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THE INTERSECTION OF SAME-SEX AND STEPPARENT VISITATION

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Even after victories in the same-sex marriage movement, same-sex parents continue to have fewer rights than opposite-sex parents. In New York, three statutes grant child visitation rights: a parent visitation statute, a grandparent visitation statute, and a sibling visitation statute. In Alison D. v. Virginia M.*, the New York Court of Appeals limited the statutory definition of "parent," as used in the parent visitation statute, to biological parents. Although there are certain circumstances where a non-biological parent may receive visitation with his or her child, a more comprehensive solution is needed.*

This note argues that New York should adopt a de facto parenting statute—modeled after the sibling and grandparent statutes—that would grant standing to individuals who have acted in the role of parent and demonstrated extraordinary circumstances. Granting standing would allow same-sex partners to petition in court and argue that it is in the best interest of the child to receive visitation. This solution would allow courts to look at the love, care, and relationship between a non-biological parent and child, rather than rigid legal definitions.

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INTRODUCTION

In June of 2011, thousands of same-sex couples celebrated the legalization of gay marriage in New York.[1] For many, this moment marked a huge victory. One individual told reporters, "[i]t means that all of my friends can finally do the thing that they wanted to do . . . . It means we're that equal."[2] Governor Cuomo remarked that New York "made a powerful statement."[3] He continued, "[t]his state is at its finest when it is a beacon of social justice."[4] Unfortunately, marriage alone does not provide all lesbian, gay, bisexual, and transgender (LGBT) partners with the same rights[5] as biological and/or traditional adoptive parents.[6]

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[1] *See New York 6th State to Legalize gay marriage,* CBS NEWS (June 25, 2011, 10:17 AM), http://www.cbsnews.com/news/new-york-6th-state-to-legalize-gay-marriage/.

[2] *Id*.

[3] *Id*.

[4] *Id.*

[5] Namely, a parent's right to visit with his or her child under N.Y DOM. REL. LAW § 70 (McKinney 2014). *See* Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).

[6] A traditional "nuclear family" is a husband, wife, and their biological children. Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 879 n.1 (1984). Recently, the number of families who fall outside of the nuclear family paradigm have increased. *See* Kristy M. Krivickas & Daphne Lofquist, *Demographics of Same-Sex Couples Households with Children* 4 (U.S. Census Bureau, Fertility & Family Statistics Branch, SEHSD Working Paper No. 2011-11, 2011) *available at* http://www.census.gov/hhes/samesex/files/Krivickas-Lofquist%20PAA%202011.pdf. In 2011, the Fertility & Family Statistics Branch of the U.S. Census Bureau conducted a study regarding same-sex couples with children. *Id*. at 1. The study "describe[d] the distribution of type of children (biological, step, adopted, non-related, or a combination of types of children) across four household forms: married opposite-sex; unmarried opposite-sex; same-sex unmarried; and same-sex with a spouse." *Id*. According to the study, 33,010 male-male unmarried couples and 71,939 female-female unmarried couples households contain children. *Id*. at 18 tbl.1. Of the male-male couples in the study 17.4% have step or adopted children, and of the unmarried female-female couples, 23% reported having step or adopted children. *Id*. Additionally, of the married same-sex couples that reported having children, 11% had children that were either adopted or step-children. *Id*.

Despite its recognition of same-sex marriage, New York has failed to recognize the legal legitimacy of same-sex separation, and, therefore, has effectively crippled the ability of non-biological parents to maintain relationships with their children after actually separating.[7] This Note argues that courts should take a functional approach in determining visitation rights, which looks at the relationship between the child and individual seeking visitation. This would be achieved through a de facto parenting statute. A de facto parent is someone that has acted as a parent, but does not have the legal title through either biology or adoption. Such recognition would make it easier for same-sex partners to obtain visitation.

The law currently fails to adequately address what happens when LGBT families split apart. Approximately fifty percent of marriages in the United States end in divorce;[8] if these statistics persist for same-sex marriages as well, then same-sex couples will increasingly face dissolution in Family Court. The process of dissolution becomes even more difficult when children are involved. The prevalence of LGBT parents makes the situation even more dire: in New York, sixteen percent of same-sex couples report that they are raising their own children.[9] Further, New York has taken several steps to foster the development of LGBT families, including the legalization of gay marriage, adoption by same-sex couples, and donor insemination.[10] It is therefore essential that the legislature and the courts take steps to remedy the issues associated with the dissolution of same-sex couples.

Despite New York's increasing support of LGBT families, the New York legislature and Court of Appeals have erected strict standing requirements in visitation cases that adversely affect same-sex parents. The statutory framework limits standing for

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[7] *See Alison D.*, 572 N.E.2d at 29–30 (holding that the term "parent" is limited to biological parents in visitation disputes).

[8] *See* Ctr. for Disease Control & Prevention, *Marriage and Divorce*, CDC HOME, http://www.cdc.gov/nchs/fastats/marriage-divorce.htm (last updated June 19, 2014).

[9] "Snapshot: LGBT Equality By State", FAMILY EQUALITY COUNCIL, http://www.familyequality.org/get_informed/equality_maps/snapshot_lgbt_equality_by_state/ (select New York from menu) (last visited Sept. 13, 2014).

[10] *Id*.

visitation cases to a narrow group of individuals: parents,[11] grandparents,[12] and siblings.[13] In addition to legislative barriers to visitation, the New York Court of Appeals has also interpreted the statute to deny same-sex, non-biological parents access to their children. The Court's current approach to visitation starts with *Alison D. v. Virginia M.*, which held that a long-term same-sex partner, who was not the biological parent of her child, was not a "parent" within the meaning of New York Domestic Relations Law § 70 and was therefore ineligible to obtain visitation with her child.[14]

Alison D. had devastating consequences for non-biological same-sex parents. To soften these consequences,[15] some lower courts have used the doctrine of equitable estoppel.[16] In *Jean Maby H. v. Joseph H.*, the Appellate Division for the Second Department ruled that "a non-biological parent may invoke the doctrine of equitable estoppel to preclude the biological parent from cutting off custody visitation with the child."[17] The court took note that the former husband had been significantly involved in raising the child and had become a part of the child's life.[18] Due to the former husband's notable involvement with the child, the court reasoned that it would have been inequitable for the mother to assert her exclusive custodial right as the biological parent and deny him visitation.[19]

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[11] N.Y. DOM. REL. LAW § 70 (McKinney 2014) (authorizing parents to petition for visitation with a child).

[12] *Id.* § 72 (granting standing for visitation to grandparents upon a showing of extraordinary circumstances).

[13] *Id.* § 71 (granting standing for visitation to siblings upon a showing of extraordinary circumstances).

[14] *Alison D.*, 572 N.E.2d at 29–30.

[15] *See, e.g.*, Jean Maby H. v. Joseph H., 246 N.Y.S.2d 677, 677 (N.Y. App. Div. 1998).

[16] The doctrine of equitable estoppel allows a court to prevent the application of a law that would lead to injustice. *Id.* In this context, equitable estoppel prevents a custodial parent from using the parent visitation statute—as interpreted by *Alison D.*—as means to deny visitation, if the denial of visitation would be unjust. *See id.*

[17] *Id.* at 678.

[18] *Id*.

[19] *Id*. at 682. The granting of equitable estoppel does not automatically

Approximately twenty years later, the Court reversed lower courts' efforts to erode its inequitable consequences and affirmed the principle of *Alison D.* In *Debra H. v. Janice R.*, the New York Court of Appeals held that courts could no longer use the doctrine of equitable estoppel to allow a former partner to seek visitation with a non-biological child.[20] Despite reaffirming the holding of *Alison D.*, the New York Court of Appeals employed the doctrine of comity to recognize the former partner's parentage from another state—the couple at issue had a civil union in Vermont, and therefore, "New York [would] recognize parentage created by a civil union . . . ."[21] The *Debra H.* decision began a judicial pattern to carve out exceptions to *Alison D.*, while maintaining the basic principle limiting the rights of non-biological parent-partners.[22] The decisions of the New York Court of Appeals in *Alison D.* and *Debra H.* were met with substantial criticism from both legal scholars[23] and the lower courts.[24]

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grant visitation rights; it grants the party standing to then be able to argue it is in the "best interest of the child" to visit with that person. *Id*. at 286.

[20] Debra H. v. Janice R., 930 N.E.2d 184, 190 (2010). This ruling must only apply to non-biological children who have not been adopted, as adoption grants a person the same legal rights as biological parents, and therefore, an adoptive parent has automatic standing to seek visitation with the subject child. *See* N.Y. DOM. REL. LAW § 117(1)(c) (McKinney 2014).

[21] *Debra H.*, 930 N.E.2d at 190.

[22] *See id*.

[23] For examples of strong scholarly criticism, see Suzanna Goldberg, Harriet Antczak & Mark Musico, *Family Law Scholarship Goes to Court: Functional Parenthood and the Case of* Debra H. v. Janice R., 20 COLUM. J. GENDER & L. 348 (2011) (arguing for a functional approach to family law in the context of same-sex couples that recognizes the rights of non-biological parents); Carlos A. Ball, *Rendering Children Illegitimate in Former Partner Parenting Cases: Hiding Behind the Façade of Certainty*, 20 AM. U. J. GENDER SOC. POL'Y & L. 623 (2012) (critiquing the courts rationale of predictability in limiting the term "parent" to biological parents); Joanna L. Grossman, *The New Illegitimacy: Tying Parentage to Marital Status for Lesbian Co-Parents*, 20 AM. U. J. GENDER SOC. POL'Y & L. 671 (2012); Jason C. Beekman, *Same-Sex Marriage: Strengthening the Shield or Sharpening the Sword? The Impact of Legalizing Marriage on Child Custody/Visitation and Child Support for Same-Sex Couples*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 215 (Spring 2012).

[24] *See* Beth R. v. Donna M., 853 N.Y.S.2d 501, 504 (N.Y. Sup. Ct. 2008) ("In the seventeen years since *Alison D*., under constraint of that decision, courts

In addition to the inequalities created by *Alison D.*, the reluctance of the Court of Appeals to abandon *Alison D*. has led to a perverse outcome that links visitation to child support.[25] In *Estrellita A. v. Jennifer D.,* the Family Court held that a mother could not prevent her former partner from seeking visitation with the child on the basis that the partner did not qualify as a parent.[26] The court reasoned that because the biological mother sought child support from her former partner, and claimed that the partner was a "parent" for child support purposes, the mother could not concurrently claim that she was not a "parent" for visitation purposes.[27] Therefore, the court tied the partner's right to visitation to the biological parent's need for child support.

The legalization of same-sex marriage provided a limited benefit because it only conferred stepparent status, and a stepparent is not entitled to visitation. In 2011, the New York legislature legalized same-sex marriage.[28] As a result, a same-sex partner who is married to the child's biological parent receives the status of "stepparent." While this may benefit some same-sex partners,[29]

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have continued to deny the proactive efforts of non-biological, non-adoptive domestic partner or spouse to obtain custodial rights, notwithstanding the ties that may have developed between that person and the child.").

[25] *See* Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843, 845–47 (N.Y. Fam. Ct. 2013) (holding respondent "judicially estopped from asserting that petitioner is not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different. . . . This biological parent deliberately sought to involve her former partner in her child's life at least until her financial majority.").

[26] *Id*.

[27] *Id*.

[28] N.Y DOM. REL. LAW § 10-a (McKinney 2014).

