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PARENT IN LIFE, STRANGER AT LAW: ADDRESSING THE INEQUALITY AND INCONSISTENCY OF PARENTAGE RIGHTS OF SAME-SEX PARENTS

PAUL COOGAN*

I. INTRODUCTION

A married heterosexual couple decides that it is time to start a family. Unfortunately, the couple is unable to conceive naturally so they decide to embark on the process of in vitro fertilization ("IVF").[1]

Together, they find a willing sperm donor whom they know and trust. Together, the couple prepares physically, emotionally, and financially to bring a child into their lives. Despite the fact that their child is genetically linked to only the mother,[2] they are

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* Paul Coogan is a 2013 graduate of The John Marshall Law School. He would first like to thank his parents for their unending support, guidance, and encouragement. He would also like to thank Lily Strumwasser, Shane Devins, Brian Roth, and all the candidates who helped prepare this Comment for publication.

1. Michael Hopkins, *What Is Sauce for the Gander Is Sauce for the Goose: Enforcing Child Support on Former Same-Sex Partners Who Create a Child through Artificial Insemination*, 25 ST. LOUIS U. PUB. L. REV. 219, 221 (2006). IVF is a process whereby one or more ova are removed from the woman and fertilized by sperm outside the woman's body. *Id.* Once the egg is fertilized, it is placed in the woman's uterine cavity. *Id.*

This Comment primarily refers to IVF, but the analysis and discussion apply to other methods of insemination that occur without sexual intercourse. Artificial insemination, for example, is a process similar to IVF, but differs in that sperm is deposited into a woman's uterus once she has ovulated. Harvey L. Fiser & Paula K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of "Best Interest of the Child" and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J. L. & GENDER 1, 3 n.3 (2008).

2. Pregnancy through IVF is often achieved using the mother's egg and the sperm of a sperm donor. Infertility Treatments – Sperm Donation, FERTILITY FACTOR.COM, http://www.fertilityfactor.com/infertility_medical_options_sperm_donor.html (last visited Mar. 24, 2013). Heterosexual couples often use this procedure when the man is sterile or the couple wishes to prevent passing on a genetic disease or disorder. *Id.* Single women and lesbian couples also use sperm donors for IVF. *Id.*

Gay couples who wish to have a child through a surrogate also utilize IVF. *Surrogacy Options for Gay Couples: In Search of a Womb of One's Own*, IT'S CONCEIVABLE, http://itsconceivablenow.com/surrogacy/ (last visited Mar.

committed to one another and to the unborn child in every way possible.

Finally, after months of preparation and anticipation, a little girl is born. Both parents sign the birth certificate at the hospital. Together, as two equal parents, they begin to raise their daughter.

Father, mother, and daughter live together happily for two years. Soon though, the parents' relationship begins to change and they grow apart. The mother, the only biological parent, decides to take the child and leave the family home. She files for divorce and refuses to allow the father to see their daughter.

In such a situation, even though he is not biologically related to his child, the father has legal remedies at his disposal. He will petition a family court (likely as part of the divorce proceedings) for custody and visitation rights so that he can continue to be a parent to his young daughter. A family court judge will then determine what is in the best interest of the child,[3] and order a visitation and custody arrangement accordingly.

Now, consider a lesbian couple in that exact situation, but living in a state that deprives same-sex couples of the right to enter into a legally recognized relationship. The outcome may be very different. Despite the fact that the two women decided to have and raise a child together, once the couple splits up the family court judge may decide that the biological mother is completely within her rights to remove the other mother from the child's life entirely. Is this fair? Does it make good sense? Most importantly, is it in the child's best interest?

This Comment addresses the rights of non-biological same-sex co-parents facing situations similar to the one described above.[4] By way of example, Part II of this Comment discusses the Ohio Supreme Court's decision in *In re Mullen*,[5] a recent case that exposed the inconsistency and inequality that unmarried gay and lesbian non-biological parents often face in court. Part II also presents an overview of the status of this area of the law across the country. Part III analyzes the *Mullen* decision in detail, and will compare how other jurisdictions have handled the rights of non-legal parents formerly in same-sex relationships. Part III also

24, 2013). In those situations, however, there is the potential for both partners to be genetically linked to the child. *Id.*

3. *See* Fiser & Garrett, *supra* note 1, at 15 n.79 (noting that courts in all fifty states apply some form of the "best interest of the child" standard when adjudicating custody and visitation disputes).

4. This Comment's scope is limited to situations in which unmarried same-sex couples make a decision to raise a child together, but the child has a biological link to only one partner. This Comment will refer interchangeably to the non-biological parents in such a situation as "non-legal," "non-biological," and "same-sex co-parents."

5. In re Mullen, 953 N.E. 2d 302 (Ohio 2011).

weighs various proposals and solutions[6] and analyzes the benefits and deficiencies they present. Finally, Part IV sets out a proposal for reform in this area of the law. It argues that non-biological co-parents should have standing to petition for visitation and custody where it is clear that both partners intended to have and raise a child together. It will provide a uniform method for determining such intent that does not involve a fact-intensive analysis by a family court judge. The result is that the inquiry as to visitation and custody rights will focus only on what is in the best interest of the child, rather than on the dynamics of the parents' former relationship.

II. BACKGROUND

This Section begins with a discussion of one recent example[7] of a case in which a homosexual co-parent was denied standing to petition for custody and visitation rights of the biological child of her former partner. It then gives other examples of states and courts that have denied rights in similar situations. Finally, it discusses various methods that states have implemented to resolve this issue in favor of recognizing co-parents' rights.

A. "Momma" in Life, But Not at Law

In the summer of 2011, the Ohio Supreme Court denied a woman's petition for parental rights of her lesbian partner's biological child.[8] Michele Hobbs ("Hobbs") and Kelly Mullen

6. *See, e.g.*, Fiser & Garrett, *supra* note 1, at 19 (stating that contract law presents a possible solution for lesbian parents facing inconsistent or unequal treatment under the law); Kelly M. O'Bryan, Comment, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L.REV. 1115, 1147 (2011) (suggesting that contract law can aide in solving disputes between former lesbian partners, one of whom is the biological mother of the child that the couple raised together for some time); Laurie A. Rompala, *Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-sex Parents Seeking Visitation*, 76 CHI.-KENT L. REV. 1933, 1954 (arguing that Illinois courts should exercise their equitable powers to allow homosexual non-biological parents to establish standing to petition for custody and visitation rights).

7. For examples of other such cases, see Guardianship of Z.C.W., 84 Cal. Rptr. 2d 48 (Cal. Ct. App. 1999), cert. denied sub nom. Crandall v. Wagner, 528 U.S. 1056 (1999) (holding that former lesbian partner of biological mother lacked standing to seek visitation and custody of child born during their relationship); In re Visitation with C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999) (preventing lesbian non-biological mother from establishing standing to seek visitation and custody).

8. *In re Mullen*, 953 N.E. 2d at 304. Under Ohio law, the non-biological parent has no parentage rights unless the parents made an agreement for shared permanent legal custody of the child. *Id.* The only issue for the court to address, therefore, was whether Kelly Mullen's conduct created such an

("Mullen") were in a committed relationship[9] for approximately three years when they decided to have a child.[10] Together, the couple decided that Mullen would carry the baby and after finding a willing sperm donor, they began the IVF process.[11]

On July 27, 2005, with Hobbs present, Mullen gave birth to their daughter, Lucy.[12] For two years, Hobbs and Mullen raised their daughter together. They held themselves out as a family and both women acted as Lucy's mother, with equal parenting responsibilities.[13] In addition to their conduct,[14] numerous documents indicated that Mullen recognized Hobbs as Lucy's mother. These documents included a Donor-Recipient Agreement on Insemination,[15] Ms. Mullen's Last Will and Testament,[16] a Health Care Power of Attorney,[17] and a General Durable Power of Attorney.[18] Lucy called Hobbs "Momma" and it was clear to their family and friends that both Mullen and Hobbs were Lucy's mothers.[19]

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agreement. *Id.* By finding that there was no agreement, the court effectively held that Michele Hobbs lacked standing to petition for custody and visitation rights. *Id.* at 315 (Pfeifer, J., dissenting).

9. Brief for Appellant-Petitioner at *1-2, In re Mullen, 953 N.E. 2d 203 (July 12, 2011) (No. 10-0276), 2010 OH S. Ct. Briefs LEXIS 386. The couple met and began dating in May 2000. They also exchanged rings as a symbol of their commitment to one another. *Id.*

10. *Id.* at *4.

