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THE “LEGAL STRANGER” AND PARENT: A LOVE STORY?

*Kellie Mahoney**

I. INTRODUCTION

Dealing with a divorce or legal separation is overwhelming for all couples.¹ Married same-sex couples who walk the same path, however, find an incredibly different road ahead of them, especially when it comes to issues of custody and visitation.² These matters are further complicated if there is only one legal or biological parent.³

Traditionally, a “parent” is defined as “an individual who is the biological parent, stepparent or adoptive parent of a child whose guardianship and custody or care and custody have been transferred by the parent to an authorized agency”⁴ However, most jurisdictions, including New York, have moved away from this strict interpretation of what a parent is.⁵ Many States have adopted the definition provided by the American Law Institute (ALI)⁶ and expanded their idea of a

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¹ Diane Neumann, *The Psychological Stages of Divorce*, DIANE NEUMANN & ASSOCIATES, (2011), <http://www.divorcemed.com/Articles/ArticlesByDiane/The%20Psychological%20Stages%20of%20Divorce.htm>.

² Julie Compton, *For Some Same-Sex Couples, Divorce is a Legal Nightmare*, NBC NEWS, (Sept. 27, 2016), <https://www.nbcnews.com/feature/nbc-out/some-same-sex-couples-divorce-legal-nightmare-n643891>.

³ *Id.*

⁴ N.Y. COMP. CODES R. & REGS. tit. 18 § 422.1 (2015).

⁵ Joel Stashenko, *Ruling Expands NY Definition of Parenthood*, NEW YORK LAW JOURNAL, Aug. 30, 2016.

⁶ The American Law Institute is the leading independent organization in the country producing work “to clarify, modernize, and improve the law.” THE AMERICAN LAW INSTITUTE, ABOUT ALI, <https://www.ali.org/about-ali/> (2017). ALI is responsible for drafting, revising

parent to include the concepts of psychological parent, de facto parent and parent by estoppel.⁷

To establish a psychological parent, the party seeking custody or visitation must meet three general requirements.⁸ The party: (i) cannot be the legal parent; (ii) must have resided with the child for a significant period of time; and (iii) must have performed a certain level of caretaking functions.⁹ ALI defines a de facto parent as a party, other than a legal or biological parent who lived with the child for a requisite period of time and, with the consent, of the legal parent, forms a parent-child relationship, or regularly performed a certain share of caretaking duties without any compensation or expectation thereof.¹⁰ A parent by estoppel is defined as an individual who is either obligated to pay child support or lived with the subject child for a certain period of time and made good-faith efforts to accept responsibilities of child care, or lived with the child since birth and accepted responsibility for the child.¹¹ While some of these definitions are recognized in New York, they have not been held to apply to same-sex couples when determining custody and visitation during a divorce.¹²

In 1991, the Court of Appeals in the state of New York decided, in *Alison D. v. Virginia M.*,¹³ that the notion of parents were a man and a woman;¹⁴ same-sex couples did not fall into this category.¹⁵ As a result of *Alison D.*, the non-biological or non-adoptive partner in a same-sex couple was not granted the same rights as a biological or legal parent when seeking custody and/or visitation.¹⁶ After more than twenty years, the Court of Appeals decided, in *In the Matter of Brooke*

and publishing Restatements of the Law, Model Codes, and Principles of Law that are foundational in both courts and legislatures, as well as being crucial to legal education.

⁷ *Id.*

⁸ JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 18, (The Free Press, 2nd ed. 1979); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 18 (American Law Institute, 1st softcover ed. 2003).

⁹ GOLDSTEIN, *supra* note 8, at 18.

¹⁰ *Id.*

¹¹ *Id.*

¹² See discussion *infra* Sections IV, V and VI.

¹³ 572 N.E.2d 27, 28 (N.Y. 1991).

¹⁴ Stashenko, *supra* note 5.

¹⁵ *Alison D.*, 572 N.E.2d 27. This changed when the highest court in New York decided *Brooke*. In the Matter of Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490 (N.Y. 2016).

¹⁶ *Alison D.*, 572 N.E.2d 27.

S.B. v. Elizabeth A. C. C.,¹⁷ that *Alison D.* no longer applied.¹⁸ In August 2016, the Court of Appeals held "that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law (DRL) § 70."¹⁹ While this may be a step in the right direction, there are still certain limitations placed upon who has standing to seek custody or visitation.²⁰ Under *Brooke*, a couple must have a preconception agreement in order for the non-biological, non-legal parent to have standing to seek custody or visitation.²¹ As such, there is still a large group of couples who will not meet this criteria.

It is the argument of this Note that the definition of parent should be expanded beyond a legal or biological parent, requiring the State to also recognize the type of parentage illustrated by the ALI principles, namely, psychological parent, de facto parent, and parent by estoppel. Expanding the legal definition of a parent would allow formerly married same-sex partners to establish standing to seek custody and visitation in the State of New York.

This Note will be divided into four sections. Section II will look at the New York Court of Appeals and its decisions regarding the status of homosexuals and the protections, or lack thereof, afforded to them and their families by the Court. Specifically, it will discuss the Court's strict interpretation of the DRL in *Alison D.*, the context that gave rise to that decision, and how courts handled *Alison D.* going forward. Section III will discuss the evolution of the definition of marriage ranging from the Defense of Marriage Act to two Supreme Court cases, the most recent of which was *Obergefell v. Hodges*,²² decided in 2015. Section IV will discuss, in detail, the three concepts of parent followed by the ALI. Specifically, this section will discuss the concept of the psychological parent, de facto parent, and parent by

¹⁷ *Brooke S.B.*, 61 N.E.3d 490.

¹⁸ *Id.*

¹⁹ *Id.* (citing to N.Y. DOM. REL. LAW §70 (McKinney 2018)).

²⁰ *See generally Brooke S.B.*, 61 N.E.3d 490.

²¹ *Id.*

²² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015). This case will be discussed at length in Section III as it is the beginning of same-sex relationship recognition throughout the legal system. As this Note is discussing married same-sex partners, a discussion of *Obergefell* is necessary to give a complete picture of same-sex couples in the legal system.

estoppel, its application in other jurisdictions,²³ and how New York courts have handled these concepts as it applies to same sex couples. Furthermore, this section explains the concept of a parent by estoppel in relation to the New York Court of Appeals 2016 landmark decision, *Brooke*, which overruled *Alison D.* Section V will make the argument as to how New York should move forward in light of the decision in *Brooke*, as well as the concepts discussed in the previous sections. Finally, section VI will put forth the proposition that New York should extend the definition of parent to include the principles set forth above.

II. *ALISON D. v. VIRGINIA M. AND HER LEGACY*

Alison D. v. Virginia M. did not arise out of a vacuum, but followed a line of cases from the New York Court of Appeals that limited or refused to acknowledge same-sex couples and their freedoms.²⁴ The two major cases, *People v. Onofre*²⁵ and *In re Adoption of Robert Paul P.*,²⁶ show the beginnings of those limitations and how the Court reached its decision in *Alison D.*

A. *Alison D.*'s Predecessors

In 1980, the Court of Appeals decided *People v. Onofre*.²⁷ Defendant Onofre was convicted by the trial court of violating § 130.38 of the Penal Law “after his admission to having committed acts of deviate sexual intercourse with a 17-year-old male at [his] home.”²⁸ The Court held New York’s sodomy laws were unconstitutional because it distinguished between married and unmarried persons as well as heterosexual and homosexual conduct.²⁹ The Court found that such classifications were unconstitutional under the Equal Protection

²³ In showcasing what this could look like, this Note will focus its examples solely on those in the Northeastern states.

²⁴ See generally *In re Adoption of Robert Paul P.*, 63 N.Y.2d 233, 235 (N.Y. 1984), *People v. Onofre* 51 N.Y.2d 476, 483 (N.Y. 1980).

²⁵ *Onofre*, 51 N.Y.2d 476.

²⁶ *Adoption of Robert*, 63 N.Y.2d 233; see also Joseph G. Arsenault, *Comment: “Family” but Not “Parent”: The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 ALB. L. REV. 813, 829 (1995).

²⁷ *Onofre*, 51 N.Y.2d 476.