[29] *See* Counihan v. Bishop, 111 N.Y.S.2d 137, 137–38 (N.Y. App. Div. 2013) (recognizing that after the passage of the Marriage Equality Act, same sex partners of children conceived through artificial insemination become the legal parents under N.Y. DOM. REL. LAW § 73(1)). Section 73 of the Domestic Relations Law reads that "[a]ny child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes." N.Y. DOM. REL. LAW § 73. This statute uses marriage to determine the legal relationship with the child—not biology—and, therefore, same-sex marriage provides greater rights in this context. *See id*; *see also* Counihan v.

laws regarding visitation are not favorable to the stepparent.[30] In New York, "step-parents have no independent rights in relation to their step-children, they . . . derive certain legal and *de facto* rights and obligations as the spouse of a parent."[31] Moreover, stepparents are generally not obligated to pay child support in New York;[32] therefore, the mechanism that allowed same-sex partners to continue to visit with non-biological children following a separation (paying child support) is not even readily available to same-sex stepparents. Further complicating non-biological parents' efforts, electing to pay child support would not resolve the issue. It is not the act of supporting a child that allows a person to seek visitation, but that the biological parent, in the petition for child support, nominally claims that the partner is a "parent."[33] Therefore, marriage alone, does not provide a sufficient remedy to non-biological parents seeking visitation with a non-adopted child.

A de facto parenting statute would resolve the problem created by *Alison D.* and *Janice R.* 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 . . . performs a share of caretaking functions at least as great as the legal parent."[34] New York should adopt a de

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Bishop, 111 N.Y.S.2d at 139 (reaching the same conclusion).

[30] *See* Bank v. White, 837 N.Y.S. 187 (N.Y. App. Div. 2007) (holding that a husband did not have standing to seek visitation with his stepchildren).

[31] Spenser v. Spenser, 488 N.Y.S.2d 565, 566 (N.Y. Fam. Crt. 1983) (italics in original).

[32] *See* Kaiser v. Kaiser, 402 N.Y.S.2d 171, 172 (N.Y. Fam. Ct. 1978) ("A stepparent does not merely by reason of the affinity stand in loco parentis to a stepchild. The legal liability of support of a stepparent for a stepchild arises by statute when the child is receiving or is in danger of receiving public assistance."). For the statute discussed in *Kaiser*, see N.Y. FAM. CT. ACT § 415 (McKinney 2014) ("Except as otherwise provided by law, the spouse or parent of a recipient of public assistance or care or of a person liable to become in need therefore or of a patient in an institution in the department of mental hygiene, if of sufficient ability, is responsible for the support of such person or patient, provided that a parent shall be responsible only for the support of his child or children who have not attained the age of twenty-one years").

[33] *Estrellita A.*, 963 N.Y.S.2d at 847.

[34] William C. Duncan, *The Legal Fiction of De Facto Parenting*, 36 J. LEGIS. 263, 265 (2010) (quoting E.N.O v. L.M.M, 429 Mass. 824, 829 (1999)).

facto parenting statute—a statute modeled after the grandparent and sibling visitation statutes—which would grant standing to a de facto parent. Then, having achieved the first hurdle of standing, a de facto parent would be able to argue that it is in the best interest of the child to visit with her.

Part I of this Note analyzes case law relevant to the issue of same-sex visitation. Part II shows the increased reliance on child-support in visitation cases involving same-sex couples and the problems associated with this linkage. Part III discusses the intersection between stepparent visitation and same-sex partnerships, and the effect on same-sex stepparents of the growing reliance on child support as a means to visitation. Part IV outlines proposed solutions to the problem confronting same-sex stepparents seeking visitation and shows why those solutions are inadequate. Part V argues for a de facto parenting statute as a solution to the barriers confronting same-sex stepparents who seek visitation rights, and provides examples of states that permit de facto parenting. Finally, Part VI addresses the criticisms of de facto parenting as a solution, and why those criticisms are without merit.

I. THE CASE LAW OF NON-BIOLOGICAL AND SAME-SEX PARENT VISITATION

This Part analyzes two New York cases that have shaped the legal landscape of same-sex visitation: *Alison D. v. Virginia M.*[35] and *Debra H. v. Janice R.*[36] Together, these cases have prevented non-biological parents from obtaining visitation with their children.

A. *Alison D. v. Virginia M.*

Alison D. and Virginia M. began their relationship in 1977, and shortly thereafter, they moved in together in Putnam County, New York.[37] When the couple decided to have children, they elected

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[35] Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

[36] Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010).

[37] Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of* Alison D. v. Virginia M., 17 COLUM. J.

that Virginia would be the biological parent via artificial insemination.[38] Virginia gave birth to their son, Andrew, in July 1981.[39] Andrew took the surnames of both of his parents, and the women shared child-rearing responsibilities, "from doctor visits and discipline to the ins and out[s] of nursery school."[40] As for Andrew's own perceptions of his family make-up, even though Alison was not his biological mother, "Andrew's grandparents included Alison's parents ('Grammy' and 'Grandad') and Alison's grandfather ('Poppa')."[41]

Two years later, Alison and Virginia ended their relationship.[42] Initially, the two worked out a schedule where "Andrew would stay overnight with Alison two or three nights per week and would also spend some birthdays, holidays, and vacation time with her."[43] Additionally, Virginia permitted Alison to go on vacations with Andrew and attend family events with Alison.[44] Over time, however, Virginia began limiting Alison's access to Andrew, against his express wishes.[45] When Alison took a job in Ireland, Virginia obstructed contact between Alison and the child by returning things that Alison sent to him.[46]

Alison attempted to resolve the conflict privately,[47] but when those efforts failed, she filed a petition in New York Supreme Court in 1988.[48] The Supreme Court relied on *Ronald FF. v. Cindy GG*.[49] and dismissed the petition.[50] In *Ronald FF.*, the court denied visitation to a mother's former boyfriend on the grounds that he

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GENDER & L. 307, 311 (2008).

38 *See Alison D.*, 572 N.E.2d at 28.

39 *Id.*; *see also* Goldberg, *supra* note 37, at 312.

40 Goldberg, *supra* note 37, at 311.

41 *Id*.

42 *Alison D.*, 572 N.E.2d at 28.

43 Goldberg, *supra* note 37, at 314.

44 *Id*.

45 *Id.*

46 *Alison D.*, 572 N.E.2d at 28.

47 Alison wrote letters to Virginia. Goldberg, *supra* note 37, at 316.

48 *Id*. at 321.

49 *In re* Ronald FF., 511 N.E.2d 75 (N.Y. 1987).

50 *Alison D.*, 572 N.E.2d at 30–31.

was not a biological parent.[51] The Supreme Court continued the narrow definition of parent.[52]

On appeal, the Appellate Division for the Second Department affirmed the Supreme Court's decision.[53] The Second Department recognized the significant role Alison played in Andrew's life, stating:

> We do not . . . minimize, in any way, the close and loving relationship that the petitioner has apparently developed with the child. Indeed, had the petitioner come within the meaning of the term "parent" contained in Domestic Relations Law §70, her claim for visitation would have been worthy of serious consideration.[54]

On further appeal, the New York Court of Appeals held that Alison was not a "parent" within the meaning of the law because she was not a biological parent.[55] This formalistic definition of "parent" was not unanimously adopted by the court.[56] In her dissent, Judge Kaye said, "[t]he Court's decision, fixing biology as the key to visitation rights, has impact far beyond this particular controversy, one that may affect a wide spectrum of relationships—including those of longtime heterosexual stepparents, 'common-law' and non-heterosexual partners such as involved here."[57] Judge Kaye recognized that such an impact would not be in the best interest of children,[58] and therefore,

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[51] *In re Ronald FF*., 511 N.E.2d at 77.

[52] *See Alison D.*, 572 N.E.2d at 29 (defining parent within the meaning of section 70 as the child's biological parent or legal guardian by virtue of adoption).

[53] Alison D. v. Virginia M., 552 N.Y.S.2d 321, 324 (N.Y. App. Div. 1990).

[54] *Id.*

[55] *See Alison D.*, 572 N.E.2d at 30.

[56] *Id.* at 30 (Kaye, J., dissenting).

[57] *Id*.

[58] *Id.* ("But the impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development. The majority's retreat from the courts' proper role—its tightening of rules that should in visitation petitions, above all, retain the capacity to take the children's interests into account—compels this dissent.").

argued that the case should be remanded to determine whether Alison D. stood *in loco parentis*.[59] Other courts and legal scholars generally agreed with Judge Kaye's dissent and criticized this landmark decision.[60]

B. *Debra H. v. Janice R.*

Twenty years later, the Court of Appeals declined to overrule *Alison D.*[61] Janice R. was the biological parent of M.R., who was conceived through artificial insemination prior to a civil union.[62] Janice R. and Debra H. met in 2003 and "entered into a civil union in the State of Vermont in November 2013, the month before M.R.'s birth."[63]

When the couple split, Janice R. initially allowed Debra H. to maintain a relationship with the child; however, in 2008, Janice R. started restricting visits.[64] Debra H. filed for visitation in New York State Supreme Court seeking "joint legal custody of M.R., restoration of access and decision-making authority with respect to his upbringing, and appointment of an attorney for the child."[65] The State Supreme Court did not award joint legal custody, but did allow for visitation.[66] The court reasoned that "it was inconsistent to estop a nonbiological father from disclaiming paternity in order to avoid support obligation, but preclude a nonbiological parent from invoking equitable estoppel against the biological parent in

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[59] *Id.* at 31. "*In loco parentis* refers to a person who has fully put himself in the situation of a lawful parent by assuming *all* the obligations incident to the parental relationship and who actually discharges those obligations." Rutkowski v. Wasko, 143 N.Y.S.2d 1, 5 (N.Y. App. Div. 1955).

[60] *See, e.g.*, Anonymous v. Anonymous, 20 A.D.3d 333, 333–34 (N.Y. App. Div. 2005) (Ellerin and Sweeny, JJ., concurring); Schepard, *Revisiting 'Alison D.': Child Visitation Rights for Domestic Partners*, N.Y. L.J., June 27, 2002, at 3; Ettelbrick, *Who is a Parent?: The Need to Develop a Lesbian Conscious Family Law*, 10 N.Y.L. SCH. J. HUM. RTS. 513, 516–517, 522–532 (1993).

[61] *See* Debra H. v. Janice R., 14 N.E.2d 184, 196 (N.Y. 2010).

[62] Debra H. v. Janice R., 930 N.E.2d 263 (N.Y. 2010)..

[63] *Id*.

[64] *Id.* at 185–86.

[65] *Id.* at 186.

[66] *Id.*

order to maintain an established relationship with the child . . . ."[67] The court permitted visitation for Debra H. on the grounds of equitable estoppel.[68] On appeal, the Appellate Division for the First Department overturned the Supreme Court's ruling.[69] The Appellate Division applied *Alison D.* and determined that the plaintiff did not have standing to seek visitation.[70]

The New York Court of Appeals continued its formalistic approach to family law.[71] The court distinguished between paternity cases and visitation cases; it held that although equitable estoppel may be used to prevent a person from denying paternity, equitable estoppel may not be used in visitation cases.[72] The court reaffirmed *Alison D.* despite its inequitable results.[73] However, the majority managed to still rule in Debra H.'s favor[74] based on the doctrine of comity.[75]

Judge Graffeo and Judge Ciparick each wrote concurring opinions that agreed with the outcome of the case, but opposed the current meaning of *Alison D.*[76] Judge Graffeo was strongly in favor of retaining *Alison D.*'s holding; he praised both the decision's clarity and its ability to reduce litigation.[77] In contrast, Judge Ciparick advocated for overruling *Alison D.*:

> In countless cases across the state, the lower-courts,

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[67] *Id.* (discussing *In re* Shondel, 853 N.E.2d 610 (2006) (applying the doctrine of equitable estoppel to a paternity case to prevent an individual who acted as a father from denying paternity)).

[68] *Id*. at 187.

[69] *See* Debra H. v. Janice R*,* 877 N.Y.S.2d 259, 259–60 (N.Y. App. Div. 2009).

