" give standing to parties other than the legal parent to bring suit for custody or visitation.[197] There are a variety of tests to determine which individuals should be awarded standing under a third party statute.[198] For example, some statutes mimic the equitable tests for parenthood,[199] while others entitle the court to use its discretion in determining who is a statutory parent.[200]

However, the Supreme Court made clear that this award of standing does not constitute permission to a court to override a fit legal parent's

194. *Id.* at 1320.

195. Polikoff, *supra* note 8, at 508 (describing a third party as a coparent who is "forced into the legal status of nonparent . . . in custody or visitation disputes").

196. *See* Troxel v. Granville, 530 U.S. 57, 64 (2000) ("The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family."); Polikoff, *supra* note 8, at 486 (describing an Oregon statute as "one of the most well-developed understandings of parental relationships formed absent biological ties or legal adoption").

197. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-415(A)(1) (2007) (giving standing to a person who stands *in loco parentis*); COLO. REV. STAT. § 14-10-123(1)(c) (West 2005) (giving standing to anyone who had "physical care" of the child for more than six months); N.J. STAT. ANN. § 9:2-13(f) (West 2002) (giving the court discretion to define parent by the context of the case, thus including domestic partners); TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon 2008) (implicating standing to a de facto parent); *see also* V.C. v. M.J.B, 748 A.2d 539, 548 (N.J. 2000) (discussing the New Jersey statute addressing standing for custody issues, noting that "it is hard to imagine what [the Legislature] could have had in mind in adding the 'context' language other than a situation . . . in which a person not related to a child by blood or adoption has stood in a parental role vis-a-vis the child").

198. *Troxel*, 530 U.S. at 99 (Kennedy, J., dissenting).

199. *See* ARIZ. REV. STAT. ANN. § 25-415(A)(1) (2007) (giving standing to a person *in loco parentis*); COLO. REV. STAT. § 14-10-123(1)(c) (West 2005) (allowing someone who had "physical care" of the child for more than six months to have standing); TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon 2008) (implicating that a de facto parent has standing); *In re* E.L.M.C., 100 P.3d 546, 555 (Colo. Ct. App. 2004) (interpreting third party statute to give standing to psychological parent); *see supra* Part II.C.

200. N.J. STAT. ANN. § 9:2-13(f) (West 2002) (giving court discretion to define parent by the context of the case, thus including domestic partners); *V.C.*, 748 A.2d at 547 (holding the language of the statute "evinces a legislative intent to leave open the possibility that individuals other than natural or adoptive parents may qualify as 'parents,' depending on the circumstances").

decisions regarding the best interests of his or her children.[201] In *Troxel v. Granville*, the Court tempered Washington's interpretation of its nonparental visitation statute in order to respect the "fundamental right" of the legal parent to control the upbringing of his or her children.[202] The statute gave standing to "[a]ny person" to petition for visitation rights "at any time," and authorized courts to grant visitation when it was in the child's best interests.[203] The Court found that the statute in this instance infringed upon the parent's fundamental right because the state court could "disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests."[204] Rather, the Court decided that the fit legal parent's decisions merited "special weight."[205] Therefore, while a third party statute can award a nonlegal coparent standing, the legal parent's decisions regarding their child will be accorded "special weight," even if those decisions are contrary to the court's best interests analysis.[206]

While third party statutes evidence legislatures' effort to recognize and accommodate the changing structure of family,[207] the statutory amendments have flaws.[208] For example, even though legislation can offer more "consistency, uniformity and predictability" than equitable solutions,[209] those benefits are confined to a particular state as family law is a subject of state control.[210] This patchwork of state law engenders uncertainty and confusion.[211]

Additionally, even the most liberal statutes may present unworkable burdens of proof.[212] For example, the Minnesota third party statute mandated that the court grant a visitation petition when, in addition to another requirement, the petitioner proved that the visitation would not interfere with the child's relationship with his or her legal parent.[213] The

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201. *See Troxel*, 530 U.S. at 72-73; *see also* Velte, *supra* note 15, at 287 (discussing *Troxel*).

202. *Troxel*, 530 U.S. at 68; *see* WASH. REV. CODE § 26.10.160(3) (West 2005).

203. WASH. REV. CODE § 26.10.160(3).

204. *Troxel*, 530 U.S. at 67.

205. *Id.* at 70.

206. *See id.* at 69.

207. *See id.* at 64 ("The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of these changing realities of the American family.").

208. *See* Velte, *supra* note 15, at 306 (enumerating the problems with legislation).

209. *Id.* at 305.

210. *Id.* at 305-06.

211. *See id.* at 306.

212. *See, e.g.*, Kulla v. McNulty, 472 N.W.2d 175, 182 (Minn. Ct. App. 1991) (affirming failure to meet stringent burden of proof under statute, and explaining that public policy favored the burden as "fostering the development and harmony of a family unit").

213. MINN. STAT. ANN. § 257C.08(2) (West 2007).

petitioner in *Kulla v. McNulty* argued that the burden gave the legal parents "a virtual veto power by simply testifying that the parties are in conflict," and that her evidence would be speculative since only the legal parents possessed "evidence of [the legal parents'] relationship" with the child.[214] The court noted that the burden is difficult "and, perhaps, rightly so," but rejected that the focus of the third factor is conflict.[215] Instead, the court circularly explained that the factor required the coparent to show that the visitation rights would not interfere with the legal parent-child relationship, simply quoting the language of the statute.[216]

Then, the court rejected the coparent's prima facie evidence of a psychologist's report, which the doctor made after both observing the coparent interact with the child and interviewing the coparent. The court concluded that the doctor "was without a basis on which to form an opinion as to whether visitation . . . would interfere with the child-parent relationship in any way" because the doctor did not observe the relationship between the legal parents and the child.[217] Thus, the court required "non-parental third parties . . . to meet the stringent burden"[218] of the statute without a clear picture of how the burden might be met.[219]

Finally, while these statutes attempt to enable coparents, they serve as memorials to society's conceptual prejudices regarding the legitimacy of same-sex couples and their families; the connection between coparent and child must be proven, rather than assumed as in opposite-sex marriages.[220] Even where opposite-sex parents are not married, the jurisprudence shows "that active parenting, rather than marriage between

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214. 472 N.W.2d at 181.