²⁸ *Id.*

²⁹ *Id.*

Clause of the Fourteenth Amendment and the right of privacy granted by the Constitution.³⁰

In an attempt to gain further protection under the laws of the United States, unmarried same-sex couples tried to find a foothold to legitimize their relationships.³¹ In the case of *In re Adoption of Robert Paul P.*, a man tried to adopt his partner for financial, economic, and emotional reasons.³² The Court found this invalid, but in hearing the case, recognized the need for same-sex partners to have security and stability in their personal affairs.³³ Nevertheless, the Court again refused to extend to same-sex partners the same rights and protections of the law granted to heterosexual couples.³⁴ This case was known as a critical low-point for homosexual couples.³⁵

While these cases did not make great strides for same-sex couples and the homosexual community, it opened the Court's eyes to the fact that there is a whole other group of people, with lives and homes, and joint bank accounts that were looking for protection and legitimacy under the law.³⁶ Despite the increased visibility within the court system of same-sex couples and the larger homosexual community, the courts continued to struggle with providing that community with the protections and legitimacy under the law that they were seeking.³⁷ Although *Alison D.* continued the trend of the courts in failing to legitimize homosexual couples and their families, it was unique in that its dissent focused on the children who were affected the most by the courts refusal to recognize their families.³⁸

B. *Alison D. v. Virginia M.*

Petitioner Alison and respondent Virginia, a homosexual couple, had been in a relationship since September 1977.³⁹ In March of 1980, after living together for two years, the couple decided to have

³⁰ *Id.*

³¹ Arsenault, *supra* note 26, at 813.

³² *Id.* at 829.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 813.

³⁶ Arsenault, *supra* note 26, at 813.

³⁷ *Id.*

³⁸ *Alison D.*, 572 N.E.2d at 30.

³⁹ *Id.*

a baby.⁴⁰ In November of 1983, when the child was a little over two years, the couple ended their relationship.⁴¹ Virginia, who was the child's biological parent, maintained custody of the child.⁴² Petitioner Alison commenced the suit seeking visitation rights after Virginia "terminated all contact between petitioner and the child, returning all of petitioner's gifts and letters."⁴³

The Court, at the outset, refused to recognize Alison as a parent;⁴⁴ Alison was described as "a biological stranger."⁴⁵ The Court of Appeals held that Alison had no standing to seek visitation rights because she was neither the biological nor the adoptive parent of the child.⁴⁶ The Court recognized that "although petitioner apparently nurtured a close and loving relationship with the child, she [was] not a parent within the meaning of Domestic Relations Law § 70."⁴⁷

The Court disregarded Alison's plea for a finding that she was "a 'de facto' parent or that she should be viewed as a parent 'by estoppel.'"⁴⁸ Rather than balancing her claim with that of the biological mother's claim, the Court found that one cannot coexist with the other.⁴⁹ The Court wrote that to award visitation, or even standing to petition for visitation, would "impair the parents' right to custody and control."⁵⁰ With the Court again citing to the DRL, it found that standing is granted only to explicit categories of persons seeking visitation, namely parents and grandparents.⁵¹ The Court reasoned

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Alison D.*, 572 N.E.2d at 28.

⁴⁴ *Id.* at 29. The Court refused to recognize Alison, even though she was the caretaker of the child. *Id.*

⁴⁵ *Id.* at 28.

⁴⁶ *Id.* at 29.

⁴⁷ *Alison D.*, 572 N.E.2d at 28.

⁴⁸ *Id.* at 29.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* DOM. REL. LAW § 70 states that "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent. . . ." DOM. REL. LAW § 72 provides that:

where circumstances show that conditions exist which equity would see fit to intervene, a grandparent of the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court . . . and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody and control of such child,

that, because “parent” is not defined, but grandparents are explicitly granted standing, Alison, in a strictly biological sense, is not a parent under the DRL.⁵²

In deciding not to interpret DRL § 70 in a broader fashion, the Court perpetuated the idea that not all parents will be considered as such under the law.⁵³ Understanding the ramifications of refusing to acknowledge other forms of parents, the Court had received multiple *amicus curiae* briefs, ranging from the National Organization for Women to the Youth Law Center to several gay and lesbian parental couples.⁵⁴ These amici believed that the case was centered on whether the Court was ready to reexamine a system which fixes marriage and biology as the end-all-be-all in determining who is a parent.⁵⁵

By interpreting DRL § 70 narrowly, the Court continued to pursue a strict definition of parent, with serious consequences for parents in a same-sex union.⁵⁶ Further, in fixing the biological connection between a parent and child as the overriding claim to parenting, the law “discriminates against the non-biological parent in a same-sex couple because only one of the partners will ever have that biological link.”⁵⁷ Not all justices subscribed to the majority view.⁵⁸ In her dissent from the majority, Justice Kaye acknowledged the ramifications of the Court’s decision.⁵⁹

C. *Alison D.*’s Dissent

Dissenting from the majority, Justice Kaye wrote that the impact of the majority’s decision would have an effect on a “wide spectrum of relationships—including those of longtime heterosexual stepparents, ‘common-law’ and nonheterosexual partners. . . .”⁶⁰ Justice Kaye wrote “that as many as 8 to 10 million children who are

to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

⁵² *Alison D.*, 572 N.E.2d at 29.

⁵³ Arsenault, *supra* note 26, at 835.

⁵⁴ *Id.* at 834.

⁵⁵ *Id.* at 835.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Arsenault, *supra* note 26, at 835. Justice Kaye was the only dissenting Justice.

⁵⁹ *Alison D.*, 572 N.E.2d at 30 (Kaye, J., dissenting).

⁶⁰ *Id.*

born into families with a gay or lesbian parent” would be affected, implicating how far this decision would reach.⁶¹ Highlighting the vulnerability of children and making it the focus of her dissent, Justice Kaye opined that the hardest hit would be those children who may be losing someone critical to their development and emotional stability.⁶² Justice Kaye’s dissent would go on to be a highly cited dissent, and was cited in the very case the Court of Appeals heard to overturn *Alison D.*⁶³

D. *Alison D.*’s Aftermath

In the jurisprudence following *Alison D.*, the Court continued to struggle in recognizing the legitimacy of the family ties created by same-sex couples.⁶⁴ The Court refused to allow nonbiological, nonlegal parents to have standing to seek custody and visitation of the children they had been raising with their same-sex partner.⁶⁵

1. *In re Jacob*

In November 1995, four years after deciding *Alison D.*, the Court of Appeals decided *In re Jacob*.⁶⁶ *In re Jacob* was a consolidated case where single, unmarried adults—one homosexual and one heterosexual—were seeking second parent adoptions.⁶⁷ In the first case, *Matter of Jacob*, the biological parents separated prior to the child’s birth and the mother was awarded sole custody.⁶⁸ The biological mother’s boyfriend then sought to adopt the child, with the biological father’s consent.⁶⁹ In *Matter of Dana*, the same-sex partner

⁶¹ *Id.* This language would later be quoted in *Brooke S.B.*, 61 N.E.3d 490.

⁶² *Id.*

⁶³ See, e.g., *Debra H. v. Janice R.*, No. 106569/08, slip op. at 11-12 (N.Y. Sup. Ct. 2008) citing cases that followed Justice Kaye’s dissent in *Alison D.*, *rev’d*, 877 N.Y.S.2d 259 (App. Div. 2009), *rev’d on other grounds*, 930 N.E.2d 184 (N.Y. 2010), *abrogated by Brooke S.B.*, 61 N.E.3d 490.

⁶⁴ *Debra H.*, 930 N.E.2d 184; *Matter of Shondel J. v. Mark D.*, 853 N.E.2d 610 (N.Y. 2006); *In re Jacob*, 660 N.E.2d 397, 398 (N.Y. 1995).

⁶⁵ *Id.*

⁶⁶ *Jacob*, 660 N.E.2d at 398.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

of the biological mother sought standing to adopt the biological mother's child.⁷⁰

Writing for the majority and mirroring her dissent in *Alison D.*, Chief Justice Kaye noted that the primary goal of the adoption statute at issue in *Jacob* was to protect the best interests of the child.⁷¹ The best interests of the child manifests itself as securing the best possible home, with "the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody. . . ."⁷²

Expressly revisiting *Alison D.*, the Court wrote that by permitting second parent adoptions, it would "achieve a measure of permanency with both parent figures and avoid[] the sort of disruptive visitation battle we faced in *Matter of Alison D. v. Virginia M.*"⁷³ When specifically dealing with homosexual couples, the Court noted that New York does not prohibit a specific group from adopting based solely on their sexual orientation.⁷⁴ *In re Jacob*, four years after *Alison D.*, represents an important step forward in the courts' decisions involving family.