11. *Id.* at *6-7. The couple jointly paid for fertility treatment. Hobbs accompanied Mullen to her doctor's appointments and they attended Lamaze classes together. *Id.*

12. *Id.* at *8.

13. *Id.* at *8-10.

14. *Id.* at *16-17. Mullen regularly referred to Hobbs as Lucy's mother, once stating "You're her Momma." She also referred to Hobbs as Lucy's "mother" and "mom" in various greeting cards and e-mails. Additionally, Mullen "never corrected anyone when they referred to Michele as Lucy's mother, momma or mom nor did she do anything to suggest that Ms. Hobbs was not Lucy's mother." *Id.*

15. *Id.* at *4-5. Pursuant to this agreement, the IVF sperm-donor agreed that he would have "no parental rights whatsoever." The agreement also "made it clear that any right that [the sperm-donor] might have to guardianship, custody, or visitation in the event of Ms. Mullen's death would be secondary to Ms. Hobbs's rights." *Id.* at *5.

16. *Id.* at *14. Mullen named Hobbs the executor of Mullen's will and the guardian of Lucy's person and estate. Mullen also stated, "I consider [Hobbs] to be Lucy's co-parent in every way." *Id.*

17. *Id.* at *15. This document authorized Hobbs to make health care decisions for Lucy. Mullen also stated in this document, "I consider Michele Hobbs to be my child's co-parent in every way." *Id.*

18. *Id.* This document authorized Hobbs to make decisions regarding Lucy's education and living arrangements. Similarly to the other documents, Mullen again stated, "I consider Michele Hobbs as my child's co-parent in every way." *Id.*

19. *Id.* at *13.

In 2007, Hobbs and Mullen grew apart and eventually ended their relationship.[20] In October 2007, Mullen moved out of the couple's home, took Lucy, and prevented Hobbs from seeing her.[21] Hobbs subsequently filed a complaint requesting that the court grant joint custody.[22]

Following a two-day trial and "extensive post-trial briefing,"[23] a magistrate judge granted Hobbs's request for shared custody and found that "it was in the child's best interests to maintain ties with Hobbs."[24] The juvenile court, however, rejected the magistrate's findings, holding that Mullen's conduct did not indicate that she desired to relinquish to Hobbs any of her custodial rights.[25] The court of appeals then affirmed that decision.[26] Of particular importance to the court of appeals was the contested fact that Mullen refused to enter into an agreed court order with Hobbs.[27] The court of appeals held that, "taken as a whole," the evidence supported the juvenile court's

20. *Id.* at *20-21.

21. *Id.* at *21.

22. *Id.* Ohio statutes define "legal custody" as a legal status that vests in an individual "the right to have physical care and control of the child," along with the responsibility to "provide the child with food, shelter, education and medical care." OHIO REV. CODE ANN. § 2151.011(B)(21) (West 2011). Two people may enter into, and a court may determine the validity of, a "shared custody" arrangement whereby they share those rights and responsibilities. OHIO REV. CODE ANN. § 2151.23(A)(2) (West 2011).

Hobbs also filed a motion requesting interim visitation with Lucy while the proceedings were occurring. Brief for Appellant-Petitioner, *supra* note 9, at *21. Additionally, Scott Liming, the sperm-donor for the IVF procedure, filed a complaint for shared custody of Lucy. *Id.* at *2.

23. *Id.* at *22.

24. *In re Mullen*, 953 N.E. 2d at 305. The magistrate judge also made the following factual findings: "that Hobbs had actively participated in the decision and process to have a child, that Mullen and Hobbs had had an understanding that they would act as equal co-parents" and that Mullen named Hobbs as an equal co-parent in three separate documents. *Id.* Due to these findings, the magistrate judge held that Mullen, through her conduct, had relinquished partial custody of Lucy to Hobbs. *Id.* The judge did not, however, rule on Liming's petition. *Id.* at 418 n.1.

25. *Id.* Importantly, the question of whether Mullen had relinquished any of her custody rights was one of fact. *Id.* at 306. The appeals court and the supreme court, therefore, were operating under a limited standard of review. They were required to affirm the trial court's determination "if there [was] some reliable, credible evidence to support the finding." *Id.*

26. *Id.* at 308.

27. *Id.* In her brief, Hobbs stated that she and Mullen discussed a formal court order for shared custody only after their relationship began to deteriorate. Brief for Appellant-Petitioner, *supra* note 9, at *28. In her testimony, Mullen stated that the first time the couple discussed a written custody agreement was not until Lucy was eight months old. *In re Mullen*, 953 N.E. 2d at 311 (Pfeifer, J., dissenting).

determination.[28]

Hobbs appealed again and the Ohio Supreme Court affirmed the lower court's decision.[29] The court initially stated that "Ohio does not recognize a parent's attempt to enter into a statutory 'shared parenting' arrangement with a nonparent, same-sex partner."[30]

As to the facts, the court noted that there was conflicting evidence as to whether Mullen had intended to share custody of Lucy with Hobbs,[31] but held that, based on the record, it could not say that the juvenile court erred in its determination.[32] The court also stated that, while not required, the best way for a parent to cede custody rights to a nonparent is through a formal written contract.[33] It found that the evidence supported the juvenile and appellate courts' holdings and therefore affirmed the judgment.[34] Despite being Lucy's "Momma" in real life,[35] the Ohio courts refused to recognize Hobbs as Lucy's mother.

B. Barriers to Continued Co-Parenting

Ohio is not the only state to deny custody or visitation rights to non-legal parents who, for all intents and purposes, have acted as a child's parent since the child's birth. The Uniform Parentage Act ("UPA"),[36] which has served as a model for many state statutes governing parentage rights,[37] presents difficulties for and a bias

28. *Id.*

29. *Id.* at 309 (majority opinion).

30. *Id.* at 305. The court stated that the currently applicable Ohio statutes did not include within the definition of "parent" a nonparent same-sex partner. *Id.*

31. *Id.* at 307.

32. *Id.* at 308. *See also supra* note 25 (noting the limited standard of review under which the court was operating).

33. *In re Mullen*, 953 N.E.2d at 308 (citing In re Bonfield, 780 N.E.2d 241 (Ohio 2002)) (stating that "the best way to safeguard both a parent's and a nonparent's rights with respect to children is to agree in writing as to how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent").

34. *Id.* This holding meant that the juvenile court could not reach the determinations of whether Hobbs was a suitable custodian or whether Hobbs and Mullen having joint custody was in Lucy's best interests. *Id.*

35. Brief for Appellant-Petitioner, *supra* note 9, at *10.

36. The Uniform Parentage Act was originally promulgated in 1973. Unif. Parentage Act (1973); O'Bryan, *supra* note 6, at 1121. The UPA was an attempt to standardize parentage law across the country. It contains provisions on parent-child relationships, paternity issues, proceedings to adjudicate parentage, and issues regarding children assisted reproduction, among others. *Id.* at 1121-26.

37. John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 681 (2008). California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, and Rhode Island

against a same-sex co-parent seeking shared custody of their former partner's biological child.

The first version of the UPA was promulgated in 1973 ("UPA (1973)").[38] Section 5 of the UPA (1973) specifically addresses children conceived through artificial insemination, but refers to the potential parents only as "husband" and "wife," thereby excluding all unmarried and same sex couples from its protections.[39]

Illinois and Ohio present just two examples of how the inequalities inherent in the UPA (1973) have created statutes that act as the first major roadblock to a lesbian mother seeking parentage rights. The plain language of the Illinois Marriage and Dissolution of Marriage Act makes it extremely difficult for a former same-sex partner of a biological mother to petition for custody or visitation.[40] The Ohio statutes explicitly give a woman's husband rights that a woman's same-sex partner would not have in the same situation.[41]

The UPA was revised in 2000 ("UPA (2000)") because the creators felt that "the law needed to keep up with new technologies and resulting legal issues, such as the increased use of assisted conception."[42] Even with that goal in mind, the UPA (2000) still referred only to "husband" and "wife" when addressing artificial insemination issues,[43] and maintained an overall bias in favor of conventional heterosexual relationships.[44]

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all enacted some form of the UPA (1973). *Id.* Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming all enacted some form of the UPA (2000). O'Bryan, *supra* note 6, at 1125 n.87.

38. Unif. Parentage Act (1973); O'Bryan, *supra* note 6, at 1121.

39. Unif. Parentage Act (1973). Under the Act, if "a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if her were the natural father of a child thereby conceived." *Id.*; O'Bryan, *supra* note 6, at 1121.