215. *Id.*

216. *Compare* MINN. STAT. ANN § 257C.08(4)(3) (requiring movant to prove "visitation rights would not interfere with the relationship between the custodial parent and the child"), *with Kulla*, 472 N.W.2d at 181 (noting the prong requires the movant "to show that the 'visitation rights would not interfere with the relationship between the custodial parent and the minor child'" (quoting MINN. STAT. ANN. § 257.022(2b)(3) (West Supp. 1982))).

217. *Kulla*, 472 N.W.2d at 183.

218. *Id.* at 182.

219. *See id*. at 184 (holding that the court must determine that visitation would not interfere with the parent-child relationship, but not offering any guidance on how that burden is met).

220. *See* Silverman, *supra* note 165, at 430 (contrasting the husband's assumed and automatic paternity when his wife is artificially inseminated or when any child is born during the marriage to the unprotected status of the same-sex coparent); *see also* Jacobs, *supra* note 49, at 350-51 (arguing against limiting coparents to "third party petitioners or 'legal strangers'"); Velte, *supra* note 15, at 273 (arguing that cases involving unmarried fathers are instructive because "they discuss the extent to which a biological connection is necessary to trigger the constitutional protections of parenthood"). *But see* Laura Mansnerus, *Baby's Birth Certificate to List Names of Both Lesbian Parents*, N.Y. TIMES, Nov. 16, 2006, at B3 (describing ruling that domestic partners were allowed to put both names on the birth certificate of their child, circumventing adoption, and getting the same presumption of paternity afforded to opposite-sex married couples).

the child's parents, is an important factor in deciding who will be deemed a legal parent, and thus whose relationship with the child will be protected."[221] Further, the assumptions and protections offered to opposite-sex parents are not based on biological connection either.[222] The lack of biological connection to a child does not hinder the presumption that a husband is the father of his wife's child when, for example, she is artificially inseminated with another man's sperm.[223] On the other hand, biological connection "does not hermetically insulate that relationship from state intervention."[224] The case *Quilloin v. Walcott* stands for the proposition that "biology alone is not determinative of legal parenthood."[225] There, a biological father who was uninvolved in his child's life was prevented from contesting the adoption of the child by the stepfather who married the mother after the child was born.[226] However, similar relationships between coparents and their children, which lack biological connection and are foreclosed from the protections of marriage, are not as easily recognized despite the abundance of caretaking and emotional connection.[227] By relegating coparents to third party status, courts and legislatures ignore actual and established parenting relationships that they have not ignored in heterosexual parenting couples. But, "coparents are anything but third parties—they are involved, nurturing, loving, and supportive parents."[228]

III. THE RIGHTS OF COPARENTS IN NEW YORK

The law of New York State, while allowing for some important recognition of coparents, falls short of serving the best interests of the children of nontraditional families. New York has certainly improved some of its family law to better suit the changing and dynamic needs of the modern family. For example, coparents in New York are no longer mere legal strangers[229] because second parent adoption[230] and certain

221. Velte, *supra* note 15, at 274.
222. *Id.* at 275.
223. Silverman, *supra* note 165, at 430.
224. Velte, *supra* note 15, at 274.
225. *Id.* at 273; *see* Quilloin v. Walcott, 434 U.S. 246, 256 (1977).
226. *Quilloin*, 434 U.S. at 247.
227. *See, e.g.*, Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (refusing to acknowledge parentage despite emotional bond and caretaking role).
228. Jacobs, *supra* note 49, at 350.
229. *See infra* Part III.A.
230. *See, e.g.*, *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995); *see infra* Part III.B.1.

equitable doctrines[231] are available to them, and New York recognizes out-of-state same-sex marriages.[232] However, these advances do not accord adequate protection to the coparent-child relationship.[233] The following sections will explore the past and present status of New York law.

A. The History of the Law in New York

In the past, New York considered coparents to be legal strangers despite their acknowledged de facto parenthood.[234] This principle was the product of earlier jurisprudence, exemplified in *Ronald FF. v. Cindy GG.*, where the court maintained that the state "may not interfere with that fundamental right [of a parent to control his or her child's associations] unless it shows some compelling State purpose which furthers the child's best interests."[235] It had been long established that "as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity."[236] Therefore, judicial intervention in the parent's custody was only justified by a "finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child."[237] Simply put, the legal parent's decisions would not be superseded by a court unless there were extenuating circumstances that were particularly harmful to the child.[238]

Applying these principles to same-sex coparents, the New York Court of Appeals in *Alison D. v. Virginia M.* held the coparent was a

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231. *See, e.g.*, Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *28 (Sup. Ct. Oct. 2, 2008) (holding legal parent potentially equitably estopped and using *in loco parentis* doctrine); *see infra* Part III.B.3-5.

232. Beth R. v. Donna M., 853 N.Y.S.2d 501, 506 (Sup. Ct. 2008).

233. *See, e.g.*, N.Y. DOM. REL. LAW § 70 (McKinney 1999) (stating that either parent may bring a custody action without defining who is a parent); Hernandez v. Robles, 855 N.E.2d. 1, 12 (N.Y. 2006) (holding that the Domestic Relations Law's limitation of marriage to opposite-sex couples is not unconstitutional); Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002), *appeal dismissed*, 784 N.E.2d 74 (N.Y. 2002) (foreclosing use of doctrine of de facto parenthood); Bowe, *supra* note 11 (noting that coparenting agreements are not determinative); *see infra* Parts III.B.2-3, 6-7.