2. *Matter of Shondel J. v. Mark D.*

In July 2006, the New York Court of Appeals decided *Matter of Shondel J. v. Mark D.*⁷⁵ In January 1996, Shondel gave birth to a daughter, naming Mark as her biological father.⁷⁶ Mark, in a sworn statement, accepted "all paternal responsibilities including child support."⁷⁷

Mark had publicly and privately held himself out to be the child's father.⁷⁸ According to Shondel, Mark saw the child regularly, bought her toys, clothes, and other gifts, took the child to meet his parents, regularly spoke on the telephone with the child, and called himself "daddy" when talking to the child.⁷⁹ Mark also signed a

⁷⁰ *Id.*

⁷¹ *Jacob*, 660 N.E.2d at 399.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 401.

⁷⁵ *Shondel J.*, 853 N.E.2d 610.

⁷⁶ *Id.* at 611.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 610.

registry in Guyana stating that he was her father, authorized the change of her last name to his, and made the child the primary beneficiary on his life insurance policy.⁸⁰ After several years of holding himself out to be the child's father, Mark learned that he may not have been the child's biological father, which prompted his filing of the case.⁸¹

The lower courts required DNA testing to determine paternity because it was alleged that Mark was not the biological father of the child.⁸² The test proved that Mark was not the child's biological father and Mark sought to sever his legal and financial obligations to the child.⁸³ Despite the paternity test result, the Court held that "a man who has mistakenly represented himself as a child's father may be estopped from denying paternity . . . when the child justifiably relied on the man's representation of paternity, to the child's detriment."⁸⁴

Throughout the Court's analysis, it continuously referred to the best interests of the child as being the primary interest of both the court and the legislature.⁸⁵ Utilizing the concept of parent by estoppel, the Court of Appeals held that *regardless of biological relation* "Mark represented that he was the father of the child, and she justifiably relied on this representation, changing her position by forming a bond with him, to her ultimate detriment."⁸⁶ If the father was permitted to sever his ties with her, after she relied so heavily on his representations, the "cutting off of that support, whether emotional or financial, may leave the child in a worse position than if that support had never been given."⁸⁷ The Court found this would be too much of a burden to put on the innocent child, and found that Mark may not sever his ties and must continue to support the child.⁸⁸ The resistance on the part of the Court to sever this tie, regardless of biological relations, offered a bright light to same-sex parents who do not have a biological relationship to their child.⁸⁹

⁸⁰ *Shondel J.*, 853 N.E.2d at 611.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 612.

⁸⁴ *Id.*

⁸⁵ *Shondel J.*, 853 N.E.2d at 612.

⁸⁶ *Id.* at 614.

⁸⁷ *Id.* at 615-16.

⁸⁸ *Id.* at 617.

⁸⁹ *Id.*

3. *Debra H. v. Janice R.*

A few years later, in 2010, the Court was again asked to discuss *Alison D.* in *Debra H. v. Janice R.*⁹⁰ In this case, Debra and Janice entered into a civil union in Vermont while Janice was pregnant.⁹¹ The Court, when asked to overrule or at least distinguish *Alison D.*, refused to do so claiming that *Alison D.* provided a simple-to-understand test that allowed for efficiency and certainty.⁹² Regardless of the reaffirmation of *Alison D.*, Debra was still permitted to seek visitation with the child.⁹³

In the interest of comity, the New York court looked to Vermont law to decide whether, in Vermont, Debra would have standing to seek custody.⁹⁴ The Vermont law states that: Parties to a civil union shall have "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in marriage" and that they shall enjoy the same rights "with respect to a child of whom either becomes the natural parent during the term of the civil union," as "those of a married couple."⁹⁵

Since Debra would have standing in Vermont to seek visitation and/or custody, and in the interest of comity, the Court held that she could seek it in New York as well.⁹⁶

In giving full faith and credit to the Vermont law, the New York Court moved farther from *Alison D.* and closer to allowing same-sex parents' custody and visitation.⁹⁷ As the States began dealing with the issue of non-biological, non-legal parentage, the Federal Government decided it needed to take steps to unify how the Courts would deal with the parent-child relationship.⁹⁸

III. DEFENSE OF MARRIAGE ACT, *WINDSOR*, AND *OBERGEFELL*

The Government passed the Defense of Marriage Act (DOMA) in an attempt to take certain steps toward unifying Courts' handling of

⁹⁰ *Debra H.*, 930 N.E.2d at 184.

⁹¹ *Id.* at 186.

⁹² *Id.* at 192.

⁹³ *Id.* at 196.

⁹⁴ *Id.* at 195.

⁹⁵ *Debra H.*, 930 N.E.2d at 195 (citation omitted).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

parentage.⁹⁹ The passage of DOMA and two crucial subsequent Supreme Court cases, however, created more confusion in the area of same-sex parentage cases.¹⁰⁰

A. DOMA

Prior to *Debra*, the federal government attempted to discard the Full Faith and Credit Clause¹⁰¹ by enacting DOMA in September of 1996.¹⁰² The 104th Congress amended the United States Code by adding, after Section 1738B, that no State shall be required to afford full faith and credit to a marriage of a same-sex couple performed in another State.¹⁰³ Section Three of DOMA, entitled Definition of Marriage, also amended the United States Code; this time amending Chapter 1 of title 1 to have a seventh section which stated:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁰⁴

It took years for these definitions to be successfully challenged.¹⁰⁵ These added provisions signaled to same-sex couples that they would not be afforded standing to seek custody and/or visitation absent a biological relation to his or her child.¹⁰⁶ There was

⁹⁹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

¹⁰⁰ *Id.*, United States v. Windsor, 133 S. Ct. 2675, 2682 (2013), *Obergefell*, 135 S. Ct. 2593.

¹⁰¹ The Full Faith and Credit Clause addresses the duties that all States have to respect, and honor, the public acts, records, and judicial proceedings of every other State. U.S. CONST. art. IV § 1. In the case of this Note, the Full Faith and Credit Clause is particularly important when dealing with legal marriages of same-sex couples in one state when there are children involved. The Full Faith and Credit Clause was a round-about way for same-sex couples to be married in State A and have children and then if the couple decided to divorce in State B (where same-sex marriage was not permitted), State B would be forced to allow the non-biological, non-adoptive parent to seek custody and/or visitation. *Debra H.*, 930 N.E.2d 184.

¹⁰² Defense of Marriage Act, 110 Stat. 2419.

¹⁰³ *See Id.* at §2(a).

¹⁰⁴ *See id.* at §3(a).

¹⁰⁵ Nina Totenberg, *DOMA Challenge Tests Federal Definition of Marriage*, NPR, (March 26, 2013), <http://www.npr.org/2013/03/27/175295410/doma-challenge-tests-federal-definition-of-marriage>.

¹⁰⁶ *Id.*

no longer a "back door" into standing for custody and visitation, as full faith and credit was no longer given to same-sex unions performed in other States.¹⁰⁷ A prime example of this refusal to recognize same-sex marriages is the 2013 Supreme Court case, *United States v. Windsor*.¹⁰⁸

B. *United States v. Windsor*

Edith Windsor and Thea Spyer registered as domestic partners in 1993, thirty years after they began their relationship.¹⁰⁹ When Spyer became sick, the couple made a trip to Ontario in 2007, and got married.¹¹⁰ Spyer died in 2009, and left the entirety of her estate to Windsor, who sought to qualify for the marital exemption from the federal estate tax.¹¹¹ After being denied the exemption, Windsor commenced a refund suit in the United States District Court for the Southern District of New York.¹¹²

The Court held that DOMA, in injuring a specific class that New York law sought to protect, violated basic due process and equal protection principles that are applicable to the Federal Government.¹¹³ The Act's principal effect was to cherry-pick marriages and make them unequal; the principal purpose was to impose inequality.¹¹⁴ The Court, highlighting why domestic partnerships and civil unions were inadequate, stated that "responsibilities, as well as rights, enhance the dignity and integrity of the person."¹¹⁵ By creating contradictory marriage schemes in which the marriages are recognized by New York, but not under federal law, DOMA forced the same-sex couples to live in a state of diminished stability and predictability of basic

¹⁰⁷ *Id.*

¹⁰⁸ *Windsor*, 133 S. Ct. at 2682.

¹⁰⁹ *Id.* at 2683.

¹¹⁰ *Id.*

¹¹¹ *Id.* The exemption excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." *Id.* Windsor paid \$363,053 in estate taxes, sought a refund and was denied that refund by the IRS. *Windsor*, 133 S. Ct. at 2683.

¹¹² *Id.* at 2684. While the refund suit was pending, the Attorney General notified the Speaker of the House that the Department of Justice would no longer defend the constitutionality of DOMA, "noting that the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples." *Id.* at 2683. According to the A.G., "the President [had] concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened level of scrutiny." *Id.*

¹¹³ *Id.* at 2694.

¹¹⁴ *Windsor*, 133 S. Ct. at 2693.