40. 750 ILCS 5/601(b)(2) (West 2005). The Act provides that a nonparent has standing to petition for custody only when the child is not in the *physical* custody of one of his natural or legal parents. In re R.L.S., 844 N.E.2d 22, 27 (Ill. 2006); In re Guardianship of Alexander O., 783 N.E.2d 673, 678 (Ill. App. Ct. 2003); In re Marriage of Siegel, 648 N.E.2d 607, 610 (Ill. App. Ct. 1995).

41. OHIO REV. CODE ANN. § 3111.95 (West 2001). The law states that so long as a husband consents to his wife's artificial insemination, a legal presumption arises that he is "the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall be treated in law and regarded as the natural child of the husband." *Id.* There is no such provision protecting the rights of same-sex partners of biological parents.

42. O'Bryan, *supra* note 6, at 1124-25.

43. *Id.* at 1125.

44. *See* Unif. Parentage Act (2000), Article 7 (concerning the parentage of children born through "assisted reproduction"). The titles of the sections in Article 7 include, "Husband's Paternity of Child of Assisted Reproduction" and "Limitation on Husband's Dispute of Paternity." *Id.* at §§ 703, 705. Article 7

In 2002, the UPA (2000) was amended to include children born out of wedlock.[45] Although such an amendment may indicate a trend toward more inclusive statutory language, the model law—and states that followed its lead—still did not extend protections to homosexual co-parents.[46] For example, in New Mexico, a state that has adopted a version of the UPA (2000),[47] an appellate court held that the former lesbian partner of an adoptive mother did not have standing to seek custody of the child even though the former partner assisted in raising the child since the time of adoption.[48] Needless to say, same-sex co-parents face a difficult uphill battle in many states. Fortunately, though, this is not the case in every state throughout the country.

C. Recognizing the Rights of Non-legal Co-Parents

A number of state court decisions have started to open the door for gay and lesbian co-parents seeking parentage rights. One of the dissenting opinions[49] in *Mullen* noted one such decision when arguing that the majority misapplied its own precedent.[50]

uses only "wife" when speaking of the mother of the child and does not make any mention of same-sex couples. *Id.*

45. Unif. Parentage Act (2000), Article 7; O'Bryan, *supra* note 6, at 1125.

46. *Id.* The Unif. Parentage Act (2000) changed references to potential parents from "husband" and "wife" to "man" and "woman," yet does not address the possibility of a same-sex couple having a child. *Id.*

47. N.M. STAT. ANN. §§ 1978, 40-11A-703, § 40-4-9.1(K) (West 2003).

48. Chatterjee v. King, 253 P.3d 915, 926 (N.M. App. Ct. 2010). This holding was based on the court's interpretation of the relevant custody statute, which states: "When a person other than a natural or adoptive parent seeks custody of the child, no such person shall be awarded custody absent a showing of unfitness of the natural or adoptive parent." *Id.*; N.M. STAT. ANN. § 40-4-9.1(K). The court recognized that a nonparent may be awarded custody under the statute, over the objections of the parent, under extraordinary circumstances. *Chatterjee*, 253 P.3d at 922-23. The court found, however, that the potential psychological harm to the child that the petitioner alleged would occur if she were not granted custody was insufficient to reach the "extraordinary circumstances" contemplated by the Supreme Court of New Mexico. *Id.* at 923. The court held, therefore, that under the plain language of the statute, the petitioner had no standing to seek custody of the child. *Id.* at 925.

Notably, however, the court subsequently held that the legislature did not limit visitation in the same way it limited custody. *Id.* at 926-27. While it did not grant visitation to the former partner, it held that she had standing to petition the juvenile court for visitation rights. *Id.* at 928. The court stated that the trial court has the discretion to determine whether granting visitation to the nonparent would be in the best interests of the child. *Id.*

49. There were three dissenting justices and two dissenting opinions. *In re Mullen*, 953 N.E.2d at 309 (O'Connor, C.J., dissenting); *Id.* at 311 (Pfeifer, J., dissenting).

50. *See id.* at 311-15 (Pfeifer, J., dissenting) (arguing that the majority's over reliance on *Bonfield* was inappropriate because there, the parties did not

The dissenter argued that the majority should have followed the path set out by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*[51]

In 1995, on facts[52] similar to those of *Mullen*, the Wisconsin high court held that a non-legal parent may obtain standing to petition a juvenile court for shared visitation if the non-legal parent can establish: that the legal parent consented to a "parent-like relationship" between the child and non-legal parent; that the non-legal parent and child lived together; that the non-legal parent took on the responsibilities of parenting; and that the non-legal parent has acted like a parent long enough to establish a "dependent relationship" with the child.[53]

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dispute co-parent status, and simply sought to submit their shared-parent agreement to the juvenile court for a "child's best interests determination;" whereas here, the parties disputed co-parent status and sought a determination of whether the legal parent had ceded custody).

51. *Id.*; In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995).

52. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419. Sandra Holtzman and Elisabeth Knott were in a committed relationship for more than ten years. *Id.* About four years into their relationship, the couple began the artificial insemination process. *Id.* Once Knott became pregnant, the couple attended all obstetrician visits and birthing classes together. *Id.* Knott gave birth to a boy on December 15, 1988. *Id.* Both Knott and Holtzman represented themselves and one another as their son's equal co-parents. *Id.* at 422. Holtzman's parents were recognized as the boy's grandparents and Holtzman's sister was named the boy's godmother. *Id.* For about five years, the two shared parenting responsibilities, and Holtzman provided most of the financial support for the family. *Id.*

The family moved in late 1992, and by early 1993 the couple had decided that their relationship was over. *Id.* They initially decided to continue living together for their son's sake, but a few months later Knott moved out and took the boy with her. *Id.* Shortly thereafter, Knott filed for a restraining order to keep Holtzman from seeing their son. *Id.* In response, Holtzman filed petitions for custody and visitation. *Id.*

Though it appeared that the circuit court judge felt compelled to grant Holtzman's petitions, he stated that the law would not allow him to do so. *Id.* Holtzman appealed, and her petition to bypass the appellate court was granted. *Id.* at 423.

53. *Id.* at 435-36. More specifically, the court held that the petitioning non-legal parent must establish:

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

Id. Importantly, the court's ruling only establishes the requirements that a co-parent must meet to have standing to petition the court for custody or

Importantly, the court found Wisconsin's visitation statutes inapplicable,[54] as it referred only to situations involving a dissolution of marriage.[55] Instead, the court used its equitable powers to fashion the test for determining whether a "parent-like" relationship exists.[56]

Wisconsin is not alone in recognizing non-biological parents' rights in this way. In 2005, for example, in the case of *In re Parentage of L.B.*,[57] the Washington Supreme Court held that factors similar to those used in *H.S.H.-K* can establish *de facto* parent status.[58] The facts[59] were again similar to those in *H.S.H.-K.* and *Mullen*. After the Superior Court denied the non-biological parent's petition for parentage and visitation rights,[60] the Court of Appeals reversed[61] and the case was appealed to the Washington Supreme Court. After a lengthy analysis, the court concluded that the state's common law allowed for, and the United States Constitution did not prevent, the establishment of *de facto* parent status.[62] The court remanded the case[63] to the trial court for a

visitation. *Id.* The trial court must then make a determination based on what is in the best interests of the child. *Id.* at 436.

54. *Id.* at 430; WIS. STAT. ANN. § 767.245(1) (2007).

55. *In re Custody of H.S.H.-K.*, 533 N.W.2d at 430.

56. *Id.* at 434.

57. In re Parentage of L.B., 122 P.3d 161 (Wash. 2005).

58. The term *de facto* parent typically refers to a person who, though not biologically related to a child, psychologically and functionally acts as the child's parent. O'Bryan, *supra* note 6, at 1131.

59. *In re Parentage of L.B.*, 122 P.3d at 163. Page Britain and Sue Ellen Carvin lived together for five years. They decided to have a child and together went through the IVF process, impregnating Britain with sperm donated by a male friend. *Id.* Britain gave birth to a girl, and together the couple raised her for six years. *Id.* The couple subsequently ended their relationship, and for approximately a year thereafter, they shared parenting responsibilities and custody of their daughter. *Id.* at 164. Then, Britain "unilaterally terminated all of Carvin's contact with [their daughter]." *Id.* Carvin petitioned with the Superior Court seeking establishment of parentage. *Id.*

60. *Id.* Carvin alleged that she was a legal parent under Washington's Uniform Parentage Act and that she should be recognized as a *de facto* parent, or alternatively, that she be granted third party visitation rights. The Superior Court dismissed Carvin's petition on all three grounds, stating that Carvin had no standing under the UPA nor as a *de facto* parent, and denied Carvin's visitation petition because there was no showing that Britain was unfit as a parent. *Id.* at 165.