[70] *Id.*

[71] *Compare* Alison D. v. Virginia M., 572 N.E.2d 27, 33 (N.Y. 1991) (maintaining a formal definition of "parent"), *with Debra H.*, 14 N.E.2d at 192 (distinguishing between visitation and paternity for the application of equitable estoppel).

[72] *Debra H.*, 14 N.E.2d at 199.

[73] *Id*.

[74] *Id.*

[75] The doctrine of comity allows a state court to apply the law of a different state; in this case, the parties married and had their child in Vermont, therefore, the court applied Vermont law. *See Id.* at 192.

[76] *Id.* at 195 (Ciparick, J., concurring); *Id.* at 193 (Graffeo, J., concurring).

[77] *Id.* at 193–95 (Graffeo, J., concurring).

> constrained by the harsh rule of *Alison D.*, have been forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships . . . . Moreover, the decision in *Alison D.* has been both questioned by judges . . . and roundly criticized by legal scholars.[78]

Judge Ciparick's opinion reiterates the concerns that Judge Kaye voiced in her dissent to *Alison D.* twenty years prior.[79] Judge Ciparick agreed with the outcome of the decision, that Debra H. is entitled to visitation, but believed that the court should have overruled *Alison D.* and considered Debra H. a parent.[80]

The passage of the Marriage Equality Act partially resolved the problem that *Alison D.* and *Debra H.* created in the context of artificial insemination.[81] The New York statute on artificial insemination states that "[a]ny child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent of the woman and her husband, shall be deemed the legitimate birth child of the husband and his wife for all purposes."[82] This statute uses marriage to determine the legal relationship with the child—not biology—and, therefore, same-sex marriage provides greater rights in this context.[83]

However, *Alison D.* and *Debra H.* continue to be a significant barrier to visitation for same-sex partners. As Judge Kaye stated, the implications of limiting the definition of a "parent" to his/her biological relationship with a child reach far beyond the narrow facts of *Alison D.* With *Alison D.*'s holding firmly in place, there are few options for non-biological, separated parents to maintain

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78 *Id.* at 196.

79 *Id.*

80 *Id.*

81 *See* Counihan v. Bishop, 974 N.Y.S.2d 137, 138 (N.Y. App. Div. 2013) (recognizing that after the passage of the Marriage Equality Act, same-sex partners of children conceived through artificial insemination become the legal parents under N.Y. DOM. REL. LAW § 73(1)).

82 N.Y. DOM. REL. LAW § 73(1) (McKinney 2014).

83 *See Counihan*, 974 N.Y.S.2d at 138.

relationships with their children. Unlike in other states,[84] in New York, marriage alone generally does not enable a person to seek visitation.[85] New York instead reduces parenthood to biology. Therefore, a solution is needed that mitigates the harsh effects of *Alison D.* and *Debra H.* for same-sex stepparents.

II. THE INCREASING IMPORTANCE OF CHILD SUPPORT IN SAME-SEX VISITATION CASES

An exception to the *Alison D.* rule manifests if the biological parent seeks child support from the non-biological parent.[86] However, this approach has undesirable consequences.[87] In New York, the interdependence between child support and visitation has changed over time. Traditionally, New York courts maintained a strong interdependence between child support and visitation.[88] However, more recently courts have made efforts to separate the notions of child support and visitation.[89] Despite these efforts, child support and visitation remain deeply intertwined.[90] This

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[84] *Debra H.*, 930 N.E.2d at 189–90 (discussing and applying Vermont law).

[85] *See, e.g.*, Bank v. White, 837 N.Y.S. 181 (N.Y. App. Div. 2007) (holding that a husband did not have standing to seek visitation with his stepchildren). Due to the relatively recent ability for same-sex couples to marry, there have not been any cases yet regarding their visitation disputes.

[86] *See* Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843, 846 (N.Y. Fam. Ct. 2013).

[87] For example, this framework creates multiple definitions of the term "parent." *See* Beekman, *supra* note 23, at 227–28.

[88] *See* Karen Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 RUTGERS L.J. 619, 625 (1989).

[89] *See, e.g.*, Stewart v. Soda, 642 N.Y.S.2d 105, 105 (N.Y. App. Div. 1996) ("Family Court erred in terminating visitation between respondent and his children because respondent failed to pay child support. Visitation cannot be terminated solely for reasons unrelated to the welfare of the child."); Labanowski v. Labanowski, 857 N.Y.S. 737, 740 (N.Y. App. Div. 2008) (stating that the obligation to pay child support may be terminated only if the party proves that "a child of employable age . . . actively abandons the noncustodial parent by refusing all contact and visitation, without cause, "or the party may prove that the custodial parent "unjustifiably frustrated the noncustodial parent's right of reasonable access . . . .").

[90] *See Estrellita A.*, 963 N.Y.S.2d at 846–47.

connection is especially problematic for same-sex couples because it not only motivates biological parents to use visitation and child support as weapons,[91] but it also creates an arbitrary definition of "parenthood" by allowing someone to be a "parent" for the purpose of child support, but not for that of visitation.[92]

A. Approaches to the Connection Between Child Support and Visitation

Pennsylvania, Florida, and New York exemplify the three approaches to the connection between child support and visitation.[93] In Pennsylvania, a visitation determination is completely separate from a child support determination.[94] In Florida, courts link child support and visitation only under certain circumstances.[95] Finally, in New York, child support used to be inextricably linked to visitation; however, more recently, New York has moved to separate the two issues.[96]

i. Pennsylvania

Pennsylvania has completely separated child support proceedings from visitation proceedings.[97] Two cases that best illustrate this separation are *Kramer v. Kelly* and *Commonwealth ex rel. Mickey*.[98] In *Kramer*, after the father and mother separated,

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[91] *See* Czapanskiy, *supra* note 88, at 638. *See infra* notes 147–53 for a discussion of parents using visitation and support obligations as weapons.

[92] *See* Beekman, *supra* note 23, at 227–28 (comparing the cases of *Debra H.* and *H.M.* which were decided on the same day, but represent different views of the scope of parenting in the context of custody/visitation cases and child support cases.).

[93] *See* Czapanskiy, *supra* note 88, at 621–25.

[94] *Id*. at 621, 623–24.

[95] *Id.* at 624–25.

[96] *Id.* at 625.

[97] *Id.* at 621–24.

[98] *See* Kramer v. Kelly, 401 A.2d 799 (Pa. Super. Ct. 1979) (holding that a parent is obligated to pay child support even if the custodial parent actively keeps the child away from the non-custodial parent and refuses to disclose the whereabouts of the child); Commonwealth *ex rel.* Mickey, 280 A.2d. 417 (Pa. Super. Ct. 1971) (holding that a father's obligation to pay child support was not

the father went to visit his child but found the mother's home abandoned.[99] He made various attempts to locate his child, including contacting the post office and hiring a private detective.[100] The father had been up to date with all child-support payments until this incident, when he terminated support.[101] When the father finally located the mother and child, he petitioned for contempt;[102] in response to his petition, the mother filed for a violation of the child support order.[103] The lower court ruled in favor of the mother, and the Pennsylvania Superior Court affirmed that order to hold the father liable for the child support he withheld while the mother denied visitation.[104]

Similarly in *Commonwealth ex rel Mickey*, a mother took the child out of the father's home and transported the child to another state without notifying the father.[105] In response to the mother's actions, the father stopped paying child support.[106] In vacating the lower court's decision that suspended child support, the Pennsylvania Superior Court found "[t]he duty to support children is not dependent upon custody of them. Even assuming that the mother improperly removed the children from the defendant's home to another state, her misconduct in doing so cannot destroy

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absolved when the mother took the child from the father's home and brought the child to another state).

[99] *Kramer*, 401 A.2d at 800.

[100] *Id.*

[101] *Id.*

[102] When an individual violates an order of child support, they may be held in contempt. *Id.* In civil court, the purpose of the order of contempt is to coerce the person to comply with the court order; whereas in criminal court, the purpose is to "vindicate the authority of the court." *Id.* at 801. A person found in contempt could be placed in jail; however, with a civil contempt order, compliance with the original court order will release the individual. *Id.* In *Kramer*, the court failed to "set conditions for purging the contempt"—a requirement for civil contempt in Pennsylvania—and the matter was remanded to the lower court to determine whether the father was in contempt. *Id.* (citing Barrett v. Barrett, 368 A.2d 616, 612 (Pa. 1977)).

[103] *Id.* at 800.

[104] *Id.* at 799–800.

[105] Commonwealth *ex rel.* Mickey, 280 A.2d. 417, 418 (Pa. Super. Ct. 1971).

[106] *Id.* at 418.

the right of those children to support from the father."[107] Therefore, in Pennsylvania, even purposeful interference with the non-custodial parent's visitation rights would not impact the obligation to pay child support.[108]

ii. Florida

Florida takes a more nuanced approach to the connection between child support and visitation.[109] In Florida, the parties can elect to make child support contingent upon visitation.[110] For example, in *Craig v. Craig*, the parents signed a divorce decree with a clause that stated that the mother "shall not remove said children beyond the jurisdiction of this Court without special order of the Court."[111] When the mother violated this provision, the Supreme Court of Florida held that the father's obligation to pay child support was suspended because the mother "deliberately, consistently, and maliciously" denied the father visitation.[112]

However, Florida sets limits on the connection between child support and visitation.[113] The first limitation is that "denial of visitation may not be raised as a defense [to a suit to recover an unpaid child-support obligation], unless the child support duty had been conditioned on visitation by court order."[114] The second limitation is that visitation may not be conditioned on child support.[115] The reverse is allowed, "a non-residential parent may withhold support . . . if the residential parent has refused to allow visitation."[116] Therefore, although Florida allows for some

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[107] *Id.* at 419.

[108] *See id.*

[109] *Compare* Czapanskiy, *supra* note 88, at 624 (discussing Florida's approach), *with id.* at 621 (discussing Pennsylvania's approach), *and id.* at 625 (discussing New York's approach).

[110] *Id.* at 624.

[111] Craig v. Craig, 26 So. 2d 881, 881 (Fla. 1946).

[112] *Id.* at 882–83.

[113] *See* Czapanskiy, *supra* note 88, at 625.

[114] *Id.*

[115] *Id.*

[116] *Id.*

interdependence between child support and visitation, this interdependence is limited.

iii. New York

New York, historically, exemplified the third approach to child support and visitation, which consistently connected custody and visitation disputes.[117] Parents would develop contracts that made financial support for the custodial parent and child contingent upon visitation with the child.[118] Even after the codification of child support laws in New York—the first of which passed in 1962[119]—the contractual approach to visitation and child support is still an option for individuals in New York.[120] In the 1960s and 1970s, courts in New York adopted the dependent approach to custody and visitation.[121] In *Fleischer v. Fleischer*, the Appellate Division affirmed the Family Court's decision to make child support dependent on visitation.[122]

More recently, however, New York has moved away from the strict connection between child support and visitation.[123] This

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[117] *Id.*

[118] *See id.*

[119] *See generally* N.Y. FAM. CT. ACT. § 413 (McKinney 2014) (illustrating New York's laws concerning a parent's duty to support a child).

[120] *See* Czapanskiy, *supra* note 88, at 625 ("[S]eparation contract has survived the creation of such child support laws. Currently, such a reciprocal separation contract remains enforceable even after divorce, unless the issues are covered by the divorce decree.").

[121] *See, e.g.*, Callender v. Callender, 325 N.Y.S.2d 420, 422 (N.Y. App. Div. 1971); Fleischer v. Fleischer, 269 N.Y.S.2d 270, 271 (N.Y. App. Div. 1966); Hudson v. Hudson, 412 N.Y.S.2d 242, 244 (N.Y. Sup. Ct. 1978).

[122] *Fleischer*, 269 N.Y.S.2d at 271.