234. *See* Alison D. v. Virginia M., 572 N.E.2d 27, 28 (N.Y. 1991) (refusing to acknowledge parentage despite emotional bond and caretaking role); *see also* Jacobs, *supra* note 49, at 342 ("[O]ur laws have not caught up with societal reality. Many lesbian couples are having children; but courts consider a child born to both a biological lesbian mother and a nonbiological lesbian mother . . . to have one legal parent and one legal stranger." (citation omitted)).

235. 511 N.E.2d 75, 77 (N.Y. 1987).

236. *Id.*

237. *Id.* (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 283 (N.Y. 1976)).

238. *See Ronald FF.*, 511 N.E.2d at 77.

"third person" who did not have standing absent a showing of parental unfitness.[239] The court "decline[d]" the coparent's "invitation to read the term parent in section 70 [of the New York Domestic Relations Law] to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child."[240] The court found that "although petitioner apparently nurtured a close and loving relationship with the child, she [was] not a parent within the meaning of Domestic Relations Law § 70."[241] The court stated that the fit legal parent had "the right to the care and custody of [his or her] child, even in situations where the nonparent has exercised some control over the child with the [parent's] consent."[242] Also, the court reasoned that awarding even a limited custody to a third party "would necessarily impair the [parent's] right to custody and control."[243] Therefore, because the coparent conceded that the legal parent was fit, the coparent did not have standing to ask the court to interject itself into the decision-making of the legal parent.[244] This case has never been overruled.[245]

Moreover, the burden of proving the legal parent unfit has remained quite high.[246] For example, in *Burghdurf v. Rogers* an appellate court held that "the disruption of a psychological bond between a child and his or her nonparental caregiver does not rise to the level of extraordinary circumstances."[247] Therefore, in New York, a coparent could not gain standing by merely pointing to the harm to the child that arose from the disruption of his or her relationship with the coparent.[248] There must be some additional showing of parental unfitness.[249]

B. Present New York Law

Currently, New York offers more protection to coparents than in the past. Namely, New York allows second-parent adoption and some

239. *Alison D.*, 572 N.E.2d at 29; *see* Franklin, *supra* note 15, at 716 (discussing *Alison D.*).
240. *Alison D.*, 572 N.E.2d at 29.
241. *Id.* at 28.
242. *Id.* at 29.
243. *Id.*
244. *Id.*
245. A search for overruling decisions yielded no results.
246. *See* Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987).
247. 650 N.Y.S.2d 348, 350 (App. Div. 1996). In this case, a grandmother petitioned for custody of her grandchild, but the principle can easily be applied to a coparenting situation. *See id.* at 349.
248. *See id*. at 350 (disruption of psychological bond between child and nonparental caregiver does not constitute extraordinary circumstances so as to justify displacing parental custody).
249. *Id*.

equitable estoppel arguments combined with *in loco parentis* determinations.[250] The state also recognizes out-of-state same-sex marriages,[251] and New York City offers a limited domestic partnership.[252] On the other hand, New York fails to meet the needs of nontraditional families by according coparenting agreements little to no weight,[253] refusing to permit a de facto parenthood determination,[254] excluding same-sex couples from marrying,[255] and maintaining that a coparent is not a parent under relevant state law.[256]

1. Second-Parent Adoption

First, second-parent adoption is available in New York.[257] However, the legislature did not institute second-parent adoption, but rather the Court of Appeals interpreted the traditional adoption statute to allow for this untraditional form.[258] In *In re Jacob*, the court read Domestic Relations Law section 117 as "a shield to protect new adoptive families," which was "never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents."[259] The court argued that a limited reading of section 117 would be irreconcilable with the legislative intent of promoting beneficial adoptions.[260] Thus, the statute did "not invariably require termination in the situation where the biological parent, having consented to the adoption, has agreed to retain parental rights and to raise the child together with the second parent."[261] The court concluded that this interpretation avoided "injustice, hardship, constitutional doubts [and] other objectionable results."[262]

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250. *See, e.g.*, Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *28 (Sup. Ct. Oct. 2, 2008) (holding legal parent potentially equitably estopped and using *in loco parentis* doctrine); *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) (allowing for second-parent adoption).

251. Beth R. v. Donna M., 853 N.Y.S.2d 501, 506 (Sup. Ct. 2008).

252. N.Y. CITY ADMIN. CODE § 3-240 (Supp. 2009).

253. *See, e.g.*, Bowe, *supra* note 11.

254. Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002), *appeal dismissed*, 784 N.E.2d 74 (N.Y. 2002).

255. Hernandez v. Robles, 855 N.E.2d 1, 12 (2008).

256. N.Y. DOM. REL. LAW § 70 (McKinney 1999) (stating that either parent may bring a custody action without defining who is a parent).

257. *In re* Jacob, 660 N.E.2d 397, 405-06 (N.Y. 1995); *see also* Forman, *supra* note 9, at 44 (explaining that New York is an exception because it "allows same-sex, second-parent adoption, but does not otherwise recognize partners as parents").

258. *In re Jacob*, 660 N.E.2d at 405-06.

259. *Id.* at 405.

260. *Id.*

261. *Id.* at 404.

262. *Id.* at 405 (quoting H. Kauffman & Sons Saddlery Co. v. Miller, 80 N.E.2d 322, 325 (N.Y. 1948)).

2. Coparenting Agreements

Second, it is unlikely that coparenting agreements will be afforded much weight in New York: "At best, co-parenting agreements serve as a way to establish intent, which state courts can choose to factor into their decisions—or not. Charged, above all, with looking out for the best interest of the child, judges are free to ignore even the most well-drawn documents."[263] For example, the court in *Alison D. v. Virginia M.* completely ignored the private visitation agreement between the legal parent and the coparent.[264] More recently, in a case discussed in depth below,[265] the Supreme Court referred to a stipulation between coparents that set a specific visitation schedule in its recitation of the facts.[266] Even though the court later found in the nonlegal parent's favor, the court ordered "a conference to address the custodial issues" without mentioning the stipulation again.[267] So, while a coparenting agreement may stand as evidence of the intent of the parties, it is unlikely to greatly influence the court.