61. *Id.* The Court of Appeals affirmed in part and reversed in part, holding that while Carvin lacked standing under the Uniform Parentage Act, she could, at the trial court level, establish herself as a common law *de facto* parent by meeting requirements similar to those used in *H.S.H.-K.* Additionally, the appellate court held that Carvin did not need "to prove that Britain is unfit in the classic sense, but only that it is detrimental to the child to sever the . . . parent-child relationship" to petition the court for visitation. *Id.*

62. *In re Parentage of L.B.*, 122 P.3d at 175. A *de facto* parent is a non-legal

determination of whether the mother was a *de facto* parent.[64] At least two other states' high courts have held similarly.[65]

Some courts have looked to similar factors, without adopting a specific set of requirements, to determine that non-legal parents in same-sex relationships have standing to seek custody or visitation.[66] Other courts have held that their existing statutes implicitly support recognition the rights of non-biological parents.[67]

There is also some direct statutory support for a broader recognition of co-parent status and rights. In July 2009, Delaware enacted a statute that may grant legal parentage to the same-sex

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parent who, because of the relationship he or she has with the child, stands in "legal parity" with the legal parent. *Id. at 177.*

The court analyzed *de facto* parent status in light of Constitutional considerations, most importantly those raised in Troxel v. Granville, 530 U.S. 57 (2000). *Troxel* held that the United States Constitution requires a presumption that a fit parent acts in the child's best interests. *Troxel,* 530 U.S. at 68-69. That case also stands for the proposition that a legal parent has fundamental rights—paramount to any potential rights of a nonparent—to make child rearing decisions. *Id.* at 57.

63. *In re Parentage of L.B.*, 122 P.3d at 176. The supreme court also reversed the appellate court on the issue of third party visitation, holding that the statute which provides for such a petition is unconstitutional. *Id.*

64. *Id.* at 176 (citing *In re Parentage of L.B.*, 89 P.3d at 285 (Wash. Ct. App. 2004)). The court adopted the same four factors for determining of *de facto* parentage as those used by the Supreme Court of Wisconsin in determining co-parent status. *Id.*

65. *See* E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1991) and V.C. v. M.J.B., 748 A.2d 539, 553 (N.J. 2000) (holding that a lesbian non-biological parent may establish *de facto* parent status and thus have standing to seek visitation and custody rights).

66. *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010) (holding that where a biological mother brought a nonparent same-sex partner into the family unit, represented that the nonparent was a parent, and allowed the nonparent to go through adoption proceedings, nonparent had standing to petition juvenile court for custody, even though the adoption was void because it was barred by state statute).

67. Courts in California and Oregon present two such examples. In *Elisa B. v. Superior Court*, the California Supreme Court concluded that the former same-sex partner of the biological mother of two children was presumed a parent under the California UPA. *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005). Although the statute provided a standard establishing only a father-child relationship, the court found that provision to be applicable to a mother-child relationship, as well. *Id.* at 666-67. Therefore, it held that a child can have two parents, both of whom are women. *Id.*

In *Shineovich v. Kemp*, an Oregon appellate court held that where a woman consents to the artificial insemination of her same-sex domestic partner with the intent of being the child's parent, she is presumed to be the parent. 214 P.3d 29, 40 (Or. Ct. App. 2009). The court included the children of mothers in same-sex relationships within the scope of the relevant statute, OR. REV. STAT. § 109.243 (West 2011), which previously applied only to children of heterosexual couples. *Id.*

partner of the biological or adoptive parent.[68] A person is a *de facto* parent under the statute if he or she meets requirements that are almost identical to those established in *H.S.H.-K.* and *L.B.*[69] Kentucky enacted a similar statute in 2010.[70]

While this type of progress is encouraging, for many, the fight is still not over. The Delaware statute, for example, may be under attack,[71] even though it was enacted in response to a Delaware Supreme Court decision denying *de facto* parent status.[72] Many non-biological parents are still lacking the equality under the law that they deserve.

III. ANALYSIS

This Section discusses the specific problems with the decision in *Mullen*. It then discusses both the strengths and weaknesses of other approaches to this issue. Finally, it will explain the importance of this issue and why it must be addressed quickly and consistently.

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68. DEL. CODE ANN., tit. 13 § 8-201(a)(4) (West 2013).

69. *Id.* To be considered a *de facto* parent under the statute, the parent must show that she:

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

Id.

70. KY. REV. STAT. ANN. § 403.270(1)(a) (West 2010), states:

> "[D]e facto custodian" means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Community Based Services.

Id.

71. Bancroft v. Jameson, 19 A.3d 730, 748-50 (Del. Fam. Ct., 2010). In 2010, a family court held the statute to be unconstitutional. The court denied a mother's boyfriend, who was not the father, *de facto* parent status for purposes of his custody petition for his girlfriend's child. The court held the statute unconstitutional as violative of a biological parent's paramount rights regarding child rearing and custody. *Id.* at 740-50 (relying on *Troxel*, 530 U.S. 57).

72. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lebsian Couples in the Twenty First Century*, 5 STAN. J.CIV. RTS. & CIV. LIBERTIES 201, 223-224 (2009).

A. *Flaws in* Mullen*'s Analysis*

With the exception of the magistrate court,[73] the *Mullen* courts were misguided in their approaches to resolving the difficult issue presented. The juvenile court began down the wrong path when it focused on the fact that Hobbs and Mullen never entered into a shared custody court order.[74] The juvenile court found this to be the "most important" fact[75] and found that it outweighed all the evidence to the contrary.[76] The juvenile court also found that the sperm donor, Scott Liming, was the child's father. It held that he had the opportunity to obtain custody rights,[77] despite the fact that he had explicitly relinquished those rights when he became the couple's sperm donor,[78] and despite the statutory bar to such a donor obtaining parental rights.[79]

The appellate court followed the juvenile court's lead. It acknowledged that the trial court gave significant importance to "the fact [that] Mullen had repeatedly refused to enter into a legally enforceable shared-custody agreement with Hobbs when

73. Brief for Appellant-Petitioner, *supra* note 9, at *23-24. "Weighing the competing versions, the Magistrate found that 'the evidence and testimony demonstrate that Ms. Mullen and Ms. Hobbs had an understanding that they would act as equal co-parents for the child.'" *Id.* (internal citation omitted). The magistrate concluded that Mullen had relinquished her right to exclusive custody and that Hobbs should remain a part of her child's life. *Id.*

74. *Id.* at *26. The juvenile court found that Mullen "refused repeatedly" to enter into a shared custody court order, thereby declining to give up any custodial rights to Hobbs. *Id.* The juvenile court made this determination, which was contrary to that of the magistrate, based solely on a review of the transcript (i.e. without personally observing any witness statements). *Id.* at *25.

75. *Id.* at *26.

76. *Id.* The evidence to the contrary included the various writings that indicated Mullen's desire for Hobbs to be a co-parent as well as the couple's conduct in relation to one another, their daughter, and their friends and family. *See supra* notes 8-19 and accompanying text (detailing the documents and conduct).

77. *In re Mullen*, 924 N.E.2d at 450. A discussion of the rights of the sperm donors in these situations is outside the scope of this Comment. The juvenile court's statements regarding Liming, however, are important here to demonstrate that the judge was willing to recognize his rights before Hobbs's, even though that recognition was likely incorrect. *See infra* notes 79 and 80 and accompanying text (explaining the appellate court's rationale).

78. *Id.*; *see also*, Brief for Appellant-Petitioner, *supra* note 9, at *23-24 (arguing that "the Donor-Recipient Agreement also made it clear that any right Mr. Liming might have to guardianship, custody, or visitation in the event of Ms. Mullen's death would be secondary to Ms. Hobbs's rights").