¹¹⁵ *Id.* at 2694.

personal relations; thus, undermining the public and private significance of state-sanctioned same-sex marriages.¹¹⁶

The Court further noted:

[I]t (DOMA) tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples.¹¹⁷

The Court then described the harm DOMA was doing to the children of these same-sex marriages, including financial harm and impacting their benefits upon the loss of a parent.¹¹⁸ After deciding that the definition of spouse offered in DOMA was unconstitutional, the Court moved on to whether there was a fundamental right to marry for same-sex couples.¹¹⁹

C. *Obergefell v. Hodges*

In 2015, the Supreme Court again made history and declared that, indeed, same-sex couples had the same fundamental right to marry as opposite-sex couples.¹²⁰ In the landmark case of *Obergefell*,

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 2695.

¹¹⁹ *Obergefell*, 135 S. Ct. 2584.

¹²⁰ *Id.* at 2599. The Court discussed four principles and traditions that demonstrate the reasons why marriage is fundamental under the Constitution for same-sex couples as well as heterosexual couples. *Id.* First, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” *Id.* Second “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” *Obergefell*, 135 S. Ct. at 2599. Thirdly, the right to marry “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.” *Id.* at 2600. Finally, the majority stated that “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.” *Id.* at 2601. Nevertheless, it is important to note that, while *Obergefell* has yet to be overturned, many States have not acted on the Court’s landmark decision. Specifically, the very States involved in *Obergefell* (Michigan, Kentucky, Ohio and Tennessee) have yet to conform their State Constitutions to reflect that same-sex married couples are afforded the same rights and protections offered to heterosexual couples. What seems to be the case, however, is that the

the petitioners were fourteen same-sex couples and two men whose partners were deceased.¹²¹ The couples were from four different states, all of which regulated marriage to be "a union between one man and one woman."¹²²

Petitioners sought to be placed on an equal playing field with opposite-sex couples; they were seeking the rights and benefits afforded to heterosexual couples.¹²³ These benefits included the protection of "child custody, support, and visitation rules."¹²⁴ Without the right to marry, these couples were not guaranteed such protection.¹²⁵ The right to marry would also provide protection to "children and families, and thus, draws meaning from related rights of childbearing, procreation and education."¹²⁶ The right to marry would "allow[] children 'to understand the integrity and closeness of their own family and its concord with other families in their community and daily lives.'"¹²⁷ While keeping the best interest of the children at the forefront, the Court held that the institution of marriage grants the permanence and stability that is so vital to children.¹²⁸

Obergefell v. Hodges addressed the fundamental right of every individual, regardless of sexual orientation, to decide whom they love and want to marry.¹²⁹ In so holding, the Court granted the legitimacy and recognition under the law that same-sex couples, and their families, had been seeking for decades.¹³⁰ By granting this legitimacy, the Court was finally giving some protection to the children whom Justice Kaye expressed concern about decades ago in *Alison D.*¹³¹ However, just because the marriages themselves were given legitimacy, it did not mean that such recognition would extend to the relationships that had not been solemnized by the government.¹³²

States are no longer enforcing the DOMA-like language contained in their Constitutions. *See generally* Arsenault, *supra* note 25.

¹²¹ *Obergefell*, 135 S. Ct. at 2593.

¹²² *Id.* The Court began with a history of marriage and its evolution over the course of the Nation's history. *Id.* at 2595-99.

¹²³ *Id.* at 2601.

¹²⁴ *Id.*

¹²⁵ *Obergefell*, 135 S. Ct. at 2601.

¹²⁶ *Id.* at 2600.

¹²⁷ *Id.* (citation omitted).

¹²⁸ *Id.*

¹²⁹ *Id.* at 2602.

¹³⁰ *Obergefell*, 135 S. Ct. at 2602.

¹³¹ *Id.*

¹³² Totenberg, *supra* note 105.

Without the protections now afforded to same-sex married couples, unmarried couples are still left with relatively little protections when it comes to their families and seeking custody and visitation of their children.¹³³

IV. RECOGNIZING DIFFERENT KINDS OF PARENTS

The Supreme Court decisions in *Windsor* and *Obergefell* granted recognition and provided protection to same-sex married couples.¹³⁴ As States have tried to reconcile the new order of things after *Obergefell*; they have instituted numerous definitions and applications of the definition of a parent under the law.¹³⁵

A. The Psychological Parent

The concept of a psychological parent “arose in the 1970’s during custody disputes between husband and wife, natural parents and foster parents, or unfit parents and grandparents.”¹³⁶ Today, the psychological parent is one who, “on a continuing and regular basis, provides for a child’s emotional and physical needs.”¹³⁷ In order to establish that an individual is a psychological parent, the party seeking custody or visitation must meet the following requirements:

(1) they must not be the child’s legal parent; (2) they must have, with the consent of the child’s legal parent, resided with the child within a significant period of time; (3) they must have routinely performed at least an equal share of the caretaking functions with the child’s primary caregiver without any expectation of compensation for the care.¹³⁸

There are a multitude of other factors many different courts have considered as well, including “whether a parent-child bond [has

¹³³ *Id.*

¹³⁴ *Windsor*, 133 S. Ct. 2675; *Obergefell*, 135 S. Ct. 2593.

¹³⁵ *Id.*

¹³⁶ Caroline L. Kinsey, *Article: Revisiting the Role of Psychological Parent in the Dissolution of the Homosexual Relationship*, 19 BUFF. J. GENDER L. & SOC. POL’Y 75, 82 (2011).

¹³⁷ *Id.* at 81-82.

¹³⁸ *Id.* at 82.

been] forged and whether [the parents] have held themselves out to the public generally as a single-family unit."¹³⁹

The bond between the psychological parent and child is one forged over countless hours and interactions.¹⁴⁰ These first attachments with the psychological parent "form the base from which any further relationships develop."¹⁴¹ If the relationship is firmly maintained, that bond becomes immensely productive on both the intellectual and the social development of the child.¹⁴² Withdrawing such support, voluntarily or by court order, can have serious detrimental effects on the child who has that strong bond.¹⁴³ In States that recognize the label of psychological parent, a party labeled as such will be provided standing to seek custody and visitation.¹⁴⁴

The impetus now is for the psychological parent label, and the legal benefits that come with that label, to be applied to homosexual couples.¹⁴⁵ In the past, such a label only applied to heterosexual couples.¹⁴⁶ However, it is the argument of this Note that a party not biologically related to the subject child would not "infringe upon the 'constitutional right [of legal parents] to direct the upbringing of their children.'"¹⁴⁷

1. Jurisdictional Discussion

The lack of cohesion has led to different interpretations of the psychological parent doctrine from state to state.¹⁴⁸ In *S.F. v. M.D.*,¹⁴⁹

¹³⁹ *Id.* at 82.

¹⁴⁰ JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 18 (The Free Press, 2nd ed. 1979).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Specifically, in the context of this Note, the legal benefits of being recognized as a psychological parent, and the ability to have standing when seeking custody and/or visitation as a direct result of having that label.

¹⁴⁶ Kinsey, *supra* note 136, at 81.

¹⁴⁷ *Id.* at 85 (citation omitted).

¹⁴⁸ *Id.* at 86. For a more robust discussion including many different states, *see id.* at 86-93. For the purpose of this Note, the author will be focusing on the northeastern states and how they have handled, if at all, the psychological parent doctrine.

¹⁴⁹ 751 A.2d 9, 10 (Md. 2000). In this case, Appellant and Appellee, a female same-sex couple, began living together in 1991. *Id.* In 1994, Appellee was artificially inseminated and gave birth. *Id.* The case centered on whether the Appellant had a right to visitation with the minor child. *Id.*

a case of first impression, Maryland's highest court borrowed the Wisconsin four-prong test for determining if a psychological parent relationship was present.¹⁵⁰ The four-prong test required that:

To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education, and development, including contributions towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.¹⁵¹

Using this test, Maryland held that a non-legal parent was entitled to standing in seeking visitation with the child.¹⁵²

In conjunction with the Maryland and Wisconsin cases, the Supreme Court of New Jersey adopted the psychological parent label in the case *V.C. v. M.J.B.*¹⁵³ This case identified the non-legal parent is a psychological parent.¹⁵⁴ The court stated that the termination of the partner's relationship did not necessarily mean that the relationship between the psychological parent and the child terminated as well.¹⁵⁵ Highlighting the fact that the legal parent fostered the non-legal parent's relationship with the child, the New Jersey court shut down critics who believed there to be a slippery slope argument.¹⁵⁶ Requiring the legal parent to foster the relationship between the child

¹⁵⁰ Kinsey, *supra* note 136, at 87-88.