[123] *See* Labanowski v. Labanowski, 857 N.Y.S.2d 737, 740 (N.Y. App. Div. 2008) (stating that the obligation to pay child support may be terminated only if the party proves that "a child of employable age . . . actively abandons the noncustodial parent by refusing all contact and visitation, without cause," or proves that the custodial parent "unjustifiably frustrated the noncustodial parent's right of reasonable access . . . ."); Stewart v. Soda, 642 N.Y.S.2d 105, 106 (N.Y. App. Div. 1996) ("Family Court erred in terminating visitation between respondent and his children because respondent failed to pay child support. Visitation cannot be terminated solely for reasons unrelated to the welfare of the child.").

transition reflects a shift toward a more functional and less rigid approach to family law.[124] Currently, the obligation to pay child support is not dependent on visitation, with limited exceptions.[125] The first exception is abandonment by the child.[126] The party seeking to terminate child support has the burden of proof to establish abandonment.[127] First, the party must show that the child is of "employable age."[128] Second, the party must show that the child "actively abandon[ed] the noncustodial parent by refusing all contact and visitation, without cause."[129]

The second exception to the general rule imposing child support, regardless of visitation status, is "parental alienation."[130] Parental alienation occurs when the custodial parent has taken affirmative steps that "severely frustrated visitation by either relocating to a distant location without permission or by intentionally alienating and brainwashing the child against the non-custodial parent."[131]

Despite these advances, New York courts' progression away from the rigid contingency between child support and visitation

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[124] *See* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 476. (Winter 2013) ("Such disaggregation of parental rights makes sense particularly for functional parents because their rights and obligations are based on the actual specific functions that they perform, which do not necessarily include all parental responsibilities and entitlements. While rights and obligations may also be disaggregated for formal parents, formal status creates a context in which assigning the whole basket of parental rights is more appropriate."). "[F]unctional parenthood is defined as the assignment of parental status based on actual, 'functional' care work or support for the children." *Id.* at 428. This is in contrast to a "formal approach to parenthood . . . that is determined ex ante, usually established at birth, and most importantly, determined by a legal rule that is applied without judicial discretion." *Id.* at 435.

[125] *See Stewart*, 642 N.Y.S.2d at 105.

[126] *Labanowski*, 857 N.Y.S.2d at 740 (quoting *In re* Chamberlin, 658 N.Y.S.2d 751 (1997)).

[127] *Id.* (quoting *In re* Wiegert, 699 N.Y.S.2d 597 (1999)).

[128] *Id.* (citing *In re* Chamberlin, 658 N.Y.S.2d 751 (1997)).

[129] *Id.*

[130] *See, e.g.*, F.S.–P. v. A.H.R., 844 N.Y.S.2d 644, 645 (N.Y. Fam. Ct. 2007).

[131] *Id.* (quoting *In re* Celeste S., 579 N.Y.S.2d 94, 94 (1992)).

has not occurred for same-sex partners.[132] While New York courts have adopted a functional approach to determine the role a noncustodial biological parent may play in a child's life, New York courts maintain a formal definition of parent, which necessitates formality in the obligations of same-sex partners.[133] Whereas for opposite-sex parents, the general rule is that visitation is not dependent on child support, the same is not true for same-sex parents.[134] For same-sex parents, a court order for visitation is dependent on the fulfillment of child support.[135] The reliance on child support in same-sex partner cases is the result of *Alison D.* and *Debra H.* remaining good law.[136] These cases, however, do not mean that family courts never award visitation to same-sex parents, but only that a court's decision to award visitation to a non-custodial same-sex parent hinges upon that parent's payment of child support.[137]

Courts have eroded the adjudicative division between visitation and child support in the context of same-sex couples. In 2007, Estrellita A. and Jennifer D. became "domestic partners," and in the following year, Jennifer D. received artificial insemination and became pregnant with a child, Hannah.[138] The parties separated in 2012 without Estrellita A. having filed for adoption of Hannah.[139] In a petition for child support, Jennifer D. stated that she and Estrellita had a child in common.[140] When Estrellita A. filed for

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[132] *See* Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843, 847 (N.Y. Fam. Ct. 2013).

[133] *See* Alison D. v. Virginia M., 572 N.E. 27, 28 (N.Y. 1991); *see generally* Laufer-Ukeles, *supra* note 124 (explaining the complex considerations in determining parental rights).

[134] *See* Stewart v. Soda, 642 N.Y.S.2d 105, 106 (N.Y. App. Div. 1996); *Estrellita A.*, 963 N.Y.S.2d at 846.

[135] *See Estrellita A.*, 963 N.Y.S.2d at 847.

[136] *See id.* (reaffirming the principle and validity of *Alison D.* despite the court reaching a different outcome).

[137] *See id.*

[138] *Id.* at 844.

[139] *Id.* If Estrellita adopted the child, this visitation dispute would have been resolved. Adoption confers all of the same legal rights as a biological relationship. *See* N.Y. DOM. REL. LAW § 117(1)(c) (McKinney 2014); *In re* Adoption of Jennifer, 538 N.Y.S.2d 915, 915 (N.Y. Fam. Ct. 1989).

[140] *Estrellita A.,* 963 N.Y.S.2d at 844.

visitation, on the other hand, Jennifer D. argued that Estrellita A. was not a "parent" under the law according to *Alison D.* and she, therefore, lacked standing for visitation purposes.[141]

Rather than determining standing using the "extraordinary circumstances" doctrine—a functional approach that examines an adult's role in a child's life[142]—the court utilized the "doctrine against inconsistent positions."[143] The doctrine against inconsistent positions states that a party may not make conflicting claims.[144] In the context of *Estrellita A.*, the doctrine meant that:

> [Jennifer D. was] judicially estopped from asserting that [Estrellita A. was] not a parent based upon her sworn petition and testimony in a prior court proceeding . . . . This biological parent deliberately sought to involve her former partner in her child's life at least until her financial majority.[145]

The grave implication of this ruling is: had Jennifer D. never sought child support from Estrellita A., Estrellita A. would have been denied access to Hannah despite having raised Hannah as her own for the entirety of the child's life.[146]

iv. Critiques of the Connection Between Child Support and Visitation

Various scholars and courts have recognized the problems that arise from making visitation dependent on child support.[147] These

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[141] *Id.* at 846.

[142] *See, e.g.*, *In re* E.S., 863 N.E.2d 100, 104 (N.Y. 2007) (demonstrating that "extraordinary circumstances" had been met in this case where the grandmother had "an extraordinarily close relationship [with the child] during the nearly five-year period that she lived with him" and the child "articulated a deep love for and attachment to grandmother"); *In re* Cocose, No. V-4205-04, 2005 WL 1792599, at *2 (N.Y. Fam. Ct. July 22, 2005) (arguing that a sibling lacked standing to seek visitation because "since Michael has not lived with Sandra since their removal from their birth parents' home in 1997, their contact is minimal and insufficient . . . .").

[143] *Estrellita A.*, 963 N.Y.S.2d at 847.

[144] *Id.*

[145] *Id.* at 845–46.

[146] *See id.*

[147] *See* Czapanskiy, *supra* note 88, at 638.

problems often harm the child. For example, under the traditional New York regime, which strongly attaches the right of visitation to the obligation to pay child support, there is an incentive for the noncustodial parent to use child support as a weapon against the custodial parent.[148] A noncustodial parent may therefore withhold child support when arguments arise about the visitation schedule, or about any other facet of visitation.[149] This withholding against the other parent has a detrimental impact upon the child.[150] Furthermore, like the parents, "[t]he child is a joint holder of the support and visitation rights with the respective parents."[151] When one parent acts out against the other by withholding child support or visitation, the child also suffers.[152] This outcome contravenes the central goal of family law—to serve "the child's best interest."[153]

In addition to general critiques of this contingency, a central legal critique of the connection between child support and visitation for same-sex partners is that it creates differing definitions of "parent" in the two areas of law.[154] In *H.M. v. E.T.*, the Court of Appeals held that a partner, who was not biologically related to the child, was obligated to pay child support to the biological mother.[155] The Court took a liberal approach in

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[148] *See id.* at 638–39.

[149] *See id.*

[150] *See* Carolyn Eaton Taylor, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 COLUM. L. REV. 1059, 1068–69 (1984).

[151] *Id*. at 1069.

[152] *See id.*

[153] *See id.* at 1069–70 (discussing that some judges have altered agreements that have visitation and child support dependent on one another because the outcome violates the best interest standard, and concluding that "[t]he contractual doctrine of constructive conditions of exchange, therefore, cannot be relied on to justify the linkage of child support and visitation because of its failure to account for the child's best interest . . . .").

[154] Beekman, *supra* note 23, at 227–34 (comparing the cases of *Debra H.* and *H.M.* which were decided on the same day, and discussing how they represent different views of the scope of parenting in the context of custody/visitation cases and child support cases.).

[155] H.M. v. E.T., 930 N.E.2d 206, 209 (N.Y. 2010).

determining parenthood for child support in furtherance of the "public policy of the State in favor of obligating individuals, regardless of gender, to provide support for their children."[156] However, on the same day, the Court of Appeals reaffirmed *Alison D.*'s definition of a "parent" for visitation—a much narrower definition.[157] This inconsistency in determining who is a "parent" prioritizes an adult's financial contributions to a child over that person's love, support, and caretaking of a child. Some family law practitioners have argued that the connection between visitation and child support fosters greater rights for non-biological same-sex parents than they previously had;[158] however, the differing definitions of parent is a fundamental harm that outweighs any incremental benefit to a same-sex partner's rights.

Although *Estrellita A.* provides relief for a small group of same-sex parents, there are negative consequences from the interdependence between child support and visitation. *Estrellita A.* creates a different relationship between child support and visitation for biological and non-biological parents. Additionally, it creates a different definition of "parent" for child support and visitation. *Estrellita A.* and its problems are the result of *Alison D.* If *Alison D.* had not held that only biological parents were "parents" for visitation purposes, courts would not need to determine whether a person can achieve standing because of a prior order of child support. This further demonstrates that a solution to *Alison D.* is needed.

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[156] *Id.*; *see also* Beekman, *supra* note 23, at 227–28.

[157] *See* Debra H. v. Janice R., 930 N.E.2d 184, 189 (N.Y. 2010); Beekman, *supra* note 23, at 227–28.

[158] *See, e.g.*, Elliot S. Schlissel, *Biological Mother Can't Argue Ex-Same Sex Partner Not Be Considered a Child's Parent*, SCHLISSEL LAW FIRM (Oct. 11, 2013), http://www.schlissellawfirm.com/blog/2013/biological-mother-cant-argue-ex-same-sex-partner-not-be-considered-a-childs-parent/ (stating that the opinion of Judge Theresa Whelan, which stated that a biological parent could not claim a former partner was not the "parent" because of a previous child support case, was "an example of a Family Court Judge protecting the visitation rights of the non-biological parent in a same-sex relationship.").

III. STEPPARENTS, VISITATION, AND THE OBLIGATION TO PAY CHILD SUPPORT

The courts' linkage of child support to visitation for same-sex parents puts same-sex stepparents at a significant disadvantage. Three factors contribute to this disadvantage for same-sex stepparents: first, stepparents do not have standing to seek visitation with their children;[159] second, stepparents generally do not have any obligation to pay child support except in limited circumstances;[160] and third, the obligation to pay child support automatically ends when the stepparent and biological parent divorce.[161] Under *Estrellita A.*, an individual could obtain standing to seek visitation due to child support; however, an individual only obtains standing to seek visitation under *Estrellita A.* if the biological parent files a petition for child support and claims that the individual is a parent.[162] Electing to pay child support would not provide any relief. Therefore, a stepparent is unable to seek visitation with a child.