79. *See* OHIO REV. CODE ANN. § 3111.95 (West 2011) (stating that where a woman undergoes non-spousal artificial insemination, the donor "shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination").

presented the opportunity to do so."[80] In addition, the appellate court made a point to note that the numerous documents[81] that referred to Hobbs's co-parentage rights "were given at Mullen's discretion, and Mullen always retained the unilateral right to revoke them."[82]

Just as the lower courts did, the Ohio Supreme Court cited the lack of a formal custody agreement between Hobbs and Mullen as the basis for its holding.[83] The court also advised that "the best way to safeguard both a parent's and non-parent's rights with respect to children" is either to enter into a formal, written agreement or to apply for a court order that clearly establishes "how custody is to be shared, the manner in which it is shared, and the degree to which it may be revocable or permanent."[84] In the next breath, however, the court noted that Ohio law does not require a written contract to relinquish custody rights.[85]

Most problematic to each court's analysis was the intense focus on the "fact"[86] that Mullen never agreed to apply for a court ordered custody arrangement nor enter into a formal custody

80. *In re Mullen*, 924 N.E.2d at 450. It is important to note, however, that the "fact" to which the court referred, regarding the "repeated" refusals and their timing, was disputed at the trial in the magistrate court. *See supra* note 27 (explaining the contradictory evidence and testimony regarding discussions to enter into such an agreement).

81. *See supra* notes 15-18 (detailing the documents that referred to Hobbs as a co-parent, which included Mullen's will, a Health Care Power of Attorney, and Durable Power of Attorney).

82. *In re Mullen*, 924 N.E.2d at 460.

83. *In re Mullen*, 953 N.E. 2d 302, 308.

84. *Id.* at 308 (citing *In re Bonfield*, 97 Ohio St. 3d at 387; Masitto v. Masitto, 22 Ohio St. 3d 63 (1986)). In *Bonfield*, a lesbian couple petitioned the juvenile court for recognition of a shared parenting agreement. *In re Bonfield*, 97 Ohio St. 3d at 388. One of the women had two adopted children and three whom she gave birth to after artificial insemination. *Id.* After the juvenile court dismissed their petition for lack of jurisdiction, the Supreme Court of Ohio held first that the Ohio statutes did not allow the legal mother's partner to be considered a "parent" for purposes of a shared parenting agreement. *Id.* at 393. However, because the couple had clearly and explicitly agreed, in writing, upon a shared custody arrangement, the court held that the juvenile court could make a determination of whether shared custody would be in the best interests of the children. *Id.*

In *Masitto*, the Supreme Court of Ohio found that where a father had relinquished his right to sole custody of his children in favor of the children's grandparents. *Masitto,* 22 Ohio St. 3d at 67. There, the court the father had consented, in writing, to the appointment of the grandparents as the children's guardians. *Id.* at 64. The court held that this was sufficient to indicate that the father had relinquished his custody rights in favor of the grandparents. *Id.* at 67.

85. *In re Mullen*, 953 N.E.2d at 308.

86. The term "fact" is in quotations here because it refers to an issue that was disputed between the parties. *Supra* note 25 and corresponding text.

agreement.[87] It was imprudent for the courts to rely on the lack of a formal agreement for a number of reasons. First, there was significant dispute over the facts that led to the courts' conclusion that Mullen's refusal to enter into a formal custody agreement was indicative of her desire to retain sole custody rights.[88] Second, and more importantly, the amount of evidence indicating the affirmative steps the couple took to equate their status as parents[89] makes it troubling that the courts gave such deference to an action the couple *did not* take.[90] The courts ignored all the actions Mullen took to relinquish her sole custody rights, while simultaneously citing the *lack* of a certain piece of evidence as the most telling sign that she had not relinquished those rights.[91]

The *Mullen* court was also misguided in its analysis of the term "co-parent." It stated that designating an individual as a co-parent is not equivalent to relinquishing custody rights in favor of that individual.[92] The court found that the term "co-parent" is subject to "many different arrangements and degrees of permanency," but cited no case law or examples demonstrating such a broad use of the term.[93]

The court went on to state, however, that the use of "co-parent" can indicate a relinquishment of custody rights if the surrounding circumstances and evidence support that indication.[94] It is surprising, then, that the court did not find such circumstances existing between Mullen and Hobbs. No interpretation of the documents in which Mullen referred to Hobbs

87. *In re Mullen*, 924 N.E.2d at 451; *In re Mullen*, 953 N.E.2d 307-08.

88. *See supra* notes 25 and 73 and corresponding text (explaining that there was evidence of an intent to co-parent and that Mullen waived her right to parent exclusively); *see also*, *In re Mullen*, 953 N.E.2d at 311 (Pfeifer, J., dissenting) (stating that the court relied in error upon Mullen's refusals because no matter which side of the disputed facts is taken as true, "Mullen had made clear long before any discussion about a *Bonfield*-like agreement that she considered Hobbs a co-parent").

89. *See supra* notes 14-18 and corresponding text (noting that Hobbs and Mullen executed a number of documents which stated that Hobbs was a co-parent, their daughter called Hobbs "Mommy," and the couple held themselves out to be a family and Hobbs to be their daughters mother).

90. *See In re Mullen*, 953 N.E.2d at 311 (Pfeifer, J., dissenting) (arguing that "the trial court gave improper weight to a document that did not exist and improperly ignored the documents that did exist").

91. *In re Mullen*, 924 N.E.2d at 451; *see also*, *In re Mullen*, 953 N.E.2d at 307 (referring to the fact that Hobbs and Mullen never entered into a normal custody agreement and did not seek a court order regarding a custody arrangement).

92. *In re Mullen*, 953 N.E. 2d at 308. (holding that "'[c]oparenting' is not synonymous with an agreement by the biological parent to permanently relinquish sole custody in favor of shared legal parenting.").

93. *Id.*

94. *Id.*

as a co-parent can support the conclusion that Mullen believed Hobbs would be a temporary co-parent.[95] The multiple references to Hobbs as "co-parent" in the various legal documents Mullen executed[96] should have been taken to mean exactly what they stated: that Hobbs was a co-parent "in every way."[97] The Ohio courts' failure to recognize custody rights as falling within the phrase "in every way" was a mistake and was contrary to common sense.

The final part of the courts' misguided analysis in this case started with the juvenile court's determination that by revoking the documents that referenced Hobbs as a co-parent Mullen indicated that she never intended Hobbs to retain any custody rights.[98] Mullen revoked these documents not only after the couple had split, but also after Mullen and Lucy had moved out of the couple's home.[99] The court should have been more concerned with Mullen's intent at the time the documents were signed, and less concerned with Mullen's unilateral actions once she had moved out of the couple's home.[100]

B. Contract-Based Proposals

For reasons that will be explained, the *Mullen* court and other commentators[101] have given undue weight to contract-based solutions to this problem. The Ohio Supreme Court stated that the "best way to safeguard" the parentage rights of a non-parent is to enter into a very specific type of agreement.[102] Creating a document that clearly indicates the intent to recognize a non-biological parent as a parent may well be the safest way to make sure those intentions are honored. The court's focus, however, was

95. *Id.* at 312 (Pfeifer, J., dissenting) (noting that "Mullen's statement was a way to show the world that Mullen and Hobbs intended to raise Lucy together, equally" and arguing that "an agreement that another person is a co-parent in every way" necessarily includes a right to custody).

96. *Supra* notes 13-17.

97. *Id.*; *In re Mullen*, 953 N.E. 2d at 312 (Pfeifer, J., dissenting).

98. *See id.* (indicating that the juvenile court placed emphasis on the revocability of the documents designating Hobbs as a co-parent); *see also*, *In re Mullen*, 924 N.E.2d at 451 (noting that the juvenile court found that "Mullen always retained the unilateral right to revoke [the documents]").

99. *In re Mullen*, 953 N.E. 2d at 312 (Pfeifer, J., dissenting) (explaining that "[n]ot until the pair separated after Lucy's second birthday did Mullen revoke the statement, 'I consider Michele Hobbs as my co-parent in every way.'").

100. *See id.* (arguing that the court should not have relied on Mullen's actions after the couple split because "the question before the court was whether Mullen agreed to share custody of her child with Hobbs, not whether she eventually came to regret that decision").

101. *Infra* note 107.

102. *Id.* at 308.

mistakenly narrow when it considered the type of writing that would be acceptable.

On multiple occasions, Mullen clearly indicated—*in writing* and with an attorney's assistance—that she considered Hobbs to be Lucy's mother.[103] The court found all of that to be insufficient.[104] Under the court's reasoning, for Hobbs to have standing to seek custody rights, she would have needed to obtain a court order recognizing those rights.[105] Alternatively, Mullen would have needed to sign a document explicitly stating, "I permanently relinquish my sole custody rights in favor of Ms. Hobbs."[106]

The Ohio courts are not alone in suggesting that this contract-based approach is the best way to resolve custody issues in these situations.[107] And to be sure, there is nothing inherently wrong with using contractual agreements as a way to protect the rights of a non-legal parent. If executed properly, there is no reason for courts to refuse to recognize them.[108]

Proposing this as the best or only solution, however, is disingenuous. One problem with the written agreement solution in *Mullen* was that the court left unclear exactly what type of agreement would constitute a valid transfer of custody rights to the non-legal parent.[109] The court's other suggestion, that couples

103. *Supra* notes 13-17 and corresponding text. An attorney assisted Mullen in executing the will, health-care power of attorney, and durable power of attorney. *In re Mullen*, 953 N.E. 2d at 307.