¹⁵¹ Holtzman v. Knolt (In re custody of H.S.H.-K), 533 N.W.2d 419, 421 (Wis. 1995).

¹⁵² S.F. v. M.D., 751 A.2d 9, 15, 17 (Md. 2000). While this case did allow the petitioner to seek visitation, during the subsequent hearing it was found that visitation was causing behavioral problems with the child. When visitation stopped, so did the behavioral problems. *Id.* at 19.

¹⁵³ *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 552.

¹⁵⁶ *Id.*

and the non-legal parent preserves the psychological parent title from part-time babysitters and visitors.¹⁵⁷

2. *Psychological Parent in New York*

New York is known as one of the first states to severely restrict the rights of psychological parents.¹⁵⁸ In 1986, the Third Department heard *Ronald FF. v. Cindy GG.*,¹⁵⁹ in which the Petitioner and Respondent were both high school students who engaged in sexual relations without protection.¹⁶⁰ The Respondent, however, was also engaged in a sexual relationship with another individual, Michael Walpole.¹⁶¹ Michael, as later blood grouping tests proved, fathered a child with the Respondent, but it was the Petitioner who lived intermittently with the Respondent and the subject child.¹⁶² The Family Court found that extraordinary circumstances existed, namely that the Respondent had "encouraged and condoned the father-son relationship which developed between Petitioner and (the subject child)."¹⁶³

These extraordinary circumstances permitted the Petitioner standing to seek custody of the subject child.¹⁶⁴ The record amply supported the Court's holding that the attachment formed between the two, even though there was no biological relation, was an extraordinary circumstance; thus, granting standing for Petitioner to seek custody and/or visitation of the child.¹⁶⁵ The Appellate Court did not, however, hold that the Petitioner could exercise visitation with the child, only that the Petitioner had standing to petition the Court for the opportunity to be granted visitation.¹⁶⁶ The Appellate Division refused

¹⁵⁷ Kinsey, *supra* note 136, at 90.

¹⁵⁸ *Id.* at 93.

¹⁵⁹ 502 N.Y.S.2d 823 (N.Y. App. Div. 1986).

¹⁶⁰ *Id.* at 824.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 825. Some of the factors the Court looked to were the parties had lived together for many months during the first two years of the child's life, the petitioner was held out as the child's father, the petitioner's name was listed on the birth certificate, and petitioner was called "daddy" by the child. *Ronald FF*, 502 N.Y.S.2d at 825. There were also psychologists for both sides who stated that to remove petitioner from the child's life would have a "wrenching affect" that should be avoided if possible. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 825. In this case, the Petitioner was granted visitation rights with the subject child.

¹⁶⁶ *Ronald FF*, 502 N.Y.S.2d at 825.

to decide, or offer dicta, on whether granting the Petitioner the right to visitation was in the best interest of the subject child.¹⁶⁷ While this established the doctrine of psychological parent in New York, a question remains as to whether or not the non-legal, non-biological parent was *actually* awarded visitation with the subject-child.

In 1987, the Appellate Division reversed a Family Court decision that granted the psychological parent the right to visitation.¹⁶⁸ In *Dehar v. Dehar*,¹⁶⁹ the Family Court awarded custody of Christopher Dehar to Angelo Iacono, the former boyfriend of Christopher's biological mother, while denying custody to the child's biological father.¹⁷⁰ Respondent mother then sought review of the Family Court order.¹⁷¹

The Appellate Court relied on the precedent set by *Ronald FF*, concluding that "the psychological parenthood of a nonparent alone [does not] constitute[] extraordinary circumstance[s]. . . ."¹⁷² While the Court denied custody to the nonbiological parent, the Court also concluded that a claim made by a non-legal parent would be insufficient when the rights of the legal parent were undisputed.¹⁷³ The Appellate Division also placed firm boundaries around what would affect the legal parents' rights when it came to custody, stating exclusively that only "surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child," would be able to interfere with those rights.¹⁷⁴ Again, the Appellate Court did not extend custody rights to a psychological parent.¹⁷⁵ While the parents were not married, the fact that the Court refused to extend standing to a psychological

¹⁶⁷ *Id.*

¹⁶⁸ *Dehar v. Dehar*, 521 N.Y.S.2d 335, 336 (N.Y. App. Div. 1987).

¹⁶⁹ *Id.* at 335.

¹⁷⁰ *Id.* at 336.

¹⁷¹ *Id.*

¹⁷² *Id.* In addition to holding that the bond of a psychological parent was not an extraordinary circumstance, the Appellate Division also held that the *Bennett* test, was inapplicable. *Dehar*, 521 N.Y.S.2d at 336. The *Bennett* test guided the courts by principles which reflected the societal judgements regarding the family unit and parenthood when considering the child's best interest. *Bennett v. Jefferys*, 40 N.Y.2d 543, 549 (N.Y. 1976).

¹⁷³ Kinsey, *supra* note 136, at 94.

¹⁷⁴ *Dehar*, 521 N.Y.S.2d at 336.

¹⁷⁵ *Id.*

parent is of import when considering the extent of the relationship the would-be parent and the subject-child had.¹⁷⁶

As recently as 2010, New York still did not acknowledge a psychological parent when deciding custody.¹⁷⁷ In *Debra H. v. Janice R.*,¹⁷⁸ Debra brought a proceeding against Janice seeking joint legal and physical custody of the six-year-old boy conceived during the couple's relationship.¹⁷⁹ The New York Court of Appeals held that without a second-parent adoption, the petitioner had no standing to seek custody or visitation.¹⁸⁰

Citing to both *Bennett* and *Ronald FF.*, the Court of Appeals found that the extraordinary circumstances rule does not apply to a "biological stranger" regardless of the fact that the couple were married.¹⁸¹ Rather than accepting evidence that displayed the attachment of the nonbiological parent to the child, the Court stated that it required adoption, which would have granted Debra legal standing.¹⁸² Holding firm to their bright line rule decided in *Alison D.*, the New York court found that:

The flexible type of rule championed by *Debra H.* threatens to trap the single biological and adoptive parents and their children in a limbo of doubt. These parents could not possibly know for sure when another adult's level of involvement in family life might reach the tipping point and jeopardize their right to bring up their children without the unwanted participation of a third party.¹⁸³

The Court ignored the fact that the biological parent *encouraged* the nonbiological parent to adopt the child, evidencing the biological parent's willingness to have a relationship develop between the nonbiological parent and subject-child.¹⁸⁴ The Court, thus, found that the nonbiological parent had no right to seek custody or visitation,

¹⁷⁶ *Id.*

¹⁷⁷ *Debra H.*, 930 N.E.2d 184.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 186-87.

¹⁸⁰ *Id.* at 194. *Debra H.* also decided a comity issue. See discussion *supra* Section II, D. Debra and Janice entered into a civil union in Vermont while Janice was pregnant. *Id.* at 186.

¹⁸¹ *Debra H.*, 930 N.E.2d at 190.

¹⁸² *Id.*

¹⁸³ *Id.* at 193.

¹⁸⁴ *Id.*

and to give her that right would infringe on the right of the biological parent.¹⁸⁵

B. De Facto Parent

As defined in the ALI Principles of the Law of Family Dissolution: Analysis and Recommendations § 2.03(c):

[A] *de facto parent* is an individual other than a legal parent or a parent by estoppel who, for a significant period of time not less than two years, (i) lived with the child and, (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking function for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived.¹⁸⁶

In *Comment c.* ALI notes that the law most closely approximating this criterion is that of Wisconsin.¹⁸⁷ Other jurisdictions have defined a *de facto* parent in a less stringent fashion, with fewer requirements placed upon the parent attempting to meet this status of parent.¹⁸⁸ For example, Massachusetts has defined a *de facto* parent as someone without a biological relationship, but who typically resides with the child and performs a share of the caretaking

¹⁸⁵ *Id.* at 193.

¹⁸⁶ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 108 (American Law Institute, 1st softcover ed. 2003).

¹⁸⁷ *Id.* at 131. Wisconsin allows visitation (but not custody) to be awarded to an individual who has formed a “parent-like relationship” with a child if:

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

Id.