3. De Facto Parenthood and Equitable Estoppel

Third, the doctrine of de facto parenthood, used in combination with equitable estoppel, is currently foreclosed to coparents.[268] In 2000, *J.C. v. C.T.* enabled a coparent to seek standing by proving de facto parenthood, which in turn enabled the coparent to petition for visitation under a theory of equitable estoppel.[269] Unfortunately, this case was overruled on appeal.[270] The appellate court summarily held that "[a]ny extension of visitation rights to a same sex domestic partner who claims to be a 'parent by estoppel,' 'de facto parent,' or 'psychological parent' must come from the New York State Legislature or the Court of Appeals."[271] Even though equitable estoppel had been used "as a defense in various proceedings involving paternity, custody, and visitation," the court held it did not apply in this case.[272]

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263. Bowe, *supra* note 11 (noting that coparenting agreements, "even when drawn up by a lawyer—often carry little legal weight").

264. 572 N.E.2d 27, 28 (N.Y. 1991); *see* Christensen, *supra* note 5, at 1353 (discussing coparenting agreement in *Alison D.*).

265. Beth R. v. Donna M., 853 N.Y.S.2d 501, 504 (Sup. Ct. 2008); *see infra* notes 279-85 and accompanying text (discussing *Beth R.*).

266. *Beth R.*, 853 N.Y.S.2d at 504.

267. *Id.* at 509.

268. Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002), *appeal dismissed*, 784 N.E.2d 74 (N.Y. 2002).

269. 711 N.Y.S.2d 295, 299 (Fam. Ct. 2000).

270. *Janis C.*, 742 N.Y.S.2d at 382.

271. *Id.* at 383.

272. *Id.*

4. Equitable Estoppel

Fourth, while de facto parenthood has not been formally revived in the New York judicial system, coparents have successfully used arguments of equitable estoppel to convince courts to examine their rights to custody and visitation.[273] First, the Court of Appeals upheld the use of the doctrine in paternity disputes because it furthered the best interests of the child:

> The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given. . . . [T]he issue does not involve the equities between the two adults; the case turns exclusively on the best interests of the child.[274]

In coming to this conclusion, the Court of Appeals noted that New York courts have "long applied the doctrine of estoppel in paternity and support proceedings" to promote the best interests of the child.[275] For example, in *Jean Maby* the court found that it was "inconsistent to estop a nonbiological father from disclaiming paternity," yet preclude him "from invoking the doctrine . . . in order to continue a long-standing relationship with the child."[276] While the court felt constrained by the holding of *Alison D.*, which held that the coparent was not a statutory parent, it nevertheless decided that the blind application of that principle would not be in the best interests of the child.[277] Thus, the court departed from the strict application of the *Alison D.* principle.[278]

Building on this line of cases, *Beth R. v. Donna M.* held that a same-sex coparent could invoke the doctrine of equitable estoppel to be found a "parent."[279] The court reasoned, "[i]f the concern of both the legislature and the Court of Appeals is what is in the child's best interest, a formulaic approach to finding that a 'parent' can only mean a biologic or adoptive parent may not always be appropriate."[280] Thus, in the

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273. *See* Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *28 (Sup. Ct. Oct. 2, 2008) (holding legal parent potentially equitably estopped); Beth R. v. Donna M., 853 N.Y.S.2d 501, 508-09 (Sup. Ct. 2008) (holding legal parent equitably estopped).

274. Shondel J. v. Mark D., 853 N.E.2d 610, 615-16 (N.Y. 2006).

275. *Id.* at 613 (citing Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 678 (App. Div. 1998); *see also Beth R.*, 853 N.Y.S.2d at 507-08 (holding that a "nonbiological parent may *offensively* invoke the doctrine of equitable estoppel to preclude a biological parent from cutting off custody or visitation with a child").

276. *Jean Maby H.*, 676 N.Y.S.2d at 680.

277. *Id.* at 681-82; *see* Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).

278. *See Jean Maby H.*, 676 N.Y.S.2d at 682; *Alison D.*, 572 N.E.2d at 29.

279. *Beth R.*, 853 N.Y.S.2d at 508-09; *see* N.Y. DOM. REL. LAW § 70 (McKinney 1999).

280. *Beth R.*, 853 N.Y.S.2d at 508.

context of a divorce proceeding,[281] the court granted the coparent's motion "to determine whether [she had] continuing custodial rights and support obligations."[282] The court noted the following facts warranted its conclusion:

> Although [the legal parent] did not allow the adoption of the children, [the legal parent] held out [the coparent] to the world, and most important, to the children, as their parent. The children were given [the coparent's] last name. The birth announcements presented [the coparent] as the parent of each child. [The elder child] was encouraged to call [the coparent] "mom" and [the coparent's] relatives by familial titles. The extended families of each party were encouraged to treat [the coparent] as a parent. [The legal parent] held out [the coparent] as a parent to the children's nanny, doctor and [the elder child's] teachers and school administrators. [The legal parent] accepted health insurance and financial contributions from [the coparent] for the benefit of the children.[283]

Also, the court stressed that the parties' marriage was an "additional factor," noting that a main reason for couples to get married is to create "familial bonds, . . . particularly for the benefit of their children."[284] While this resolution marks a tremendous change in favor of coparents in that they may use equitable estoppel to prove themselves to be parents under the relevant state statute, it is important to note that this case is not infallible. The marriage of the parties was an important factor in the court's decision, and this could prove to be a significant hurdle, given the limited availability of same-sex marriage. Additionally, this decision was issued at the trial court level. The holding has yet to be tested in the higher courts.[285]

5. *In Loco Parentis* and Equitable Estoppel

Fifth, shortly after *Beth R. v. Donna M.*,[286] the state trial court approved the use of an *in loco parentis* standard to determine whether the contesting party was entitled to an equitable estoppel argument in the context of a custody dispute.[287] In *Debra H. v. Janice R.*, the court echoed the concern that "a formulaic approach to defining the word

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281. The parties had entered into a same-sex marriage in Canada. *Id.* at 502.

282. *Id*.

283. *Id.* at 509.