104. *In re Mullen*, 953 N.E. 2d at 308.

105. *Id.*

106. *See id.* (stating that despite the documents and conduct to the contrary, "Mullen did not create an agreement to permanently relinquish sole legal custody of her child in favor of shared legal custody with Hobbs").

107. *See* O'Bryan, *supra* note 6, at 1147-48 (suggesting that in order to avoid future custody battles, couples should enter into pre-insemination agreements that "establish that the biological parent's partner, or the nonbiological parent, is an equal co-parent to the resulting child"). *See also*, Fiser & Garret, *supra* note 1, at 27 (arguing that where a same-sex couple exerts "a great amount of thought and often significant financial outlay" and together agrees to conceive through artificial insemination, "deliberate parties should have their agreements enforced").

108. *See* O'Bryan, *supra* note 6, at 1148 (noting that many courts are already recognizing such agreements); *see also*, *In re Mullen*, 953 N.E. 2d at 308 (stating that these contractual agreements are the preferred method for protecting rights).

109. *Mullen*, 953 N.E. 2d at 312 (Pfeifer, J., dissenting). The dissent questions what exactly the majority means when it describes the recommended written agreement:

> Is it not enough to say that the natural parent is ceding partial custody to the nonparent so that the two can raise the child together equally? Is the couple to describe in a legal document how they expect the family to develop? . . . Must they define roles? Must they establish a visitation schedule to use after an eventual break-up, before a baby is even

seek a court order establishing the scope of custody awarded to each partner, is also flawed in that it removes the decision from the couple's hands and places it in the hands of a judge.[110]

Another major problem with this approach is that many same-sex couples who wish to have a child together will not (and should not be expected to) have the foresight to plan for a future break-up and custody battle by executing a formal contract. Hobbs and Mullen, for example, had no reason to believe that their relationship would be temporary.[111] Requiring a same-sex couple to enter into a formal contract-type custody agreement should be unnecessary, especially when that couple intends to remain in a committed relationship, puts significant thought into having a child and starting a family, and takes affirmative steps to acknowledge both partners as parents of the child.[112]

C. Other Approaches to Establishing Co-Parent Standing

Courts and legislatures in some states have found alternatives to the contract-based solution.[113] All of these approaches allow a non-legal parent to establish standing to seek custody and visitation by demonstrating—through varying, yet similar requirements—that he or she has acted as a child's parent.[114]

These solutions are a step in the right direction. By focusing on the relationship between the non-legal parent and the child,

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brought home from the hospital?

Id. at 312-13.

110. *Id.* The dissent notes that if the juvenile court judge does not "bless" the couple's relationship or custody agreement, then the "nonparent is left with nothing." *Id.* at 313. *See* Fiser & Garrett, *supra* note 1, at 10 (noting the limitations of a resolution based on interpretation by "individual judges").

111. *See* Brief for Appellant-Petitioner, *supra* note 6, at *2-3 (noting that Hobbs and Mullen were a "committed couple in an intimate relationship," and that "[a]t one point, they bought and exchanged rings as a symbol of their commitment to one another").

112. *See In re Mullen*, 953 N.E. 2d 312 (Pfeifer, J., dissenting) (noting that a *Bonfield*-type agreement was not necessary and that the lack of a such an agreement "does not negate the fact that an agreement to share custody already existed before Lucy was even born").

113. *See, e.g.*, *In re Custody of H.S.H.-K.*, 533 N.W.2d at 435-36 (allowing non-legal parents to obtain standing to petition for parentage rights under Wisconsin law by satisfying a four-part test); *In re Parentage of L.B.*, 122 P.3d at 176-77 (holding that a non-legal parent in Washington who satisfies an identical four-part test is a *de facto* parent and stands in "legal parity with an otherwise legal parent"); *E.N.O. v. L.M.M.*, 711 N.E.2d at 892 (holding that a lesbian non-legal parent may establish *de facto* parent status and have standing to seek visitation and custody rights); DEL. CODE ANN., 13 § 8-201(a)(4) (codifying *de facto* parent status using criteria similar to *H.S.H.-K.* and *L.B.*).

114. *Supra* notes 55, 61, 64, 65, 67 and 69 and corresponding text.

this approach manages to protect that parent's rights, while simultaneously recognizing the importance and benefits of maintaining the relationship that parent has fostered with his or her child.

Moreover, this approach continues to protect the rights of the biological parent by allowing a juvenile court to conduct a close examination of the parent's involvement in the child's life. If the court determines that the parent has not had sufficient involvement, it may still refrain from recognizing the non-legal parent's rights. The test ensures that the non-legal parent is, for all intents and purposes, the child's parent and has acted accordingly.[115] Furthermore, even if the non-legal parent meets these requirements, the court must still determine that joint custody is in the best interests of the child. There is virtually no risk that custody would be shared wrongly or unfairly under these tests. Most importantly, these tests shift the main focus of the inquiry from the relationship (or subsequent lack thereof and any resulting animosity[116]) of the partners, to the relationship between the co-parent and the child.[117]

115. *In re Custody of H.S.H.-K.*, 533 N.W.2d at 435-36. The test ensures this by requiring that the biological parent consented to the establishment of a parent-like relationship; that the non-legal parent and child lived together; that the non-legal parent assumed responsibilities of parenthood; and that the non-legal parent has held a parental role for a sufficient period of time. *See also In re Mullen*, 953 N.E. 2d at 312 (Pfeifer, J., dissenting) (noting that the *H.S.H.-K.* test ensures that a non-legal parent cannot gain custody without "first having a significant, parent-like relationship with that child that the natural parent allowed and encouraged"); *In re Parentage of L.B.*, 122 P.3d at 177 (using an almost identical test, "recognition of a *de facto* parent is 'limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in a child's life'") (internal citation omitted). The *L.B.* court also noted that some critics argue that this type of test may become a slippery slope, through which any adult close to a child could petition for visitation and/or custody rights. *Id.* at 179. The court refuted that argument, though, by stating that a critical component of the test is that the biological or legal parent "'consented to and fostered' the parent-child relationship." *Id.*

116. *In re Mullen*, 953 N.E. 2d at 312 (Pfeifer, J., dissenting). The dissent points out that Lucy's best interests never even entered the conversation as the courts attempted to resolve the dispute. Instead, "Mullen's self-interests" and the women's relationship status were the biggest factors in determining the outcome of this case. *Id.*

117. *See id.* at 314 (noting that under the *H.S.H.-K.* test, "a natural parent's decision to end her relationship with a co-parent would not obviate the reality of a child's relationship with a co-parent."). The *Mullen* dispute arose when Mullen and Hobbs ended their relationship and Mullen left with Lucy. *Id.* at 304 (majority opinion). Under an *H.S.H.-K.*-type test, the co-parent's relationship with the child would be reviewed independent of the co-parent's relationship with the biological parent. *Id.* at 314 (Pfeifer, J., dissenting).

Still, these solutions are not without problems of their own. The most glaring of those problems is that the test-based approach leaves much up to the discretion and interpretation of a single family court judge. Nearly all of the courts and legislatures that have recognized a non-legal parent's right to petition for visitation and custody require showing that the biological parent consented to and intended for the non-legal parent's acquisition of such a right.[118] While this is clearly an important part of any such inquiry, the determination of whether that consent and intent existed need not fall within the family court's fact-finding discretion. As the Proposal Section of this Comment demonstrates, courts can easily and consistently determine a couple's intent as to parentage rights, even in the absence of a formal written custody agreement or court order.

D. A Problem with Growing Importance and Urgency

Michele Hobbs's story is not uncommon. As more children are born to and adopted by lesbian, gay, bisexual, and transgender (LGBT) couples,[119] this issue will only become more prevalent.

There are currently seventeen jurisdictions that allow same-sex couples to enjoy the same legal rights as married heterosexual couples.[120] Where a same-sex couple has entered a legally-

118. *See, e.g.*, *In re Custody of H.S.H.-K.*, 533 N.W.2d at 435 (requiring the non-biological parent to show "that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child"); *see In re Parentage of L.B.*, 122 P.3d at 176 (requiring a showing that "the natural or legal parent consented to and fostered the parent-like relationship").