¹⁸⁸ *Care & Protection of Sharlene*, 445 Mass. 756, 766 (Mass. 2006), (citing ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.03 (1)(b)).

responsibilities.¹⁸⁹ The petitioner must be a participant in the child's life as a member of the child's family.¹⁹⁰

1. *Other Jurisdictional Approaches to De Facto Parents*

Adopting a less stringent definition, the Massachusetts Supreme Court, in *Care & Protection of Sharlene*,¹⁹¹ decided a case in which a child's stepfather was seeking to be declared Sharlene's de facto parent.¹⁹² During the trial court's hearing, petitioner described his relationship with Sharlene over the four years he lived with her.¹⁹³ He testified that he supported her financially, attended dance recitals, and generally took an interest in her welfare.¹⁹⁴ He testified that Sharlene, around her friends, referred to him as "her father."¹⁹⁵ He conceded that he did not perform much of Sharlene's parenting functions, nor did he testify as to his knowledge of Sharlene's injuries and the way they were inflicted, invoking his Fifth Amendment right.¹⁹⁶

When the child was admitted to Baystate Medical Center on September 11, 2005, she arrived with critical injuries and remained in an irreversible vegetative state until the Department of Social Services, who had been granted custody of Sharlene, asked the court's permission to withdraw life support.¹⁹⁷ The trial judge granted the

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Sharlene*, 445 Mass. at 756.

¹⁹² *Id.* The Department of Social Services argued that petitioner had only been interviewed once as a part of a home visit, because he was not "available." *Id.* at 764. Petitioner had left the day before Sharlene was brought to the hospital, knowing she had been injured and was throwing up, but did nothing to check on her. *Id.* Sharlene's guardian ad litem also argued that, given the extent both physically and chronologically of Sharlene's injuries, that petitioner had to know—if not a participant—of the habitual abuse of Sharlene. *Id.*

¹⁹³ *Sharlene*, 445 Mass. at 764.

¹⁹⁴ *Id.* at 763.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 758. On September 13, the Department of Social Services filed a care and protection petition and received custody of Sharlene. *Sharlene*, 445 Mass. at 757. On September 22, Sharlene's adoptive mother, who was her only legal guardian, died. *Id.* Sharlene's biological mother was sixteen when she had Sharlene and was not married to Sharlene's biological father. *Id.* at 758. When Sharlene was four, she was sent to live with her aunt, who would later become her adoptive mother. *Id.* That same year, after it was determined Sharlene was sexually abused by her biological mother's boyfriend, the Department of Social Services received custody of Sharlene. *Id.* She was permitted to stay at her aunt's home as a

motion to withdraw life support and provided that his decision was to be made available only to persons connected with the case.¹⁹⁸ Given the evidence presented, the trial judge found that the petitioner did not provide a majority of the caretaking functions of the child.¹⁹⁹ The judge also concluded that, because the petitioner was not the legal, adoptive, putative, or de facto father of Sharlene, he would not be allowed to participate as a party in the hearing regarding withdrawal of life support.²⁰⁰ The petitioner then challenged the denial of his motion for de facto parental status, and sought a new hearing on the withdrawal of life support in which he, as the de facto parent, would have a voice.²⁰¹

After reaching the Supreme Court of Massachusetts, the Court affirmed the lower court's denial of petitioner's motion to be deemed Sharlene's de facto parent.²⁰² The Court noted:

[A] de facto parent must live with the child for not less than two years and that the caretaking relationship have been established "for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure of inability of any legal parent to perform caretaking functions."²⁰³

The Court also noted that, given the precedent set, the ties between a child and a de facto parent must be loving and nurturing.²⁰⁴ In its holding, the Court discussed petitioners lack of evidence that proved his loving and nurturing relationship with Sharlene.²⁰⁵ Ultimately deciding against allowing petitioner to attain de facto

foster child. *Sharlene*, 445 Mass. at 758. In February of 2000, petitioner began living in the home and married Sharlene's aunt in September of 2001. *Id.* In October 2001, Sharlene was adopted by her aunt as a single parent. *Id.* The guardian ad litem report disclosed multiple instances of child abuse and investigations involving Sharlene and her two siblings. *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Sharlene*, 445 Mass. at 764.

²⁰⁰ *Id.* at 766.

²⁰¹ *Id.* Petitioner also argued that the public should be allowed access to all proceedings, except the new hearing he was requesting, and all relevant documents. *Id.* The Court, while questioning if petitioner had standing to bring a claim on behalf of the public, ultimately denied petitioner's request to make the proceedings and documents public. *Id.*

²⁰² *Sharlene*, 445 Mass. at 756.

²⁰³ *Id.* at 766 (quoting ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.03(c)).

²⁰⁴ *Id.* at 768.

²⁰⁵ *Id.* The Court had difficulty finding evidence that the relationship was even *beneficial* to the child. *Id.*

parent status, the Court held that "to recognize petitioner as a de facto parent . . . is unthinkable in the circumstances of this case and would amount to an illogical and unprincipled perversion of the doctrine."²⁰⁶

Sharlene's case contains the important belief that in order to be considered a de facto parent, the would-be parent must have a loving relationship with the child.²⁰⁷ This places an important limit upon who may be considered a de facto parent under the law.²⁰⁸ While the petitioner may have met a definition of de facto parent, without the loving relationship, the best interest of the child would not be met.²⁰⁹ The Massachusetts Courts have granted standing to seek custody and visitation to de facto parents when this factor is present.²¹⁰

Massachusetts, however, allowed de facto parents a legal right to custody and visitation in *E.N.O. v. L.M.N.*²¹¹ The parties were two women who were engaged in a committed and monogamous relationship for thirteen years.²¹² In 1991, they decided that the defendant would be artificially inseminated with their child.²¹³ The plaintiff attended all insemination appointments and participated in all medical decisions.²¹⁴ In 1994, the couple became pregnant and, throughout the complicated pregnancy, plaintiff took care of defendant and attended every doctors visit.²¹⁵

Before the child was born, and again after, the two women executed a co-parenting agreement, which "expressed the parties' intent that the plaintiff retain her parental status even if the defendant and the plaintiff were to separate."²¹⁶ When the child was born, the plaintiff acted as a birthing coach, cut the baby's umbilical cord, stayed overnight at the hospital, was given a parent hospital bracelet, was listed as parent on the birth announcements, and shares a last name with the child.²¹⁷ She assumed financial responsibility of the child and

²⁰⁶ *Sharlene*, 445 Mass. at 768.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ 429 Mass. 824 (Mass. 1999).

²¹² *Id.* at 825.

²¹³ *Id.* Before beginning the insemination, both parties attended workshops to learn about the process and typical parenting issues that may arise. *Id.*

²¹⁴ *Id.*

²¹⁵ *E.N.O.*, 429 Mass. at 825.

²¹⁶ *Id.* The defendant also executed documents authorizing the plaintiff to care for the child as a parent.

²¹⁷ *Id.*

assumed primary care of the child when the defendant was experiencing medical issues.²¹⁸ While engaged in adoption proceedings, the couple's relationship began to deteriorate until they finally separated in May 1998.²¹⁹ At this point, the defendant denied plaintiff access to the child.²²⁰

After seeking custody and visitation, the plaintiff was awarded temporary visitation by a Probate Court judge.²²¹ Upon further review by the Supreme Court of Massachusetts, it affirmed the lower court's decision.²²² Considering the child's nontraditional family, the Court held that:

[T]he de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. The de facto parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide.²²³

The Massachusetts Court decided that given the increasing number of "nontraditional" families, "the best interests (of the children) calculus must include an examination of the child's relationship with both his legal and de facto parent."²²⁴ As such, the Court held unequivocally that the plaintiff was the child's de facto parent.²²⁵

²¹⁸ *Id.* at 826.

²¹⁹ *Id.*

²²⁰ *E.N.O.*, 429 Mass. at 826. In June 1998, the plaintiff sought specific performance of the parties' agreement to allow the plaintiff to adopt and assume joint custody of and visitation with the child.

²²¹ *Id.*

²²² *Id.* at 834.

²²³ *Id.* at 829 (referencing ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.03(6)).