The limited definition of "parent" established in *Alison D.*[163] continues to haunt same-sex stepparents. The Marriage Equality Act has enabled numerous same-sex partners to become stepparents. Despite this advancement, stepparents have no independent grounds to seek visitation with their stepchildren.[164] In *Bank v. White*, the Appellate Division held that a stepfather

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[159] *See* Bank v. White, 837 N.Y.S.2d 181, 182 (2d Dep't 2007); Spenser v. Spenser, 488 N.Y.S.2d 565, 566 (N.Y. Fam. Ct. 1983) ("[S]tepparents have no independent rights in relation to their step-children, they do derive certain legal and *de facto* rights and obligations as the spouse of a parent.").

[160] *See Spenser,* 488 N.Y.S.2d at 566; *see also* N.Y. FAM. CT. ACT § 415 (McKinney 2014) (requiring support when the child at issue is a recipient of public assistance).

[161] Dep't of Soc. Servs. *ex rel.* Daniel P. v. Robert B., 500 N.Y.S.2d 620, 621 (N.Y. Fam. Ct. 1986).

[162] *See* Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843, 847 (N.Y. Fam. Ct. 2013).

[163] Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991).

[164] *See Bank*, 837 N.Y.S.2d at 182; *Spenser*, 488 N.Y.S.2d at 565–66 ("[S]tepparents have no independent rights in relation to their step-children, they do derive certain legal and *de facto* rights and obligations as the spouse of a parent.").

"lacked standing to seek visitation with his wife's children."[165] The stepfather had lived with his wife and her two biological children from a previous marriage for six years.[166] Despite the amount of time the plaintiff-stepfather spent with the children and acted as a "father figure," the court rejected that a stepparent is a "parent" who can petition for visitation.[167]

These stepparents cannot rely on the loophole created by *Estrellita A.* that allows same-sex parents to gain visitation if the biological parent sought a child-support order. Stepparents, on the other hand—from both same-sex and opposite sex partnerships—rarely have legal obligations to pay child support, their only route to gain visitation.[168] Under the New York Family Act § 415, there are limited circumstances wherein a stepparent becomes liable for child support.[169] Even in these limited circumstances, the decision to hold a stepparent liable for child support is within the discretion of the court.[170] Moreover, that obligation—if the court chooses to impose it—will end automatically upon divorce.[171] Therefore, even if a stepparent fits into one of the limited categories that create an obligation to pay child support, this would not enable her to obtain visitation under the *Estrellita A.* rationale because there would be no obligation to pay child support following the divorce, which is when visitation would be sought.[172] New York must develop a solution that benefits same-sex stepparents.

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165 *See Bank*, 837 N.Y.S.2d at 182.

166 *Id.* at 181–82.

167 *Id.* (citing Alison D., 77 N.Y.2d at 657).

168 *See Spenser*, 488 N.Y.S.2d at 566.

169 N.Y. FAM. CT. ACT § 415 (McKinney 2014) ("[T]he spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof or of a patient in an institution in the department of mental hygiene, if of sufficient ability, is responsible for the support of such person or patient, provided that a parent shall be responsible only for the support of his child or children who have not attained the age of twenty-one years. . . . Step-parents shall in like manner be responsible for the support of children under the age of twenty-one years.").

170 *See* Dep't of Soc. Servs. *ex rel*. Daniel P. v. Robert B., 500 N.Y.S.2d 670 (N.Y. Fam. Ct. 1986).

171 *Id.*

172 Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843, 847 (N.Y. Fam. Ct. 2013).

IV. THE POSSIBLE ALTERNATIVES ARE AN INADEQUATE REMEDY

There have been two proposed remedies for same-sex stepparents, who want to maintain a relationship with their non-biological child: adoption[173] and a stepparent visitation statute.[174] While these solutions offer clear standards that may reduce litigation in family court, they create undesirable barriers[175] to same-sex stepparents, and they unnecessarily formalize the law by focusing on categorization rather than the relationship between the person seeking visitation and the child.

A. Adoption

The New York Court of Appeals relies on the possibility of adoption to allow non-biological parents to seek visitation.[176] The New York Legislature permitted stepparents to adopt the biological children of their spouses.[177] If a spouse adopts a child, he or she obtains all of the same rights and obligations as a biological parent.[178] There are two different types of adoption that will be discussed: traditional adoption and second-parent adoption.

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[173] *See* Debra H. v. Janice R., 930 N.E.2d 184, 190 (N.Y. 2010) ("We stressed that permitting second parent adoptions allows children to achieve a measure of permanency with both parent figures and avoids the sort of disruptive visitation battle we faced in *Alison D*.") (internal quotation marks omitted).

[174] Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children,* 47 FAM. L.Q. 1, 7 (2013) (stating that eight states—California, Illinois, Kansas, New Hampshire, Oregon, Tennessee, Virginia, and Wisconsin—have statutory provisions that permit stepparent visitation).

[175] Adoption generally requires the consent of both parents. Limited statutory exceptions to this requirement are discussed *infra* at note 188.

[176] *See Debra H.*, 930 N.E.2d at 190.

[177] *See* N.Y. DOM. REL. LAW § 117(1)(c) (McKinney 2014).

[178] *Id*; *see also In re* Adoption of Jennifer, 538 N.Y.S.2d 915, 917 (N.Y. Fam. Ct. 1989).

i. Traditional Adoption

Traditionally, an order of adoption terminates the rights of the biological parents.[179] Termination of parental rights by adoption most frequently occurs where a parent or couple gives the child up and a biological stranger adopts the child and acts as the primary caregiver.[180] A literal reading of New York Domestic Relations Law § 117 suggests that a stepparent or partner could not adopt a child without terminating the rights of the noncustodial, biological parent.[181] However, New York courts have modified this type of adoption.[182] The Court of Appeals recognized this injustice and ruled that the adoption of a child by a stepparent does not terminate the rights of the noncustodial, biological parent.[183]

Despite this ruling, adoption is not always easily attainable because it requires the consent of the other biological parent.[184] As a matter of United States constitutional law, the rights of the biological parent are considered superior to those of all others.[185]

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[179] *See* N.Y. DOM. REL. LAW § 117(1)(a) (McKinney 2014) ("After the making of an order of adoption the birth parents of the adoptive child shall terminate all parental duties toward and of all responsibilities for and shall have no rights over such adoptive child or to his property by descent or succession . . . .").

[180] *See e.g., In re* Adoption by Emanuel T., 365 N.Y.S.2d 709, 712 (N.Y. Fam. Ct. 1975).

[181] *See* N.Y. DOM. REL. LAW §117(a).

[182] *See, e.g.*, Matter of Jacob, 660 N.E.2d 397, 401–02 (N.Y. 1995) (holding that the portion of the statute that terminates the biological parent's rights did not apply where the biological parent agrees to retain his or her rights and agrees to raise the child with the adoptive parent).

[183] *Id.* ("Given . . . the anomaly created by an unnecessarily literal reading of the statute, we conclude that neither subdivision (1)(a) nor subdivision (1)(i) was intended to have universal application.").

[184] *See In re* of Estate of Seaman, 78 N.Y.2d 451, n.2 (1991) (stating that a stepparent may "adopt [a] child with the consent of, or after the death of, the noncustodial parent."); Child Welfare Information Gateway, *Consent to Adoption*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU (2013), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/consent.pdf#Page=8&view=Fit.

[185] *See* Troxel v. Granville, 530 U.S. 57, 60 (2000) (holding that a statute that permits "[a]ny person to petition a superior court for visitation rights whenever visitation may serve the best interest of the

New York family law jurisprudence has long recognized this superior right as well.[186] Therefore, if the noncustodial parent objects to the adoption, the adoption does not go forward.[187] Only in limited circumstances may a stepparent adopt a child without the consent of the biological parent.[188] Divorce and other family law issues are often highly tumultuous; amidst the tumult, disgruntled noncustodial parents often deny adoption rights.[189] Despite the availability of adoption, only about five percent of stepchildren are adopted by their stepparents,[190] a figure that suggests adoption has been an ineffective tool to provide relief to same-sex stepparents looking to maintain a permanent role in their children's lives.

ii. Second-Parent Adoption

As with efforts to use traditional adoption as a remedy for limited visitation rights, efforts to use second-parent adoption as a

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child . . . unconstitutionally interferes with the fundamental right of parents to rear their children.").

[186] *See, e.g.*, Matter of Michael B., 604 N.E.2d 122, 127 (N.Y. 1992) ("A biological parent has a right to care and custody of a child, superior to that of other . . . .").

[187] TIMOTHY PATRICK JOHNSON, EDITOR, THE MORALITY OF ADOPTION: SOCIAL-PSYCHOLOGICAL, THEOLOGICAL, AND LEGAL PERSPECTIVES 247 (2005).

[188] *See* NY DOM. REL. LAW § 111(2)(a)–(e) (McKinney 2008). The statute provides five limited circumstances that permit adoption without consent. First, where the parent "evinces an intent to forego his or her parental custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to so." *Id.* § (2)(a). Second, where the parent "surrendered the child to an authorized agency . . . ." *Id* § (2)(b). Third, where a "guardian has been appointed. *Id.* § (2)(c). Fourth, when "by reason of mental illness or mental retardation . . . [the parent] is presently and for the foreseeable future unable to provide proper care for the child." *Id* § (2)(d). Lastly, when the parent has denied paternity. *Id.* § (2)(e).

[189] *See* Walter Wadlington, *The Divorced Parent and Consent for Adoption*, 36 U. CIN. L. REV. 196, 207 (1967) ("At the same time, the out-of-custody parent whose consent is required for adoption may stoop to the tactic of using his veto power to accomplish changes in a settlement agreement or to apply pressure in some other matter of concern between the ex-spouses.").

[190] *See* Susan D. Stewart, *Characteristics and Well-Being of Adopted Stepchildren*, 59 FAM. REL. 558, 563 (2010).

remedy have similarly fallen short.[191] Second-parent adoption allows an unmarried partner of a biological parent to adopt the child.[192] Professor Julie Shapiro articulates two concerns surrounding second-parent adoption, "[f]irst, . . . [second-parent adoptions] divide our community. Second, . . . the uncritical acceptance of second-parent adoptions contributes to [LGBT partners'] domestication."[193] Shapiro's first critique stems from the preferential treatment certain partners, who conform to heterosexual norms, receive under the law.[194] This division delegitimizes certain parenting roles based on a legal classification, unrelated to the caregiving that person provides.[195] Furthermore, second-parent adoptions perpetuate a distinction between "good lesbians" and "bad lesbians."[196] Second-parent adoptions are not available to all people, "[t]hey are not available to low-income lesbians or other lesbians practically excluded for any number of personal characteristics, including a history of drug or alcohol abuse, a criminal record, or an unconventional lifestyle."[197] Therefore, someone who either cannot afford adoption or is discriminated against due to their past is unable to adopt. Only those who are perceived as good lesbians are permitted to adopt.

Professor Shapiro's second critique touches upon three different mechanisms by which second-parent adoption domesticates same-sex partners. The first critique is that "second-parent adoptions provide a powerful incentive to mold oneself to fit the 'good lesbian' model, because courts typically approve

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[191] Julie Shapiro, *A Lesbian-Centered Critique of Second Parent Adoptions*, 14 BERKLEY WOMEN'S L.J. 17, 18 (1999).

[192] *See* N.Y. DOM. REL. § 110 (McKinney 2010).

[193] Shapiro, *supra* note 191, at 30.

[194] *Id.* "In serving the needs of some but not all non-legal mothers, second-parent adoptions reinforce the idea that there are two distinct categories of lesbians raising children: 'real' lesbian mothers, who may be able to adopt if they are fortunate, and those other lesbians, whose status as women raising children is diminished." *Id.* The Article references "lesbians," however, the principles and idea apply equally to men.

[195] *Id.* at 30–31, & n.75.

[196] *Id.* at 31.