119. Movement Advancement Project, Family Equality Council & Center for American Progress, LGBT FAMILIES: FACTS AT A GLANCE 2 (October 2011), *available at* http://action.familyequality.org/site/DocServer/AllChildrenMatterFactsFinal10192011.pdf?docID=2404 [hereinafter LGBT FACTS AT A GLANCE] (stating that "[a]n estimated two million children are [currently] being raised in LGBT families" and that the number is on the rise). *See also* Movement Advancement Project, Family Equality Council & Center for American Progress, ALL CHILDREN MATTER: HOW LEGAL AND SOCIAL INEQUALITIES HURT LGBT FAMILIES 7 (October 2011), *available at* http://action.familyequality.org/site/DocServer/AllChildrenMatterFullFinal10212011.pdf?docID=2401 [hereinafter ALL CHILDREN MATTER] (indicating that reports on the number of children being raised in LGBT homes vary from two million to 2.8 million). One-third of lesbian women, over half of gay men, and close to three-quarters of bisexual men and women without children state that they want to have children. LGBT FACTS AT A GLANCE, *supra*, at 2.

120. *Id.* As of the writing of this Comment, same-sex marriage is legal in Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington, and the District of Columbia. *Where State Laws Stand*, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/where-state-laws-stand (last visited April 1, 2013). Civil unions or domestic

recognized relationship, the law presumes that both the biological parent and the consenting homosexual partner are the parents of the child born through IVF.[121] Other same-sex couples with children do not enjoy such a presumption.[122] Additionally, in many cases individuals in these situations are unaware of what, if any, rights they have.[123] Inconsistency and inequality also exists with respect to adoption laws throughout the country.[124]

Ensuring that LGB[125] parents are treated equally and consistently under the law becomes particularly important when one considers how current obstacles affect these families. Research shows that LGB parents are just as capable as their heterosexual counterparts,[126] and that their children have equally positive outcomes.[127] Still, these unconventional families face discrimination, stigma,[128] unequal access to healthcare,[129] and

partnerships that provide the same rights and responsibilities of marriage are available to same-sex couples in California, Delaware, Hawaii, Illinois, Nevada, New Jersey, and Rhode Island. *Id.* Rhode Island and New Mexico explicitly recognize out-of-state same-sex marriages. *Id.*

121. LGBT FACTS AT A GLANCE, *supra* note 119, at 3.

122. *See id.* (noting that "over a dozen" states have laws that allow a non-legal parent to acquire parental rights in custody disputes). Non-biological parents seeking parentage rights of children born to their same-sex partners through IVF face inconsistent laws and court decisions. *Id.* Individuals seeking to adopt the children of their same-sex partners are also treated unequally and inconsistently. *Id.* Fifteen states expressly allow for such an adoption, but "[i]n the 35 remaining states, this option does not exist." *Id.*

123. *See id.* at 4 (explaining that "[a] patchwork of statutory and case law creates deep uncertainty for [lesbian, gay, bisexual, and transgender] families.").

124. *See id.* at 3 (stating that seventeen states expressly allow joint adoption by same-sex couples, five have banned such adoption, and the law is silent in the remaining states, "creating uncertainty for families").

125. *See* ALL CHILDREN MATTER, *supra* note 119, at 11 (explaining that "transgender" is a term that does not necessarily refer to one's sexuality). Transgender individuals may be in a same-sex or heterosexual relationship. *Id.* Therefore, for purposes of noting differences between same-sex and heterosexual couples, the acronym "LGB" is used in reference to same-sex couples.

126. *Id.* "All leading child health and social service organizations support LGB parenting." *Id.* Children of LGB parents are just as physically and psychologically healthy as those raised by heterosexual parents. *Id.* at 12. In fact, some research shows that children of LGB parents are better adjusted than those raised by heterosexual parents. *Id.*

127. *See id.* at 6 (noting that "nearly every major authority on child health and social services" agrees that children of LGB parents show no differences from those raised by heterosexual parents in measures of health and happiness, and are just as well-adjusted as other children).

128. *See* LGBT FACTS AT A GLANCE, *supra* note 119, at 5 (asserting that LGBT families must deal with "inappropriate questions, the politicization of

unequal tax burdens.[130] Preventing further trauma by allowing both parents to remain a part of a child's life is extremely important. This is a pressing issue that legislatures must quickly address and remedy.

IV. PROPOSAL

The patchwork of statutes and judge-made law surrounding the rights of homosexual co-parents leaves many facing inequality and inconsistency when attempting to assert their parentage rights. This Section suggests ways by which the law can be made consistent[131] and the resolution of these disputes can center on the best interest of the child.

A. Approaching the Issues with More Common Sense

Many, including the *Mullen* court, have suggested that the best way same-sex couples can solve this problem is by entering into shared custody agreements.[132] Again, while a contract-based solution would suffice in some cases, expecting all same-sex couples to plan for a break-up in such a way is not entirely practical or realistic. Moreover, though possibly desirable from a policy standpoint, forcing couples to plan for such potentially unpleasant circumstances is not desirable from a personal standpoint.

As noted above, a number of states have followed the approach taken by the Wisconsin Supreme Court in *H.S.H.-K.*[133]

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their families," and unfair treatment in schools and neighborhoods because of their familial status).

129. *See id.* at 6 (noting the disparities facing LGBT families in overall health, access to health insurance, health coverage, and denial of hospital visitation).

130. *See id.* at 5 (laying out the various inequities in tax burdens placed on LGBT families including denial of dependency exemptions, child credits, earned income credits, education deductions, and gift and estate exemptions). An LGBT family of four making $45,000 per year pays an average of $2,200 more in taxes annually than a family of four headed by a heterosexual couple. *Id.*

131. *See* Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 700 (2007) (stating that "consistency across the country in this area of family law is a desirable objective").

132. *Supra* notes 100 and 104 and corresponding text.

133. *In re Custody of H.S.H.-K.*, 533 N.W.2d at 424; *see e.g., In re Parentage of L.B.*, 122 P.3d at 176-77 (holding that a co-parent can petition for visitation and custodial rights as a *de facto* parent by meeting four requirements almost identical to those set out in *H.S.H.-K.*); *Boseman*, 704 S.E.2d at 504 (holding that where a biological or adoptive parent consented and represented that the co-parent was an equal parent, the biological parent shared decision-making

Though imperfect, such an approach is definitely a step in the right direction. By focusing more on the relationship between the non-biological parent and the child, this test-based approach manages to recognize the importance and benefits of maintaining the relationship that non-biological parent has fostered with his or her child.

This approach also continues to protect the rights of the biological parent. By conducting a close examination of the co-parent's involvement in the child's life, the court may still determine that the co-parent has not had sufficient involvement in the child's life, and therefore, refrain from recognizing the co-parent's rights. These tests provide a judicial determination of whether the co-parent is, for all intents and purposes, the child's parent.[134] Furthermore, even if the co-parent parent meets these requirements, the court must still determine that joint custody is in the best interests of the child. These tests shift the main focus of the inquiry from the relationship of the partners, to the relationship between the co-parent and the child.[135] This shift in focus is important because it is the only way to guarantee that the child's best interest is at the heart of the resolution to any custody

responsibilities with the co-parent, and the co-parent was committed to jointly parenting the child, the co-parent has standing to seek visitation and custody rights).

134. *In re Custody of H.S.H.-K.*, 533 N.W.2d at 424. The test ensures this by requiring that the biological parent consented to the establishment of a parent-like relationship; that the non-legal parent and child lived together; that the non-legal parent assumed responsibilities of parenthood; and that the non-legal parent has held a parental role for a sufficient period of time. *See also*, *In re Mullen*, 953 N.E. 2d at 312 (Pfeifer, J., dissenting) (noting that the *H.S.H.-K.* test ensures that a non-legal parent cannot gain custody without "first having a significant, parent-like relationship with that child that the natural parent allowed and encouraged"); *In re Parentage of L.B.*, 122 P.3d at 177 (under an almost identical test, "recognition of a *de facto* parent is 'limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in a child's life'"). The *L.B.* court also noted that some critics argue that this type of test is a "slippery slope," whereby any adult close to a child could petition for visitation and/or custody rights. *Id*. The court refuted that argument, though, by stating that a critical component of the test is that the biological or legal parent "'consented to and fostered' the parent-child relationship." *Id.* at 179.