284. *Id.*

285. A search for subsequent history yielded no results.

286. *See supra* notes 279-85 and accompanying text.

287. Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *27 (Sup. Ct. Oct. 2, 2008).

'parent' . . . may not always effectuate the legislature's express intent of furthering the best interests of the child,"[288] and also sought to be consistent in application of the estoppel doctrine.[289] The court recited the facts which, "if found to be true, establish a prima facie basis for [i]nvoking the doctrine of equitable estoppel":[290]

> Of particular significance are her allegations that the parties moved in together and consulted an adoption attorney prior to M.R.'s birth, sent out birth announcements together, were both listed as M.R's parents on the child-naming certificate and on some of M.R.'s school and camp documents, and that [the coparent] was present in the delivery room at M.R.'s birth and cut his umbilical cord, and that M.R. was given [the coparent's] last name as a middle name on his original birth certificate.
>
> Moreover, the parties' civil union at the time of M.R.'s birth, is a significant, though not necessarily a determinative, factor in [the] estoppel argument.[291]

However, because nearly all of the facts were sharply disputed, a hearing was necessary to resolve whether the alleged coparent stood "in loco parentis to the child and may, therefore, invoke the doctrine of equitable estoppel against" the legal parent.[292] Therefore, *Debra H. v. Janice R.* provides potential standing through an *in loco parentis* determination for a coparent to assert his or her parental rights through equitable estoppel.[293] However, this decision was also issued from the trial court, so the reliability of the doctrine remains uncertain.[294]

6. Same-Sex Marriage

Sixth, New York does not permit same-sex partners to marry.[295] In *Hernandez v. Robles*, the Court of Appeals held that "the New York Constitution does not compel recognition of marriages between members of the same sex" and left the question of whether marriages *should* be recognized to the legislature.[296] First, the court concluded that

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288. *Id.* at *25.
289. *Id.*
290. *Id.* at *25-26.
291. *Id.* at *26.
292. *Id.* at *27.
293. *See id.* at *27-28.
294. A search for subsequent history yielded no results.
295. *See* Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006) (holding "that the Domestic Relations Law's limitation of marriage to opposite-sex couples is not unconstitutional" and deferring to legislature).
296. *Id.* at 5.

the prohibition against same-sex marriage did not violate due process.[297] The court reasoned that the right to marry someone of the same sex, as opposed to the right to marry, was not a fundamental right, and therefore did not merit a heightened level of scrutiny.[298] So, the court examined the restriction on marriage and its benefits to opposite-sex partners with a "rational legislative decision" standard of review.[299] First, the court found that the legislature "could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships" because opposite-sex intercourse leads to children and same-sex intercourse does not.[300] Also, the court noted that the legislature could find that same-sex "relationships are all too often casual or temporary."[301] Second, the court explained that the legislature "could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."[302] To counter this argument, the plaintiffs offered evidence that proved that there was at least "no marked differences" between children raised in same-sex households and those raised in opposite-sex households.[303] However, the court rejected this offering, explaining that "[i]n the absence of conclusive scientific evidence, the [l]egislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home."[304]

Second, the court held that the same-sex marriage prohibition did not violate the Equal Protection Clause because it did "not create an irrationally overnarrow or overbroad classification."[305] First, the court rejected the argument that the prohibition was overly narrow because same-sex couples can also have and do have children.[306] The court pointed, rather vaguely, to its "earlier discussion [to] demonstrate[] that the definition of marriage to include only opposite-sex couples is not irrationally underinclusive."[307] Second, the court rejected the contention that the prohibition was overly broad because marriage is not merely an

297. *Id.* at 10.
298. *See id.*
299. *Id.* at 6; *see also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule [of rational basis review] is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").
300. *Hernandez*, 855 N.E.2d at 7.
301. *Id.*
302. *Id.*
303. *Id.* at 7-8.
304. *Id.* at 8.
305. *Id.* at 12.
306. *Id.* at 11.
307. *Id.*

institution for bearing children, and many opposite-sex couples choose not to have children.[308] The court answered that the distinction is not overinclusive because "limiting marriage to opposite-sex couples likely to have children would require grossly intrusive inquiries, and arbitrary and unreliable line-drawing."[309] In sum, the court found the distinction between same-sex and opposite-sex couples to be constitutionally sound, exercising extreme judicial restraint, and stressed that the people of the state must turn to the legislature to address this issue.[310]

While New York does not offer the protections of marriage to its own same-sex couples, New York recognizes out-of-state same-sex marriages and acknowledges other statutory relationships.[311] Governed by common law and considerations of comity, "New York courts have long held that out-of-state marriages, if valid where entered will be respected in New York even if under New York law the marriage would be void."[312] Additionally, state and local executive offices have recently released statements that support recognition of out-of-state marriages.[313]

Also, New York City provides a limited form of domestic partnership for city residents or employees.[314] However, the domestic partnership does not offer many substantial benefits to the typical same-sex couple.[315] Additionally, domestic partnership explicitly excludes the right to use "equitable estoppel to enforce parental rights," among other important rights.[316]

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308. *Id.*

309. *Id.* at 11-12.

310. *Id.* at 12.

311. *See, e.g.*, Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *26 (Sup. Ct. Oct. 2, 2008) (acknowledging that civil union procured in Vermont, which is "given the same benefits, protections and responsibilities under Vermont law as are granted to those in a marriage," is a factor in determination); Beth R. v. Donna M., 853 N.Y.S.2d 501, 506 (Sup. Ct. 2008) (recognizing out-of-state marriages as valid).

312. *Beth R.*, 853 N.Y.S.2d at 504.

313. *See id.* at 505-06 (listing statements by various state executives).

314. N.Y. CITY ADMIN. CODE § 3-240 (Supp. 2009); *see* Office of the City Clerk, Domestic Partnership Registration, http://www.cityclerk.nyc.gov/html/marriage/domestic_partnership_reg.shtml (last visited Mar. 25, 2010) (discussing the procedure of obtaining a domestic partnership in New York City, and the rights and privileges associated with it).