[197] *Id.*

second-parent adoptions for 'good lesbians.'"[198] The second critique is that "the legal possibility of second-parent adoptions may domesticate lesbians by convincing us to internalize the mainstream notion that a 'real' mother must be a legal one."[199] The last critique is that "second-parent adoptions . . . foster the belief that the law will protect rather than constrain lesbians."[200] Because of the practical and cultural problems associated with adoption, it is not an adequate remedy for same-sex partners.

B. A Stepparent Visitation Statute

Another approach that some states have taken is to enact a visitation statute that specifically provides rights for stepparents.[201] The rationale for these statutes, as expressed by the Pennsylvania Superior Court, is that "[a] stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be . . . . The departure of a stepparent from the home would no more destroy the love and affection between the stepparent and child than it would in the case of a natural child."[202]

However, a stepparent visitation statute is both over- and under-inclusive. This type of statute is over-inclusive because not all stepparents take an active role in childcare. Any person who marries a biological parent becomes a stepparent regardless of the nature of the relationship to the child. A stepparent visitation statute is also under-inclusive because it does not encompass individuals who have acted as a parent, but are not legally married to the biological parent. The law should look to the functional

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[198] *Id.* at 35.

[199] *Id.* at 36.

[200] *Id.*

[201] Atkinson, *supra* note 173, at 7 (stating that eight states, California, Illinois, Kansas, New Hampshire, Oregon, Tennessee, Virginia, and Wisconsin, have statutory provisions that permit stepparent visitation). For example, the New Hampshire statute states: "If the court determines that it is in the best interest of the children, it shall in its decree grant reasonable visitation privileges to a party who is a stepparent of the children . . . ." N.H. REV. STAT. § 461-A:6(V).

[202] Atkinson, *supra* note 174, at 7–8 (quoting Spells v. Spells, 378 A.2d 879, 881–82 (Pa. Super. Ct. 1977)).

relationship between the adult and child to determine whether visitation is necessary, not formalist categories that both leave merited parents out and bring undeserving parents in.

Furthermore, stepparent visitation statutes do not remedy the "good lesbian" versus "bad lesbian" distinction that the current adoption framework creates.[203] The law creates a second class of parental figures when it only recognizes a parental relationship through marriage. Some same-sex couples choose not to marry regardless of whether same-sex marriage is legal in a particular state.[204] An individual who chooses not to marry should not be punished and denied a relationship with a child whom she substantially raised.

Both solutions, adoption and a stepparent visitation statute, are inadequate to address the problem of same-sex stepparent visitation. Families need a solution that examines the relationship between the child and non-biological parent to determine whether visitation is beneficial to the child. De facto parenting would provide such a solution.

V. SOLUTION: A DE FACTO PARENTING STATUTE

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 . . . performs a share of caretaking functions at least as great as the legal parent."[205] The de facto parent assumes a nurturing role

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[203] *See* Shapiro, *supra* note 191, at 31.

[204] *See* Cara Buckley, *Gay Couples, Choosing to Say 'I Don't',* N.Y. TIMES (October 25, 2013), http://www.nytimes.com/2013/10/ 27/style/gay-couples-choosing-to-say-i-dont.html?_r=0. Buckley recognizes that couples choose not to marry for various reasons,

> For some, marriage is an outdated institution, one that forces same-sex couples into the mainstream. For others, marriage imposes financial burdens and legal entanglements. Still others see marriage not as a fairy tale but as a potentially painful chapter that ends in divorce. And then there are those for whom marriage goes against their beliefs, religious or otherwise."

Id.

[205] Duncan, *supra* note 34, at 265 (2010) (quoting E.N.O v. L.M.M, 711

comparable to a legal parent and "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." [206] This Part proposes that New York should adopt a de facto parenting statute and will provide and analyze examples of de facto parenting statutes. These examples demonstrate the two different approaches to de facto parenting statutes that have been enacted: the expansive approach and the limited approach.[207] The proposed New York statute should follow the limited approach.

A. New York Should Adopt a De Facto Parenting Statute

The best solution for same-sex stepparents seeking visitation rights in New York is for the legislature to adopt a de facto parenting statute modeled after grandparent and sibling visitation statutes already in existence. De facto parenting removes the formalistic barriers to parental rights and instead considers whether that person has functioned as a parent in such a way that the denial of visitation would be contrary to the child's best interest. The passage of a de facto parenting statute will grant individuals standing that would otherwise be barred under *Alison D.*[208]

Courts should adopt the American Law Institute's (ALI) three-prong test for determining whether an individual qualifies as a de facto parent. The prongs are "residency," "caretaking," and "agreement."[209] "Residency" is when "a legal parent's partner lives

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N.E.2d 886, 891 (1999)).

[206] *Id.*

[207] *See* De Facto Parent Recognition Map, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/other_parenting_laws (last visited Sept. 13, 2014).

[208] *See* Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (holding that the term "parent" is limited to biological parents in visitation disputes, and therefore the party did not have standing to seek visitation with the child). Because *Alison D.* interprets § 70 of N.Y. Domestic Relations Law, the addition of a de facto parenting statute would not technically overturn the case's holding. But such a statute *would* render the application of *Alison D.* meaningless where a parent is arguing that he or she is a "parent" within the meaning of § 70, but is instead a de facto parent under a different law.

[209] *See* Robin Fretwell Wilson, *Limiting the Prerogatives of the Legal Parents: Judicial Skepticism of the American Law Institute's Treatment of De*

with the child and the legal parent for . . . two years."[210] The "caretaking" prong "requires the partner to perform at least half of the caretaking functions for the child."[211] "Agreement" is met when the "child's legal parent agrees to allow the partner to perform an equal share of the child's caretaking."[212] Courts analyze "agreement" based on the couple's relationship while they were still together, and not at the time of litigation, when a legal parent will predictably challenge the standing of her former partner by denying her status as a parent.[213]

A central critique of the ALI test is that "the [three prongs] do not look for a bonded, dependent relationship of a parental nature between the child and the de facto parent in deciding which relationships to preserve. Instead the [prongs] opt . . . for an easily administrable test . . . ."[214] For this reason, Professor Robin Fretwell Wilson finds that judges are reluctant to implement the ALI test.[215] Arguably, there is some determination of the bond between the de facto parent and the child inherent in the caretaking prong. If, for example, an individual plays with a child, feeds a child, protects the child, and arranges for that child's education, there is likely to be some basis of a bond between that person and the child. However, under the proposed de facto parenting statute, the ALI test would be used merely to define a de facto parent, similar to how a grandparent is defined as the parent of the child's parent.[216] Once the test determined that a person is in fact a de facto parent, she would *still* be required to demonstrate

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Facto Parents, 25 J. AM. ACAD. MATRIM. LAW. 477, 486 (2013).

[210] *See id.*

[211] *Id*. The ALI includes a list of various activities that qualify as caretaking, including "grooming," "toilet training," "playing with child," "satisfying nutrition needs," "discipline," "arranging for education," "providing moral guidance." *See id.* at 489, fig. 1.

[212] *Id.* at 486.

[213] *See* Estrellita A v. Jennifer D., 963 N.Y.S.2d 843 (N.Y. Fam. Ct. 2013).

[214] Wilson, *supra* note 209, at 511.

[215] *Id.* at 507 ("the greatest bulk of de facto parent cases citing the Principles dispatch the claim by a live-in partner or other adult on a different basis than the ALI-test . . . .").

[216] N.Y. DOM. REL. LAW § 72 (McKinney 2014).

extraordinary circumstances,[217] which would necessarily look at the bond between the individual and the child. "Extraordinary circumstances" is a term of art in family law that has been used to determine whether visitation with a non-biological parent is warranted.[218] Extraordinary circumstances must be proven before the court will make a determination about the best interest of the child.[219]

The critiques of the ALI test are not applicable to the proposed de facto parenting statute. The ALI test allows courts to recognize individuals who have had sufficient involvement in a child's life to warrant visitation after the termination of the relationship between the biological parent and partner. Since the person seeking visitation would still have the burden of demonstrating extraordinary circumstances, courts would continue considering the relationship between the child and the de facto parent and whether the revocation of that relationship would be detrimental to the child.

B. Examples of De Facto Parenting Statutes that Have Been Enacted in Other States

New York would not be the first state to adopt a de facto

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[217] "Extraordinary circumstances" is a highly fact-sensitive inquiry conducted by courts to determine whether there are sufficient reasons to grant visitation to either a grandparent or sibling. *See, e.g.*, Davis v. Davis, 725 N.Y.S.2d 812, 814 (N.Y. 2001) (holding that the requirement of extraordinary circumstances had been satisfied when the grandmother had been an exceptionally devoted grandmother by providing "financial, emotional, and physical support . . . visit[ing] with the child extensively, often keeping her for weekends, and car[ing] for [the child] for a more extended period when [the mother] suffered postpartum depression."). A showing of extraordinary circumstances will also allow a court to award custody to a nonparent over a parent. *See, e.g.*, Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1976). The burden for showing extraordinary circumstances in the context of visitation is less onerous than in custody cases, where an individual may be required to show "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" to overcome the presumption in favor of parents. *Id.*

[218] *See Bennett*, 356 N.E.2d at 277.

[219] *See Davis*, 725 N.Y.S.2d at 815.

parenting regime.[220] There have been two approaches to the adoption of de facto parenting: one approach grants a de facto parent all of the rights of a biological parent; the other adopts a more limited approach that does not equate the rights of a de facto parent with a biological parent.[221]

Delaware is one of two states that have adopted the first approach, which grants a de facto parent all the rights of a biological parent.[222] The determination that a person is a de facto parent creates either a mother-child or father-child relationship.[223] Delaware defines a de facto parent as someone who:

> (1) [h]as . . . the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship[;] . . . (2) [h]as exercised parental responsibility for the child[;] . . . and (3) [h]as acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.[224]

The proposed statute for New York should not be as expansive as the Delaware model of de facto parenting. In New York, unlike in Delaware, a de facto parent should not have the same rights as a biological parent.[225]

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[220] *See De Facto Parent Recognition Map*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/other_parenting_laws (last visited Sept. 13, 2014). While only three states, New Mexico, Kansas, and Delaware, completely recognize de facto parents, twenty-two other states, including Pennsylvania, Maine, South Carolina, Texas, California, Nevada, Oregon, and Washington, recognize a limited version of de facto parenting. *Id.*

[221] *Id.*

[222] *See* DEL. CODE ANN. tit. 13 § 8-201(a)(4), (b)(6), (c) (2014).

[223] *See id.* § 8-201(a)(4), (b)(6).

[224] *See id*. § 8-201(c). Section 1101 of the statute defines "parental responsibilities" as "care, support and control of the child in a matter that provides for the child's necessary physical needs, including adequate food, clothing and shelter, and that also provides for the mental and emotional health and development of such child." *Id.* § 1101.

[225] This is due to the constitutional issues raised by the Delaware statute. For further discussion of the constitutionality of de facto parenting see *infra* Part IV(A).

California is the second state that recognizes de facto parenting, and it exemplifies the limited approach to de facto parenting. The proposed statute for New York should more closely resemble the limited approach to de facto parenting, such as that in California.[226] Under California law, de facto parents are entitled to more rights than other third parties, but their rights do not rise to the level of those of biological parents.[227] While California lacks a specific statute authorizing visitation to de facto parents, California case law has held that de facto parents may be entitled to visitation.[228]

VI. CRITIQUES OF DE FACTO PARENTING

The legal community has voiced criticism of de facto parenting models.[229] The two most prominent critiques of de facto parenting are: 1) it infringes on the rights of biological parents;[230] and 2) it is detrimental to the child.[231]

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[226] *See, e.g.*, *In re* B.F., 118 Cal. Rptr. 3d 561, 566 (Cal. Ct. App. 2010) (demonstrating the limited nature of de facto parenting in California by holding that a de facto parent is not entitled to access a biological mother's psychological evaluation).