135. *In re Mullen*, 953 N.E.2d at 314 (Pfeifer, J., dissenting) (noting that under the *H.S.H.-K.* test, "a natural parent's decision to end her relationship with a co-parent would not obviate the reality of a child's relationship with a co-parent"). The *In re Mullen* dispute arose when Mullen and Hobbs ended their relationship and Mullen left with Lucy. *Id.* at 308 (majority opinion). Under an *H.S.H.-K.*-type test, the co-parent's relationship with the child would be reviewed independent of the co-parent's relationship with the biological parent. *Id.* at 314 (Pfeifer, J., dissenting).

dispute between former same-sex partners. [136]

Still, this approach is not ideal, mainly because it relies heavily on the discretion of an individual family court judge. Fortunately, there is a solution to that problem. By building on the progress that this approach has already made, state legislatures can implement laws that will recognize, equally and consistently, the rights of all parents. The best way to resolve these disputes (and even avoid them altogether) is to reform the system and implement uniform laws that consider whether an individual is in fact a child's parent, not merely a parent through biology or at law.

B. Need for Certain and Uniform Reform

This Comment has focused on advocating for recognition of the rights of non-legal parents facing custody and visitation disputes. One must remember, however, that this advocacy is also on behalf of the children who are truly at the center of those disputes. Children are much better off when they are able to maintain stable and healthy relationships with the parents who raised them,[137] even if those parents no longer have a relationship of their own. This is the most important justification for making sure that non-legal parents, who have acted as parents for the entirety of a child's life, are recognized as such and given the opportunity to maintain relationships with their children.

One effective solution would be for each of the fifty states to legalize same-sex marriage.[138] With marriage comes the presumption at law that both partners are the equal parent of any child that comes about as a result of that relationship.[139] This would solve the multitude of problems[140] that arise when such a presumption does not exist and an ex-partner is forced to convince a judge that he or she is, in fact, the children's parent.

Of course, even with this solution, a number of difficulties arise. The first, and most glaring, is the relatively small number of states that have approved same-sex marriage to date.[141] Even in

136. *See infra* note 137 and corresponding text (explaining the importance and benefits of maintaining a child-parent relationship even after the parent-parent relationship has broken down).

137. *See* ALL CHILDREN MATTER, *supra* note 119, at 18 (asserting that "[c]hildren need the security and emotional support of loving parents or guardians who care for and nurture them," and that maintaining stability in those relationships is key to healthy development).

138. *But see infra* notes 141-45 (noting the impracticalities of this solution).

139. LGBT FACTS AT A GLANCE, *supra* note 119, at 3.

140. *See* ALL CHILDREN MATTER, *supra* note 119, at 98 (detailing the issues facing lesbian, gay, bisexual, and transgender couples and their children and explaining that legalizing same-sex marriage could solve these issues).

141. *See supra* note 118 (noting that only ten jurisdictions recognize same-sex marriages).

light of indications that acceptance of same-sex marriage is growing,[142] there is still a long way to go.[143] While this solution may be the most comprehensive way to protect children and their non-biological parents, its future is uncertain to say the least.[144] Moreover, aside from the unclear prospects of nationwide approval of same-sex marriage, this solution is also inadequate for those same-sex couples who have no desire to marry, but wish to parent children together.[145]

For those reasons, the more practical solution is to implement (and amend those already existing) laws that act as a combination

142. In November 2012, voters in Maine, Maryland, and Washington approved some form of same-sex marriage. *Same-Sex Marriage and Domestic Partnerships on the Ballot*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/same-sex-marriage-on-the-ballot.aspx (last updated Nov. 7, 2012). Additionally, voters in Minnesota rejected a proposed constitutional amendment banning same-sex marriage. *Id.* Moreover, according to the Pew Forum on Religion and Public Life, forty-eight percent of Americans approved of same-sex marriage in 2012, compared with thirty-five percent in 2001. *Id.*

143. *See id.* (noting that in May 2012, North Carolina voters approved a same-sex marriage ban); *see also supra* note 118 (stating that only ten jurisdictions allow same-sex marriage).

144. On December 7, 2012, the Supreme Court granted petitions for writs of certiorari in two cases involving issues of same-sex marriage. United States v. Windsor, 699 F.3d 169 (2d Cir. 2012), *cert. granted*, 184 L. Ed. 2d 527 (U.S. Dec. 7, 2012) (No. 12-307); Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted*, *sub nom*. Hollingsworth v. Perry, 184 L. Ed. 2d 526 (U.S. Dec. 7, 2012) (No.12-144). The main question in *Windsor* is whether the Defense of Marriage Act's definition of marriage as being between one man and one woman violates the Fifth Amendment's guarantee of equal protection of the laws as applied to same-sex couples married under the laws of their state. *United States v. Windsor*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/windsor-v-united-states-2/ (last visited Mar. 20, 2013). The issue in *Perry* is "[w]hether the Equal Protection Clause of the Fourteenth Amendment prohibits the State of California from defining marriage as the union of a man and woman." *Hollingsworth v. Perry*, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/ (last visited Mar. 20, 2013). It remains unclear what, if any, impact these cases will have on same-sex marriage rights throughout the country. *See* Lyle Denniston, *On Same-Sex Marriage, Options Open*, SCOTUS BLOG (Dec. 7, 2012, 5:47 PM), http://www.scotusblog.com/?p=15 6291 (explaining that both cases present preliminary questions that may prevent the Court from reaching the Constitutional issues and noting that even if the Court does reach those issues, the potential outcomes vary in kind and in scope).

145. *See Lesbian, Gay, Bisexual, Transgender & Queer (LGBTQ)*, UNMARRIED EQUALITY, http://www.unmarried.org/glbt.html (last visited Mar. 20, 2011) (noting that "significant numbers of LGBTQ people say they wouldn't want to marry even if same-sex marriage were legal").

of "consent to inseminate" laws[146] and laws which create a parentage presumption in both partners of a couple parenting a child. By creating a presumption of parentage at the time the child is born, a same-sex couple will not have to consider and plan for the possibility that something may end their relationship, which could, in turn, end the non-biological parent's relationship with her child.

This model law would achieve a number of things. First, and most importantly, it would allow for the name of the biological parent's partner to appear on the child's birth certificate as a parent. This would indicate the intent[147] and consent[148] of both partners to enter into a parent-child relationship with the child. It would also eliminate the need to have a judge determine whether one or both of the parents intended to enter into such a relationship. The presence of both names on the birth certificate would eliminate the questions of whether the non-biological parent intended to become a parent, and whether the biological parent consented to his or her partner becoming the parent of the child.

The model law would then state that, where there is intent to enter into a parent-child relationship, a presumption of parentage arises, regardless of the parents' genders. This would eliminate the need of the non-biological parent to resort to other means to demonstrate to a trial court that he or she was the child's actual parent. It would also eliminate the ability of the biological parent to challenge that assertion. Once the non-biological parent establishes the intent element (which he or she could accomplish by signing the birth certificate), the law would assume that both parents are on equal footing and share the same rights. From that point, a family court would make visitation and custody determinations based on the best interest of the child.[149] Such a law not only appeals to fairness and common sense; it also protects non-biological parents while simultaneously ensuring that child's best interest remains central.

146. ALL CHILDREN MATTER, *supra* note 119 at 36. "Consent-to-inseminate" laws are those which "define when and how to grant parentage to the partner (or spouse) of a birth mother using donor insemination." *Id.*

147. *See In re Parentage of L.B.* 122 P.3d at 170 (stating that "in the case of artificial insemination, the intent of the parties is the principal inquiry in determining legal parentage").

148. *See In re Custody of H.S.H.-K.*, 533 N.W.2d at 435-36 (requiring consent of the biological parent before a non-legal parent's rights are recognized). *See also* ALL CHILDREN MATTER, *supra* note 119, at 36 (indicating that "consent-to-inseminate" laws have as their basis the "consent" element).

149. *See* Fiser & Garrett, *supra* note 1, at *15 n.79 (noting that courts in all fifty states apply some form of the "best interest of the child" standard when adjudicating custody and visitation disputes).

V. CONCLUSION

The law regarding the parentage rights of non-biological parents who are or were in same-sex relationships with the biological parent is in a state of flux and severe inconsistency. *Mullen* is simply the latest high-profile case in a series of decisions that, when coupled with various statutes, show the lack of common sense and fairness these parents face across the country. Courts and legislatures have started to look for solutions to this problem, but there is still room for improvement. If the law allows the non-biological parent's name to appear on the birth certificate, same-sex parents can easily and undeniably establish their intent to raise a child together and as equal co-parents. For the co-parents' sake, and even more importantly, for the sake of the children at the center of these disputes, state legislatures must act to make this area of the law more equal and consistent.