²²⁴ *Id.*

²²⁵ *E.N.O.*, 429 Mass. at 830. The Court reasoned that the plaintiff participated in the child's life as a member of the child's family (the child said he had two moms). *Id.* The parties decided to have a child together and form that family; they also re-executed the co-parenting agreement. Acting as parent's to the child, and keeping the child's best interests in mind, they stated their wish to continue plaintiff's relationship with the child regardless of the status of the parties' relationship. *Id.* The plaintiff, with the defendant's consent and encouragement, participated in the raising of the child. *Id.* The child's guardian ad litem found that the plaintiff was an active parent, who supported the family financially as well as emotionally. *E.N.O.*, 429 Mass. at 830. The defendant furthered that relationship by representing the plaintiff as the child's parent in public. *Id.* The plaintiff was authorized to make medical decisions for the

The Court disagreed with the defendant's assertions that to allow the plaintiff visitation was to restrict her fundamental right as a fit parent to the custody of her child.²²⁶ In disregarding this assertion, the Court balanced the defendant's interest in protecting her custody right with the child's best interest in maintaining the child's relationship with the de facto parent.²²⁷ However, in that balance, the child's best interests must always supersede the parents' interests.²²⁸ Bearing that in mind, the Massachusetts Court allowed the plaintiff, as a de facto parent, to have custody and visitation rights of her child.²²⁹

2. New York's Approach to De Facto Parents

New York, in dealing with de facto parents, has been more lenient when granting custody and visitation rights to such parents.²³⁰ The seminal case when discussing the doctrine of de facto parents in New York is *In re Jacob*.²³¹ After the decision handed down by the Court of Appeals of New York in *Alison D.*, it seemed that nonbiological parents would not gain custody of their children.²³² However, *In re Jacob*, penned by Judge Kaye who dissented in *Alison D.*, held that both parents seeking custody rights to the children were permitted those rights.²³³

In the consolidated cases of *Jacob*, there were favorable home visits, healthy and stable children, encouragement from the biological parent in the fostering of a parent-child relationship with the de facto parent, and manifestations from the children that the de facto parent was thought of as a traditional definition of parent.²³⁴ Judge Kaye, in

child and was designated as the child's guardian in the event of defendant's death or inability to care for the child. *Id.*

²²⁶ *Id.* at 832.

²²⁷ *Id.* at 833. The defendant's parental rights cannot be stretched to extinguish the child's relationship with the plaintiff. The defendant's right will not be enforced to the detriment of the child.

²²⁸ *E.N.O.*, 429 Mass at 833.

²²⁹ *Id.* at 834.

²³⁰ *Jacob*, 660 N.E.2d 397.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 669. As a reminder, *Jacob* was a combination of two cases in which proposed adoptive parents petitioned the family courts to adopt. *Id.* at 656. One appellant petitioned to adopt his girlfriend's son (with permission of the biological father). *Jacob*, 660 N.E.2d at 656. The other sought adoption of the child of her lesbian partner. *Id.*

²³⁴ *Id.* at 656-57.

reversing both lower court's decisions, promoted "the statute's legislative purpose—the child's best interest."²³⁵

She discussed not only the economic benefits such as social security and life insurance benefits but also what she deems "the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody, and the children's relationship with their parents, siblings and other relatives will continue should the co-parents separate."²³⁶ The Court held that denying the children the opportunity of having de facto parents become two legal parents would be unjust and not in the best interests of the children.²³⁷ The Court allowed the de facto parents to adopt the children of their partner, regardless of their marital status or sexual orientation.²³⁸

More recently, the same Court of Appeals decided *Brooke*.²³⁹ The Court returned to Justice Kaye's dissent from *Alison D.*, discussing the negative impact on the children.²⁴⁰ The Court discussed that "[a] growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children."²⁴¹ While making huge steps forward for nonbiological parents in overruling *Alison D.*, the Court still fell short in establishing any kind of test for parental figures who wish to seek custody or visitation.²⁴²

The Court's guidance applies only to an exclusive group of couples, those who have a pre-conception agreement to conceive and raise children as co-parents, to have standing to seek custody and

²³⁵ *Id.* at 658.

²³⁶ *Id.* at 658-59. The Court of Appeals also found that an adoption in these cases—and many others—does not necessarily require a termination of biological parental rights where the two have agreed that the biological parent will maintain his or her rights. *Jacob*, 660 N.E.2d at 659.

²³⁷ *Id.* at 667.

²³⁸ *Id.* at 669.

²³⁹ *Brooke S.B.*, 61 N.E.3d 488. This decision expressly reversed *Alison D.* and held "that where a petitioner proves by clear and convincing evidence that he or she has agreed to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child." *Id.* at 501.

²⁴⁰ *Id.* at 494. "The rule of *Alison D.* has inflicted disproportionate hardship on the growing number of nontraditional families across our State." *Id.* at 499.

²⁴¹ *Id.*

²⁴² *Brooke S.B.*, 61 N.E.3d at 500.

visitation.²⁴³ If another parental figure comes forward seeking custody or visitation with such agreement, the lower courts of New York would have to rely on either *Alison D.* or *In re Jacob*.²⁴⁴ This uncertainty will most likely result in conflicting views of who is permitted to seek custody and visitation when the nonbiological parent would be considered a de facto parent.²⁴⁵

C. Parent by Estoppel

The advantage of adopting a parent by estoppel doctrine is that the child's best interest is at the very forefront of the Court's consideration of each set of circumstances.²⁴⁶ The best interest of the child is contained in the very definition of parent by estoppel.²⁴⁷ According to the ALI Principles:

[A] parent by estoppel is an individual who, though not a legal parent (i) is obligated to pay child support under Chapter 3; or (ii) lived with the child for at least two years and (A) over that period has a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and (B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or (iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an

²⁴³ *Id.* at 501.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ AMERICAN LAW INSTITUTE, *supra* note 186, at 107.

²⁴⁷ *Id.*

agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.²⁴⁸

After a co-parent meets the requirements of parent by estoppel, that person has the rights and privileges of a legal parent.²⁴⁹ These rights include the crucial requirement of standing to bring an action for custody.²⁵⁰ In this situation, the co-parent has gained "a presumption of custodial time, joint allocation of decision making, right of access to school and health records and priority over de facto and non-parents in the allocation of custody;" thus, granting the co-parents parity with the legal parent.²⁵¹

Most parent by estoppel cases take place in the context of paternity by estoppel, as illustrated by the language of the definition.²⁵² Estoppel considered in the area of paternity law is "applied to prevent a presumptive father (the husband), or the natural mother (the wife), from denying the husband's paternity if the couple has resided together as husband and wife and the husband held the child out as his own."²⁵³ As such, if the mother leads the presumptive father to believe that he is the biological father through fraud or misrepresentation, he is not estopped from denying paternity, as long as, when the fraud is revealed, he ceases to have contact with the child.²⁵⁴

1. Jurisdictional Approach to Parent by Estoppel

The Superior Court of Pennsylvania, in a case of first impression, decided *Conroy v. Rosenwald*,²⁵⁵ which involved

²⁴⁸ *Id.*

²⁴⁹ Margaret S. Osborne, *Legalizing Families: Solutions to Adjudicate Parentage for Lesbian Co-Parents*, 49 VILL. L. REV. 363, 389 (2004).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Jacquelyn A. West, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 DUQ. L. REV. 577, 582 (2004). The continued use of "father" and "mother" in the definition lends one to belief that, at least when constructing §2.03(1)(b), the heterosexual family was given priority. *Id.*

²⁵³ Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963, 979 (1996).

²⁵⁴ West, *supra* note 251, at 582.

²⁵⁵ 940 A.2d 409, 411 (Pa. Super. Ct., 2007).

estopping a father from denying paternity of his child and reinstating a prior child support order in favor of the mother.²⁵⁶ The mother had a relationship with Michael and a married man, Glen Rosenwald, at the time of conception.²⁵⁷ Prior to the birth of the child, and continuing for about two and one-half years thereafter, Michael and the mother lived together, although there were frequent periods of separation.²⁵⁸ After some time with the mother and child, Michael claimed that he had DNA evidence to prove that he was not the father of the child.²⁵⁹ Subsequently, the mother filed for support against Glen, who requested the motion be dismissed on grounds of paternity by estoppel.²⁶⁰ The lower Court refused to dismiss the petition and ordered Glen to pay child support.²⁶¹

On appeal, the Superior Court held that the concept of estoppel has been used in various cases involving paternity and support, finding the nature of the conduct and the effect on the father and child and their relationship that is the focus of such a concept.²⁶² While considering the equitable remedy of paternity by estoppel, the most important factor the courts look to is the best interests of the child.²⁶³ Using this doctrine, the Court held that it was inappropriate to deny Glen's request for a dismissal.²⁶⁴

In examining the facts of the case, the Superior Court found that the mother listed Michael as the child's father on the birth certificate, the mother and Michael functioned as a family unit and acted as the child's parents for years, the mother instituted two actions against Michael for child support, and even after the mother and Michael ended their relationship, he continued to exercise partial custody of the child.²⁶⁵ Given these facts and the relationship

²⁵⁶ *Id.* The biological mother, Jennifer Conroy was having a sexual relationship with both alleged father by estoppel Michael Guinan and Appellant Glen Rosenwald. *Id.* The Family Court found that Rosenwald was the legal father of the child as of May 21, 2001, and that Conroy was estopped from claiming he was the father prior to that date. *Id.* at 414.

²⁵⁷ *Id.*

²⁵⁸ *Rosenwald*, 940 A.2d at 414.

²⁵⁹ *Id.* at 412.