[227] *See* CAL. CT. R. 5.534(e) (2014) ("On a sufficient showing, the court may recognize the child's present or previous custodian as a de facto parent and grant him or her standing to participate as parties in the disposition hearing and any hearing thereafter at which the status of the dependent child is at issue."). California defines a "de facto parent" as "a person who has been found by the court to have assumed, on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection, and who has assumed that role for a substantial period." *Id*. R. 5.502(10).

[228] *See In re* Robin N., 9 Cal. Rptr. 2d 512 (Cal. Ct. App. 1992).

[229] *See, e.g.*, Duncan, *supra* note 34, at 271; Elizabeth A. Pfenson, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2023, 2027 (2013); Wilson, *supra* note 209, at 505.

[230] *See generally* Troxel v. Granville, 530 U.S. 57 (2000) (holding that an overly permissive visitation statute violated a parent's constitutional interests).

[231] *See* Duncan, *supra* note 34, at 271; Pfenson, *supra* note 229, *at* 2059.

A. The First Critique: De Facto Parenting Infringes upon the Constitutional Rights of the Biological Parents to Care for Their Children.

The Supreme Court has recognized that granting standing for visitation to a non-parent infringes upon a parent's constitutional rights.[232] Through the Fourteenth Amendment, parents have a fundamental interest in the "care, custody, and control of their children . . . ."[233] In *Troxel v. Granville*, the Court invalidated a Washington statute that granted visitation to "any person . . . at any time . . . whenever visitation may serve the best interest of the child."[234] The court found that the statute infringed on the parents' liberty interest.[235] The Court reasoned that a parent and a non-parent cannot be given equal treatment in custody and visitation cases.[236]

To avoid constitutional infirmity, New York should adopt a limited de facto parenting statute. Courts have not interpreted *Troxel* to invalidate all expansions to standing in visitation cases.[237] The Appellate Division of New York determined that Domestic Relations Law § 72, which established standing for grandparents who seek visitation with their grandchildren, was

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[232] *See* Troxel, 530 U.S. at 62–73.

[233] *Id.* at 65. "[S]o long as a parent adequately cares for his or her children . . . there will normally be no reason for the state to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 68–69.

[234] *Id.* at 60.

[235] *Id.* at 68–73.

[236] *Id.* at 69 ("The problem here is not that the Washington Superior Court intervened, but that it gave no special weight at all to Granville's determination of her child's best interest . . . The judge's comments suggest that he presumed the grandparents' request should be granted unless the children would be 'impact[ed] adversely.' In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters.").

[237] *See* Morgan v. Grzesik, 732 N.Y.S.2d 773, 774–75 (N.Y. App. Div. 2001) (holding that the decision in *Troxel* does not invalidate N.Y. Dom Rel. Law § 72, which grants standing to grandparents to seek visitation upon a showing of extraordinary circumstances).

consistent with *Troxel*.[238] The court gave two reasons why the statute was constitutional, in light of *Troxel*: first, the statute pertained to a very narrow set of people, grandparents; and second, standing was not automatic but was granted if "[the grandparents] can establish circumstances in which equity would see it fit to intervene."[239] These same limiting factors would be applicable to de facto parenting, and thus would not violate a biological parent's constitutional interests. De facto parenting would only be available to individuals who meet the ALI factors of residence, caretaking, and agreement.[240] Moreover, a de facto parent would be required to demonstrate the same "extraordinary circumstances" standard required for grandparents and siblings to receive visitation.[241] Due to the limiting requirements of the three-prong test, de facto parenting would not infringe on biological parents' interest in the care, custody, or control of their children.[242]

The constitutional rights of biological parents are at greater risk under Delaware's approach to de facto parenting, which equates a de facto parent to a biological parent. The constitutionality of Delaware's statute has been challenged in court.[243] In *Bancroft v. Jameson*, a mother's boyfriend sought joint custody with the child's mother and father under the de facto parenting statute.[244] The Delaware Family Court ruled that the statute unconstitutionally violated the parents' liberty interests under *Troxel*.[245] The court reasoned that Delaware courts have always recognized "the sacred constitutional rights of two parents to raise

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238 *See id.* at 774–77.

239 *Id*. at 776 (citing Emanuel S. v. Joseph E., 577 N.E.2d 27, 28 (N.Y. 1991)).

240 *See* Wilson, *supra* note 209, at 487.

241 *See* N.Y. DOM. REL. LAW § 71 (McKinney 2014) (extending standing to siblings upon a showing a extraordinary circumstances); *Id.* § 72 (granting standing for visitation to grandparents upon a showing of extraordinary circumstances).

242 *See generally* Troxel v. Granville, 530 U.S. 57, 60, 65, 75 (2000) (deciding that the statute was unconstitutional in that it infringed on the biological parents' fundamental right to make decisions regarding the care, custody, and control of their children).

243 Bancroft v. Jameson, 19 A.3d 730, 731 (Del. Fam. Ct. 2009).

244 *Id.* at 732.

245 *See id.* at 750 (relying on *Troxel*, 530 U.S. at 60).

children, with that right only being forfeited . . . when a child is found dependent or neglected in a parent's care."[246] Because the statute required no showing of neglect or inadequate care on the part of the parents, the court held that the statute was overbroad.[247]

However, the Delaware Supreme Court subsequently rejected the Family Court's interpretation of the statute.[248] In *Smith v. Guest*, an adoptive mother's former lesbian partner filed a petition for custody, claiming that she was the child's de facto parent.[249] The Delaware Supreme Court held that the statute was constitutional.[250] In reaching this conclusion, the court held:

> *Troxel* does not control these facts. The issue here is not whether the Family Court has infringed Smith's fundamental parental right to control who has access to [the child] (ANS) by awarding Guest co-equal parental status. Rather, the issue is whether Guest is a legal "parent" of ANS who would also have parental rights to ANS—rights that are co-equal to Smith's.[251]

Delaware has now potentially jeopardized the constitutional rights of biological parents. For that reason, this Note argues for a more limited de facto parenting statute, which respects the rights of biological parents.[252]

B. The Second Critique: Visitation is Detrimental to the Child

Critics who suggest that de facto parenting would be detrimental to the child proffer three grounds for their argument. First, stepparents or partners are likely to harm children.[253] Second, "over-access" to children would be detrimental to the child.[254]

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246 *See id.* at 749.

247 *See id.* at 749–50.

248 *See* Smith v. Guest, 16 A.3d 920, 931 (Del. 2011).

249 *Id.* at 924.

250 *Id.* at 931.

251 *Id.*

252 *See* DEL. CODE ANN. tit. 13 § 8-201(a)(4), (b)(6), (c) (2014).

253 *See* Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y.L. SCH. L. REV. 537, 538 (2004).

254 *See* Duncan, *supra* note 34, at 267. Over-access occurs when more

Third, de facto parenting harms the institution of marriage, which in turn harms the children.[255]

1. A Legal Parent's Significant Other is Likely to Abuse the Child

One argument against de facto parenting is that spouses of biological parents are more likely to abuse children. Professor Wilson discussed the risks associated with de facto parenting.[256] The de facto parenting statute would primarily benefit biological parents' significant others. Professor Wilson presents findings that suggest these significant others are more likely to abuse children, and therefore argues that de facto parenting should be avoided.[257]

While Professor Wilson's findings warrant concern for the safety of children, those statistics do not demonstrate the full picture of abuse and neglect cases.[258] The Children's Bureau of the U.S. Department of Health and Human Services found that the

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than two people have a legal right to either custody or visitation. Critics perceive over-access as detrimental because it creates too much inconsistency in the child's life. *Id.*

[255] Mary Summa, *It Doesn't Take a Village: The Destructive Effects of the De Facto Parenting Doctrine*, FAM. N.C., Spring 2013, at 8–9, *available at* http://ncfpc.org/FNC/1305-FNC-Spring13-8.2smallweb2.pdf.

[256] *See* Wilson, *supra* note 209, at 489 ("The ALI's test fails to consider the risks to children that flow from significantly enlarging the parental rights of former male live-in partners. Children who spend time with unrelated males outside the presence of their mothers are placed at a significantly higher risk of physical and sexual abuse.").

[257] *See id.* at 490. For example, Professor Wilson cites a study which state that "66.5% of the victims of sexual abuse came from families that experienced at least one change of parents before the age of 15, compared to 33% of children who did not experience abuse." *Id.* (internal quotation marks omitted). The article further states that "60% of children who experienced intercourse as part of the abuse experience had been exposed to parental divorce or separation." *Id.* Wilson cites a study by Rebecca Bolen that found that "children living with males in the household after separation of the parents were more than seven times more likely to be abused than children living with only females after separation." *Id.*

[258] *See* CHILD WELFARE INFOR. GATEWAY, CHILDREN'S BUREAU CHILD MALTREATMENT 2012: SUMMARY OF KEY FINDINGS 3 (2014), *available at* https://www.childwelfare.gov/pubs/factsheets/canstats.pdf.

majority of abusers were legal parents, not live-in partners or spouses.[259] Moreover, according to the Bureau's findings, relatives (including grandparents and siblings) are more likely to abuse a child than the partner of a parent.[260] However, relatives are routinely afforded standing to seek visitation.[261] Live-in partners or stepparents' rights should not be restricted based on statistics when even more troubling statistics do not prevent other groups from obtaining standing to seek visitation.

In addition to these statistics, there are multiple stages in the judicial determination of de facto parenting where the potential for abuse would likely be revealed, and could act as a barrier to visitation. First, the requirement of extraordinary circumstances could be used to protect children from dangerous individuals. The burden of proof to establish extraordinary circumstances is on the party seeking visitation.[262] Furthermore, if the individual satisfied the requirement of extraordinary circumstances, the court is required to further consider abuse when making a determination of what is in the child's best interest.[263] Thus the normal process of visitation litigation presents several opportunities for the detection and consideration of abuse.

Secondly, Professor Stephen A. Newman has also argued against the use of social science as an argument against visitation.[264] He points out that social science statistics were manipulated to support injustices in the contexts of interracial marriage, eugenics, and same-sex marriage.[265] This misuse has

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[259] *See id.* ("More than 80 percent (80.8 percent) of perpetrators of child maltreatment were parents, 5.9 percent were other relatives, and 4.2 percent were unmarried partners or parents.").

[260] *Id.*

[261] *See* N.Y. DOM. REL. LAW §§ 71–72 (McKinney 2014).

[262] *See* Jamison v. Chase, 841 N.Y.S.2d 140, 140 (N.Y. App. Div. 2007).

[263] N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2014) ("If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child . . . .").

[264] *See* Newman, *supra* note 253, at 538.

[265] *See id.* at 538–49.

warped judicial findings.[266] For example, Justice Schenk in *Perez v. Lippold* relied on a study conducted in Jamaica that concluded that the "crossing of distinct races is biologically undesirable and should be discouraged."[267] This erroneous sociological finding enabled Justice Schenk to conclude that "intermarriage between Negroes and white persons [was] incompatible with the general welfare . . . ."[268]

Similarly, some supposed experts have testified to the harmful effects of same-sex marriage on children.[269] These experts have cautioned that same-sex marriage can lead to a plethora of problems for children including "economic poverty, conduct disorders, poor school performance, and teenage pregnancy."[270] Professor Newman cautions against using social science to make broad generalizations.[271] Instead, the court should make individualized, case-specific determinations about what is in the child's best interest, an assessment consistent with the procedures of a de facto parenting regime.[272]

Social science data are highly susceptible to manipulation and

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[266] *See id.* at 538–49.

[267] Perez v. Lippold, 198 P.2d 17, 45 (Cal. 1948) (Schenk, J., dissenting) (citing B.C. DAVENPORT & MORRIS STEGGERDA, RACE CROSSING IN JAMAICA (1929)); *see also* Newman, *supra* note 252, at 539–40.