315. *See* Office of the City Clerk, *supra* note 314 (explaining that domestic partnership allows for benefits including a monetary award from the Mayor to the surviving partner following the line-of-duty death of a city employee; health insurance coverage for the domestic partner of a member of the police or fire departments who was killed in the line of duty; city employee benefits; qualification as a "family" under the housing code; a special parking permit for the domestic partner of person with a disability; the right to visit a domestic partner in a health care facility; treatment as a spouse for the purposes of death benefits for a domestic partner killed in the attacks of September 11, 2001; and other minor and miscellaneous rights).

316. *Id.* Other excluded rights include the right to "[g]eneral worker's compensation death benefits," the right to "maintain an action based upon an implied contract for personal services" or

7. Third Party Statute

Seventh, state custody and visitation statutes do not adequately enable coparents to assert their parental rights, nor sufficiently hold coparents to their parental obligations.[317] As explored above, only a parent may bring a custody action in New York.[318] However, the relevant law does not define who qualifies as a parent.[319] As evidenced, the courts have waivered on whether a coparent is a parent for the purposes of the statute.[320] The most recent trend of case law evidences a willingness on the part of the judiciary to view a same-sex coparent as a parent under the statute if the coparent proves that he or she stands *in loco parentis* to the child.[321] Even then, however, coparents are forced to present arguments of equitable estoppel to prevent the legal parents from contesting their paternity.[322] Additionally, a coparent cannot truly depend on a favorable judicial interpretation of his or her role in regard to the child until the Court of Appeals speaks to this new line of interpretations.[323] Ultimately, the legislature has remained silent on this issue.[324] Without a definition that accommodates finding a coparent to be a parent, a coparent is forced to bring suit as a third party.[325] As a third party, the coparent must prove parental unfitness before the court can infringe upon the legal parent's fundamental rights.[326] As the burden of proving parental unfitness is very high, the coparent will not meet it without proving some sort of serious detriment to the child, which

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an "action in partition or division of property under legal framework of marriage," the right "to bring a wrongful death claim," the rights "inherent in marital residence," and the right "to maintain an action for loss of consortium." *Id.*

317. *See* N.Y. DOM. REL. LAW § 70 (McKinney 1999) (stating that either parent may bring a custody action without defining who is a parent); N.Y. DOM. REL. LAW § 240 (McKinney 1999) (structuring the court's determination of child custody and visitation); N.Y. FAM. CT. ACT § 651 (McKinney 2009) (outlining jurisdiction of the state family court to determine custody and visitation of minors).

318. N.Y. DOM. REL. LAW § 70; *see* discussion *supra* Part III.A.

319. *See* N.Y. DOM. REL. LAW § 70; *see, e.g.*, *In re* Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).

320. *Compare Alison D.*, 572 N.E.2d at 28 (not a parent), *and* Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002) (not a parent), *with* Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677, 679 (App. Div. 1998) (more open interpretation of parent), Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *28 (Sup. Ct. Oct. 2, 2008) (coparent could stand *in loco parentis*), *and* Beth R. v. Donna M., 853 N.Y.S.2d 501, 508 (Sup. Ct. 2008) (parent).

321. *See, e.g.*, *Debra H.*, 2008 N.Y. Misc. LEXIS 6367, at *27-28; *see supra* Part III.B.5.

322. *See, e.g.*, *Debra H.*, 2008 N.Y. Misc. LEXIS at *27; *see supra* Part III.B.5.

323. *See, e.g.*, *Debra H.*, 2008 N.Y. Misc. LEXIS 6367, at *27-28 (allowing for *in loco parentis* determination at the trial court level).

324. *See* N.Y. DOM. REL. LAW § 70 (parent still undefined).

325. *See, e.g.*, *Alison D.*, 572 N.E.2d at 28 (coparent forced to bring suit as a third party because not a parent under the statute).

326. Ronald FF. v. Cindy GG., 511 N.E.2d 75, 77 (N.Y. 1987).

cannot be met by the termination of the coparent-child relationship alone.[327]

IV. THE FUTURE OF THE RIGHTS OF NONTRADITIONAL FAMILIES IN NEW YORK

In sum, New York State must be tolerant and flexible with the innumerable variations of family compositions and protect all families equally in order to faithfully enforce the state policy of placing a child's welfare before all other concerns in the dissolution of a family.[328] Unless New York modifies its current legal and legislative structures, the relationship between a child of a nontraditional family and his or her coparent will not be adequately protected, if protected at all.[329] Even if New York shelters nontraditional relationships to a degree, the law as it stands now does not afford the same protection to a child of a nontraditional family as the law does to a child of a traditional family.[330] This discrepancy exists because remedies are available to opposite-sex parents to assert their parental rights that are not always available to same-sex coparents.[331] But, then again, through the eyes of an impartial stranger, such as a judge, a child-coparent relationship may be harder to distinguish than a relationship between, for example, a child and his or her biological, involved father. Even more perplexing to such a party may be the difference between a close, but not parental, relationship between a child and his or her mother or father's partner.[332] In order to make these determinations while acknowledging and protecting important nontraditional parenting relationships, each of the above methods must be available to same-sex coparents, so they can organize

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327. *See, e.g.*, Burghdurf v. Rogers, 650 N.Y.S.2d 348, 350 (App. Div. 1996); *see supra* notes 247-49 and accompanying text.

328. *See, e.g.*, N.Y. DOM. REL. LAW § 70 (stating that neither parent has a prima facie right to custody, but that courts will determine custody solely on analysis of best interests of child); *Ronald FF.*, 511 N.E.2d at 77 (holding state may not interfere with parent-child relationship without compelling state purpose furthering the child's best interests); Bowe, *supra* note 11 (stating courts are charged with protecting the child's best interests above all else).

329. *See* discussion *supra* Part III.B (examining the extent of rights of same-sex coparents).

330. *See* discussion *supra* Part III.B.