[268] *Perez*, 198 P.2d at 45 (Schenk, J., dissenting).

[269] Newman, *supra* note 253, at 545.

[270] *Id.*

[271] *Id.* at 551 ("Sweeping statements about any group, be it handicapped persons, interracial couples, or homosexuals, often reflect little more than prevailing social prejudice and intolerance.").

[272] *Id.* at 552. Professor Newman proposes four pillars to avoid falling prey to these generalizations:

> A. Avoid Stereotypes that Cast Doubt upon Whole Categories of People Acting in the Role of Parent. . . .
>
> B. Determine Children's Best Interests by Considering the Many Factors, Tangible and Intangible, that Affect Their Well-Being. . . .
>
> C. Avoid Using an Idealized Family Arrangement as the Legal Standard for Judging Today's Families . . . .
>
> D. Don't Allow Community Prejudice to Dictate Decision-making About Children's Welfare.

Id. at 551–59.

can be unreliable. In the context of same-sex marriage, social science data can be a reflection of prejudice or the result of an idealized version of the heteronormative family.[273] The answer to judges' concerns regarding children's welfare will not be found by looking to social science.[274] Courts should take an individualized approach, rather than allowing over-generalized and potentially biased studies to determine what is in the child's best interest.

2. Over-Access to Children

Critics also cite over-access as a reason why de facto parenting will adversely affect children.[275] This concern has been labeled the "Count Olaf Doctrine."[276] Proponents of this argument speculate that the number of individuals with legal access to children will grow too large.[277] The fear is that de facto parenting will "introduce children to the anguish of being between three or four worlds."[278] Over-access induces negative effects for children because it "threatens the stability" and "undercuts the authority of a biological or adoptive parent . . . ."[279]

The inclusion of extraordinary circumstances as a prerequisite to standing narrows the field of people who would qualify as a de facto parent under the proposal in this Note, thus minimizing the concerns of children being caught in "three or four worlds." The

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[273] *See id.* at 556–59.

[274] *See id.* at 559 ("There is no conclusive, scientific answer to the question of what children's development and well-being will be if society permits same-sex marriages. This is not surprising, in view of the limited nature of research done, and the difficulties of doing large scale, randomized, controlled studies. Indeed, virtually none of the changes that have dramatically affected the institution of marriage in recent times . . . have been preceded by reliable scientific studies demonstrating the likely effects of such changes on children.").

[275] *See* Duncan, *supra* note 34, at 267.

[276] *See id*. The doctrine was named after the fictional character, Count Olaf, from Lemony Snicket's book, *The Bad Beginning*, because the character relied on the doctrine of *in loco parentis*. *Id.* at 267 n.25 (citing LEMONY SNICKET, THE BAD BEGINNING 66 (1999)).

[277] *Id.* at 267.

[278] *Id.* at 268.

[279] *Id.* at 269.

Count Olaf Doctrine incorrectly assumes that de facto parenting will allow any former spouse or partner to be granted visitation with the child.[280] Such an assumption misconstrues the purpose of de facto parenting. The purpose is to allow individuals who have played a significant role in a child's life to *continue* that relationship. The standard of extraordinary circumstances is not easy to achieve.[281] Merely qualifying as a de facto parent would not guarantee an order of visitation any more than qualifying as a grandparent would.

Critics also cite practical concerns related to over-access.[282] Scheduling visitation between two parents can be complicated enough, and adding an additional parent worsens that problem.[283] Critics argue this arrangement threatens the stability of children's lives.[284] However, these practical concerns should be allayed given the court's obligation to consider visitation arrangements in the child's best interest determination. If a parent can show that visitation would jeopardize stability for the child, then such a showing would weigh against an order of visitation. However, this factor should be relatively minor. In all likelihood, scheduling difficulties would pale in comparison to the grave risk of a child's loss of access to a loved one. A case-by-case determination is

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[280] *Id.* at 266. ("Given the not infrequent incidence of serial divorce followed by remarriage (or divorce followed by serial cohabitation) the potential number of children who could be affected by the recognition of this new legal status is significant.").

[281] *See* Colon v. Delgado, 963 N.Y.S.2d 663, 663–64 (N.Y. App. Div. 2013) (holding that a grandmother had established extraordinary circumstances because "the child lived with her mother and grandmother until her mother's death and, thereafter, her grandmother assumed primary responsibility for her care . . . . This prolonged separation between the father and his daughter, and his lack of involvement in her life, warranted a finding of extraordinary circumstances.").

[282] *See* Duncan, *supra* note 34, at 268; Summa, *supra* note 255, at 1–2.

[283] *See* Duncan, *supra* note 34, at 268 ("As difficult as it is for children to navigate between the expectations and demands of two households, a common enough occurrence in instances of divorce, imagine the difficulty of navigating the demands of a mother, her former partner, a sperm donor father and perhaps even his partner – or shuttling between the homes of a mother and father and the mother's ex-husband or ex-boyfriend.").

[284] *Id.* at 269.

necessary to find what is in the individual child's best interest because no two families are alike. Over-generalized statements about what is in every child's best interest—like over-generalizations about how many people should be involved in a child's upbringing—should be avoided.

Furthermore, a biological parent would still have a superior access right, which should reduce concerns related to over-access.[285] A de facto parenting law would not change that foundational principle. Visitation orders can be flexible[286] and the parenting time that the de facto parent receives doesn't need to be equal to that of the biological parent(s). This flexibility lies in contrast to Delaware's statute, which grants a de facto parent the same rights as biological parents and, therefore, creates a higher likelihood that more than two individuals will equally share parenting time.[287]

In sum, the concern about over-access is inapposite to a limited approach to the de facto parent doctrine because the situational nature of the exceptional circumstances doctrine narrows the field of putative individuals seeking access/visitation, the flexibility of the doctrine permits consideration of practical and scheduling concerns, and the doctrine never divests the natural parent of his or her superior access right.

3. Diminishing the Value of Marriage

Critics of de facto parenting also contend that allowing additional people to obtain the same parental rights inherent in marriage undercuts the importance of marriage, and ultimately creates a disincentive for people to marry.[288] This critique misses the primary purpose of visitation: the best interest of the child. Even if de facto parenting decreased the value of marriage, such an effect is inconsequential compared to the happiness and well-being

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[285] *See* Troxel v. Granville, 530 U.S. 57, 65–66 (2000).

[286] Parents may stipulate agreements that set out visitation schedules; however, this agreement may be modified if the court find "fraud, duress, mistake, or overreaching." *See* Conti v. Conti, 657 N.Y.S.2d 922, 923 (N.Y. App. Div. 1977).

[287] *See* DEL. CODE ANN. tit. 13 § 8-201(a)(4), (b)(6), (c) (2014).

[288] *See* Summa, *supra* note 255, at 9.

of the subject children.[289] Additionally, the societal value of marriage may be declining anyway.[290] Marriage rates in the United States are at a record low, and more couples are choosing to cohabitate and not marry.[291] Even if de facto parenting contributes to the diminution of marriage, the value gained for children— who gain greater access to a loved one—outweighs that cost. The value of marriage should not be a factor in determining whether someone has standing to seek visitation. The focus should be on the relationship between the individual and child.

VII. CONCLUSION

In *Alison D. v. Virginia M.*, the New York Court of Appeals altered the legal landscape for same-sex partners by limiting the term "parent" to biology.[292] While subsequent cases carved out limited exceptions to this principle, through either child support or the doctrine of comity, *Alison D.* remains the law today.[293] In an

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[289] In fact, numerous studies show that alternative families provide considerable benefits for children. *See, e.g.*, Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 APPLIED DEVELOPMENTAL SCI. 98, 104 (2012) ("[N]umerous studies of children and adolescents raised by same-sex parents conducted over the past 25 years by respected researchers and published in peer-reviewed academic journals conclude that they are as successful psychologically, emotionally, and socially as children and adolescents raised by heterosexual parents.").

[290] *See* Trever Butterworth, *What's Behind The US Decline In Marriage? Pragmatism.*, FORBES (June 25, 2013, 3:34PM), http://www.forbes.com/sites/trevorbutterworth/2013/06/25/whats-behind-the-us-decline-in-marriage-pragmatism/.

[291] *Marriage Rate Declines to Historic Low, Study Finds*, HUFFINGTON POST (7/22/2013), http://www.huffingtonpost.com/2013/07/22/marriage-rate_n_3625222.html.

[292] *See* Alison D. v. Virginia M., 77 N.Y.2d 651, 657 (N.Y. 1991).

[293] *See* Debra H. v. Janice R., 14 N.Y.3d 576, 590 (N.Y. 2010) (granting visitation to a non-biological partner because the couple had been married in Canada, and under Canada law that made her a "parent"); Estrellita A. v. Jennifer D., 963 N.Y.S.2d 843 (N.Y. Fam. Ct. 2013) (holding that "respondent is judicially estopped from asserting that petitioner is not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different.").

effort to maintain the holding of *Alison D.*, the New York Court of Appeals has created inconsistent principles about who qualifies as a parent.[294] These principles have failed to account for a significant number of same-sex partners and stepparents. According to U.S. Census Data, eleven percent of same-sex families have children through either adoption or from a previous marriage.[295] However, in New York, there is neither a right to visitation for stepparents nor an obligation to pay child support.[296] Therefore, same-sex stepparents face substantial obstacles to visitation with their children.

The solution to this problem is the recognition of de facto parenting. New York should adopt a de facto parenting visitation statute that is modeled after the grandparent and sibling visitation statutes already in effect.[297] The American Law Institute provides useful guidelines for determining who qualifies as a de facto parent.[298] In addition to meeting the requirements of a de facto parent, an individual would also be required to prove extraordinary circumstances.[299] By requiring extraordinary circumstances as a

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[294] Beekman, *supra* note 23, at 227–28 (comparing the cases of *Debra H.* and *H.M.* which were decided on the same day, but represent different views of the scope of parenting in the context of custody/visitation cases and child support cases.).

[295] Krivickas, *supra* note 6, at 18 tbl.1.

[296] *See* N.Y. FAM. CT. ACT § 415 (McKinney 2014) ("[T]he spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof or of a patient in an institution in the department of mental hygiene, if of sufficient ability, is responsible for the support of such person or patient. . . . Stepparents shall in like manner be responsible for the support of children under the age of twenty-one years."); Bank v. White, 837 N.Y.S.2d 181, 182 (N.Y. App. Div. 2007); Spenser v. Spenser, 488 N.Y.S.2d 565, 566 (N.Y. Fam. Ct. 1983) ("[S]tepparents have no independent rights in relation to their step-children, they do derive certain legal and *de facto* rights and obligation as the spouse of a parent.").

[297] *See* N.Y. DOM. REL. LAW § 70 (McKinney 2014) (authorizing parents to petition for visitation with a child); *id.* § 71 (extending standing to siblings upon a showing a extraordinary circumstances); *id.* § 72 (granting standing for visitation to grandparents upon a showing of extraordinary circumstances).

[298] *See* Wilson, *supra* note 209, at 486 (stating that to qualify as a de facto parent, an individual must meet the requirements of residency, caretaking, and agreement).

[299] *See* N.Y. DOM. REL. LAW § 72.

threshold showing, courts would ensure that only individuals who have developed a substantial relationship with a child are able to obtain visitation. By requiring such a showing, the biological or adoptive parent's constitutional rights remain fully intact. Further, the flexibility of the approach allows for courts to consider whether the ex-same-sex partner seeking visitation poses a physical danger or a threat of over-burdening the child with involved parents. Rather than continuing to carve out limited exceptions, New York should adopt an approach that looks at the role an individual has had in a child's life and makes a functional determination about whether that relationship warrants visitation.