331. *See* discussion *supra* Part III.B (examining remedies for asserting parental rights); *see, e.g.*, Debra H. v. Janice R., No. 106569/08, 2008 N.Y. Misc. LEXIS 6367, at *25 (Sup. Ct. Oct. 2, 2008) ("[I]t is inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligations, but preclude a nonbiological parent from invoking the doctrine against the biological parent in order to maintain an established relationship with the child.").

332. *See, e.g.*, *Debra H.*, 2008 N.Y. Misc. LEXIS 6367, at *25-27 (stating disputed facts and requiring an *in loco parentis* determination).

their lives to protect their families without having to resort to the uncertainty and expense of the judicial system.[333]

First, the advances the judiciary has made thus far in allowing for second-parent adoption must continue to be available to nontraditional families.[334] However, the legislature needs to independently and explicitly approve of second-parent adoption by amending the statute. Also, the statute should make it unlawful to preclude a coparent from adopting solely on the basis of the coparents' same-sex relationship. Both of these objectives could be achieved by simply amending section 110 of the Domestic Relations Law to include the following language:

> If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent. Termination of the parent's parental rights is unnecessary in an adoption under this subsection. A same-sex relationship between the parent and the parent's partner, without more, is not in contravention of the best interests of the child.[335]

These provisions are necessary because the permission of the Court of Appeals to grant adoption petitions will not affect judges who categorically question the stability and appropriateness of same-sex relationships.[336] Currently, too much is left up to the discretion of unsympathetic judges. Without legislative mandates, judges are not obligated to act without prejudice against same-sex couples in granting adoptions.

Second, the agreements same-sex coparents make to raise a family or to organize the dissolution of a relationship must be afforded weight as at least evidence of intent, subject to a best interests analysis.[337] If a coparenting couple agrees on a visitation schedule after the dissolution of their relationship, a court should consider the agreement.[338] To ignore such a schedule, especially if it was followed without dispute for a long period of time, is to turn a blind eye to the reality of the situation. That visitation scheme is clear evidence of the parties' mutual intent to share time with the children and to continue raise them together despite the

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333. *See supra* notes 155-60 and accompanying text.

334. *See* discussion *supra* Parts II.A, III.B.1.

335. A portion of this language mimics Vermont's second-parent adoption statute. VT. STAT. ANN. tit. 15A, § 1-102(b) (2007).

336. *See* NAT'L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LESBIAN, GAY, AND BISEXUAL PARENTS: AN OVERVIEW OF CURRENT LAW 3 (2010), www.nclrights.org/site/DocServer/adptn0204.pdf?docID=1221 ("In practice, judicial reaction to openly lesbian, gay, and bisexual adoptive parents ranges from supportive acceptance to overt hostility.").

337. *See* discussion *supra* Parts II.B, III.B.2.

338. *See, e.g.*, Nancy S. v. Michele G., 279 Cal. Rptr. 212, 214 (Ct. App. 1991) (private visitation agreement followed for several years without conflict).

termination of the relationship; it should be recognized as such. Specifically, there should be a statutory provision that allows for a decree stating either the intent of the parties to coparent a child or organizing a visitation/custody scheme to be filed with the court or other state agency.[339] While this decree should not be afforded determinative weight, it should be available to the parties for purposes of estoppel as evidence of intent should one of the coparents later deny paternity.[340] Allowing coparents to privately organize resolutions to their disputes or to prevent disputes all together will lighten the burden on the judicial system and provide nontraditional families with more immediate security.

Third, the legislature should amend the law to recognize the reality of the modern family, and define a coparent as a parent vested with full parental rights. This includes specifically defining a coparent to be a "parent" in legal parity with a biological parent under section 70 of the Domestic Relations Law.[341] More specifically, the legislature should adopt a de facto parent test, effectively overruling *Janis C. v. Christine T.*, and give the courts a defined standard to determine who qualifies as a parent.[342] The test enunciated in *Holtzman v. Knott* is best suited to this end.[343] That de facto determination gives courts a very particular standard, which will include the great majority of same-sex coparents, while serving to exclude those individuals who are involved in the child's life, but not as a parent.[344] The specificity of the test will hopefully ensure consistent results by leaving less up to the discretion of the court. Whatever standard the legislature chooses to adopt, a "triggering event"[345] should not be required because it unnecessarily endangers the child.[346] If a coparent's relationship with his or her child must be interrupted before the coparent can assert his or her rights, the relationship must be compromised before the coparent can take any steps to protect it.[347] Rather, the coparent should be entitled to the same fundamental rights as a legal parent and the disruption of a child's

339. *See, e.g.*, Kristine H. v. Lisa R., 117 P.3d 690, 696 (Cal. 2005) (allowing coparent to estop legal parent with a filed stipulation regarding intent to coparent).

340. *See, e.g.*, *id.* (estopping the legal parent with a filed stipulation regarding intent to coparent).

341. *See* N.Y. DOM. REL. LAW § 70 (McKinney 1999).

342. 742 N.Y.S.2d 381, 383 (App. Div. 2002) (invalidating adoption of de facto parentage test).

343. 533 N.W.2d 419, 421 (Wis. 1995).

344. *See id.* (outlining the four requirements); *see also* text accompanying note 88.

345. *See id.* (de facto test requiring "triggering event" in which legal parent substantially interferes with coparent's relationship with the child).

346. *See supra* notes 116-21 and accompanying text.

347. *See supra* notes 116-21 and accompanying text.

relationship with his or her de facto parent should be against his or her best interests as a matter of law so as to justify interference in the biological parent-child relationship.[348]

Fourth, courts must be allowed their traditional broad discretion to apply applicable family law fairly to each individual situation in order to reach the most just result. This means that the de facto parent,[349] equitable estoppel,[350] and *in loco parentis*[351] doctrines must remain available to the courts. The possibilities of variation within individual families are innumerable, and this variety is only amplified when dealing with nontraditional family forms. These doctrines are available in the context of opposite-sex parenting couples, and courts should be permitted to exercise their traditional discretion in the context of same-sex parenting couples as well.[352] In fact, it would seem that equitable discretion is even more appropriate in nontraditional families, whose form may not have been anticipated by the legislature.[353] Judges should not be criticized for coming to fair resolutions merely because they depart from the original legislative conception.[354] Judges are constantly presented with novel situations that must be resolved. Courts must work with what statutory guidance they have, and come to equitable resolutions.

Fifth, the New York legislature must institute same-sex marriage that affords the same rights as traditional marriage.[355] Just as importantly, New York must continue to give full faith and credit to out-of-state same-sex marriages and other statutory relationships.[356] The legislature must take the Court of Appeals' invitation to "listen and decide as wisely as it can" as to whether same-sex marriage is right or wrong.[357] It is time to abandon the idea that same-sex couples do not need the protections of marriage because they do not have children as conveniently or as flippantly as same-sex couples.[358] It is axiomatic that same-sex couples are having children, questions of convenience aside. Further, the legislature cannot cling to the bare assertion that children are

348. *See, e.g.*, *In re* E.L.M.C., 100 P.3d 546, 561 (Colo. App. 2004).
349. *See* discussion *supra* Parts II.C.1, III.B.3.
350. *See* discussion *supra* Parts II.C.3, III.B.4.
351. *See* discussion *supra* Parts II.C.2, III.B.5.
352. *See* discussion *supra* Part III.B.4-5.
353. *See supra* notes 160-64 and accompanying text.
354. *See supra* notes 149-54 and accompanying text.
355. *See* discussion *supra* Parts II.D.1, III.B.6.
356. *See* discussion *supra* notes 311-13 and accompanying text.
357. Hernandez v. Robles, 855 N.E.2d 1, 12 (N.Y. 2006).
358. *See id.* at 7 (asserting that promoting stability in opposite-sex couples is rational because opposite-sex intercourse potentially leads to pregnancy, whereas same-sex intercourse does not).

better off with a mother-father parenting couple, though the Court of Appeals does.[359] The evidence that demonstrates that there is no difference between same-sex and opposite-sex parenting couples' ability to raise children must be acknowledged and accepted.[360] Allowing same-sex partners to marry and to give their families the best possible protection by publically proclaiming their lifetime commitment to one another is right. Relegating same-sex couples to a non-marriage institution is wrong; there is no such thing as separate but equal.[361] Excluding same-sex couples from the protections and benefits of marriage is harmful discrimination, and the children of these categorically disadvantaged and unprotected families pay the biggest costs of all.

V. CONCLUSION

In conclusion, New York currently does not recognize the legitimacy of coparent-child relationships, or adequately protect the truly loving, caring, and nurturing environment that they create for so many fortunate children. On the contrary, New York affords significantly less protection to a child's relationships in a nontraditional family than the state does in a traditional family. For example, in a traditional family, the parents are clearly statutory "parents," entitled to assert their parental rights in court, coequal with the other parent. Also, in opposite-sex parenting couples, biology is not determinative of paternity. Additionally, the parenting couple in a traditional family can marry and thereby cement the familial bonds and obligations that are meant to protect children, and qualify for divorce remedies should the adult relationship end. But these options are either not available or, at best, not guaranteed to same-sex coparents. Biology becomes determinative, or at least so heavily weighted that a simple "third party" coparent cannot overcome the legal parent's autonomy. Thus, the state affords less protection to the child of a nontraditional relationship than a child of a traditional relationship purely because his or her parents are a same-sex couple. This unequal treatment cannot be in the best interests of the child. Disregarding coparent-child relationships does not promote the best interests of child because deep, meaningful emotional bonds between a child and his or her coparent can be severed with little to no recourse. And this is a two-way street: a legal parent can cut off the

359. *See id*. (offering the benefit of growing up with a mother and a father as a rational reason for the legislature to limit marriage to opposite-sex couples).

360. *See id.* at 8 (discussing studies introduced by the plaintiffs).

361. *See supra* notes 176-82 and accompanying text.

coparent from seeing their child or a coparent can renounce his or her responsibilities as a parent and refuse to support and acknowledge their child. If we do not let the mothers and fathers of opposite-sex parenting couples act selfishly at the expense of their children, we cannot let the mothers and fathers of same-sex parenting couples do so either.

To foster the best interests of a child in a nontraditional family, each of the above described methods must be available to same-sex coparents in New York State, so that nontraditional families can tailor their relationships to reflect their unique situations. Allowing for second-parent adoption is a step in the right direction, but New York cannot stop there. Adoption is expensive and time-consuming, and it is an additional step that opposite-sex parenting couples, even where one parent is not biologically related to the child, often do not have to take because of the presumption of legitimacy that arises from marriage. Same-sex coparents should be allowed to privately order their lives, and courts should take notice of agreements between coparents as evidence of their intent. Furthermore, there should be a mechanism by which coparents can file documents with the court or another state agency to evidence their intent to coparent a child together. These agreements, however, should not be determinative; the court should always apply a best interests analysis in its decisions. With that said, courts should be allowed to apply the same equitable remedies they have always been able to use, such as equitable estoppel, to coparenting situations. Standards like de facto parenthood and *in loco parentis* are merely attempts by the court to come up with a fair and equitable standard that will apply to more than one instance, in an effort toward consistency. This is not judicial activism; this is judicial ingenuity, necessary to solve the innumerable variation of disputes that come before the court. But, the answer does not lie completely within the court system; legislatures must also act. First, same-sex couples must be allowed to marry, and that marriage must afford them and their families all of the traditional protections and obligations. After all, if the couples are allowed to marry, but they are not entitled to divorce remedies, a presumption of legitimacy, or other marital benefits and responsibilities, this problem will not be solved. Finally, the legislature must amend the relevant statutes to explicitly define a coparent as a parent. It is time to acknowledge these relationships for what they create: a family. We, as both a society and as a legal community, must continue to challenge the outdated, so-called “traditional” nuclear family model to recognize and protect the reality, diversity, and legitimacy of the modern American family.

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