²⁶⁰ *Id.* at 413.

²⁶¹ *Id.*

²⁶² *Id.* at 416.

²⁶³ *Rosenwald*, 940 A.2d at 419.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 414.

established between Michael and the subject-child, the Court found that the action instated against Glen was estopped.²⁶⁶

2. *New York's Approach to Parent by Estoppel*

Historically, New York has approached parent by estoppel like most other States, namely, as a doctrine applicable to paternity cases.²⁶⁷ However, in the second half of 2016, Justice Abdus-Salaam wrote the opinion in the landmark New York Court of Appeals case, *Brooke*, which overruled *Alison D.* and granted standing to two parents seeking custody and/or visitation using the doctrine of parent by estoppel.²⁶⁸

In the Matter of Brooke S.B. v. Elizabeth A. C.C. combined two similar appeals in which petitioners lacked any biological or adoptive connection to the children who were at the center of the dispute.²⁶⁹ The parties directed the attention of the Court to *Alison D.* and asked it to answer the question of whether “in an unmarried couple, a partner without a biological or adoptive relation to a child is [] that child’s ‘parent’ for purposes of standing to seek custody or visitation under Domestic Relations Law §70. . . .”²⁷⁰ The Court boldly overruled *Alison D.* and held “that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation under Domestic Relations Law § 70.”²⁷¹

In the first appeal, the same-sex couple began dating in 2006, and soon thereafter announced their symbolic engagement.²⁷² Then the couple jointly agreed to have a child together that the respondent would carry.²⁷³ The petitioner attended prenatal appointments, was involved in prenatal care, including being present in the emergency room when the respondent had complications related to the

²⁶⁶ *Id.* at 420.

²⁶⁷ See generally Arsenault, *supra* note 26.

²⁶⁸ *Brooke S.B.*, 61 N.E.3d 488.

²⁶⁹ *Id.* at 490.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* Due to lack of financial means, the couple could not travel to another jurisdiction that allowed same-sex marriage. *Brooke S.B.*, 61 N.E.3d at 490. Also hindering the couple was the fact that, at this time in New York jurisprudence, the Court was unclear about whether it would recognize the validity of an out-of-state same-sex marriage. *Id.*

²⁷³ *Id.* at 491.

pregnancy.²⁷⁴ Petitioner was present during labor and delivery, and cut the cord at birth.²⁷⁵ Additionally, the child was given the petitioner's last name.²⁷⁶

In 2010, when the parties ended their relationship, respondent maintained custody of the boy and allowed petitioner to have regular visits with the child.²⁷⁷ After two years of regular visitation, respondent and petitioner's relationship deteriorated and by July 2013, petitioner's contact with the child was effectively terminated by respondent.²⁷⁸ Petitioner then filed suit seeking joint custody and regular visitation.²⁷⁹

The second appeal involved in this case, *Estrellita A. v. Jennifer D.*,²⁸⁰ involved a couple that began dating (and subsequently moved in together) in 2003. In 2007, after filing for domestic partnership, the couple decided to have a baby with respondent carrying the child.²⁸¹ Similar to *Brooke*, the petitioner attended the prenatal medical appointments and was called "Mama" by the baby girl.²⁸² In September 2012, after ending the relationship in May 2012, the petitioner moved out of the home, but continued to have contact with the child.²⁸³ Petitioner filed suit seeking visitation with the child.²⁸⁴ When respondent sought to dismiss the petition based on lack

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Brooke S.B.*, 61 N.E.3d at 491. The parties lived together with the child and raised his jointly. *Id.* They shared all major parental responsibilities. *Id.* For a year of the boy's life, petitioner stayed home with him so that respondent could return to work. *Id.* The boy called petitioner "Mama B." *Id.*

²⁷⁷ *Brooke S.B.*, 61 N.E.3d at 491.

²⁷⁸ *Id.*

²⁷⁹ *Id.* The Family Court appointed attorney found that the best interest of the child would be served by allowing regular visitation. *Id.* Family Court dismissed the petition, claiming that plaintiff/petitioner did not have standing under Domestic Relations Law § 70 to seek custody and/or visitation with the child. *Id.* Family Court noted that petitioner did not adopt the child and noted the constraint on it by *Alison D.* The Appellate Division unanimously affirmed, concluding that there was no legal or biological relation to the child, *Alison D.* prohibited a ruling that petitioner had standing under Domestic Relations Law § 70. *Brooke S.B.*, 61 N.E.3d at 491.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 491-92. The couple also decided that the donor would be of the same ethnicity as the petitioner. *Id.* at 492.

²⁸² *Id.* The three resided in the couple's home while the two shared a complete range of parental responsibilities. *Brooke S.B.*, 61 N.E.3d at 492.

²⁸³ *Id.*

²⁸⁴ *Id.* In a suit pending at the same time, respondent was seeking child support from petitioner, who denied liability. *Id.* The court appointed an attorney for the child. *Id.* After a hearing, the Family Court granted the child support petition, holding that "the uncontroverted

of standing under *Alison D.*, both the attorney for the child and the attorney for petitioner opposed.²⁸⁵ When hearing the petition, the Court held “that petitioner’s regular visitation and consultation on matters of import with respect to the child would serve the child’s best interests.”²⁸⁶

Under *Alison D.*, the Court had held that the word parent in DRL § 70 should be interpreted narrowly, precluding standing “for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child’s parent for visitation purposes.”²⁸⁷ The *Brooke* Court criticized its predecessors, stating that, “[d]eparting from [the] tradition of invoking equity, in *Alison D.*, we narrowly defined the term ‘parent,’ thereby foreclosing ‘all inquiry into the child’s best interest’ in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child.”²⁸⁸ As a result, the Court found itself in a legal landscape that prevented a non-biological, non-adoptive parent from disclaiming parentage and required to pay child support, all while being denied standing to seek custody and visitation.²⁸⁹

In light of the enactment of same-sex marriage in New York, and given the holding of *Obergefell*, *Alison D.*’s premise of heterosexual parenting and nonrecognition of same-sex couples became unsustainable.²⁹⁰ However, the fundamental right of a biological or legal parent mandates caution when expanding the definition of parent.²⁹¹ These fundamental rights of parents must be balanced against the fundamental liberty interests of children in preserving the bonds they have created with their family.²⁹²

facts establish[ed]’ that petitioner was ‘a parent’ to the child, and as such, ‘chargeable with the support of the child.’” *Brooke S.B.*, 61 N.E.3d at 492. Petitioner then amended her visitation petition to show that she had been found to be the parent and was also a legal parent when it came to her visitation rights. *Id.*

²⁸⁵ *Id.* The Family Court denied the motion to dismiss. *Id.* It opined that, while petitioner did not have standing under *Alison D.* nor *Debra H.*, given respondent’s successful support petition, equitable estoppel applied in this case. *Id.*

²⁸⁶ *Brooke S.B.*, 61 N.E.3d at 493.

²⁸⁷ *Id.* at 494.

²⁸⁸ *Id.* at 498 (quoting *Alison D.*, 77 N.Y.2d at 659 (Kaye, J., dissenting)).

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Brooke S.B.*, 61 N.E.3d at 499.

²⁹² *Id.*

The Court struggled with devising a test when considering who has standing as a parent under DRL § 70.²⁹³ It held that because of the fundamental rights afforded to biological and legal parents, any test that seeks to expand the definition of parent must be appropriately narrow.²⁹⁴ Petitioners and some amici encouraged the Court to endorse a functional test for standing, which considers many factors, most relating to the post-birth relationship between the non-biological, non-adoptive parent and the child.²⁹⁵ Others proposed a "test that hinges on whether petitioner can prove, by clear and convincing evidence, that a couple 'jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents.'"²⁹⁶

The Court, however, rejected the premise that it must decide a test that would be appropriate for all situations, but rather finds that because the two cases involve couples that have entered a pre-conception agreement, that agreement is enough to establish standing.²⁹⁷ As such, while *Brooke* expressly overruled *Alison D.*, making significant progress in the field of same-sex couples by giving them standing to seek custody and visitation, it fell short of securing them such standing in all situations.²⁹⁸ Without a pre-conception agreement, the Court is silent on whether a non-biological, non-adoptive parent would have standing under the "broadened" definition of parent under DRL § 70.²⁹⁹

V. ANALYSIS

Under the psychological parent doctrine, the person seeking custody or visitation must not be the legal parent, must have resided with the child for a specified amount of time, and must have routinely performed a certain share of caretaking functions.³⁰⁰ If this was the test used in *Brooke*, both petitioners would have been awarded standing.³⁰¹ Both petitioners were not the legal parents, both lived with

²⁹³ *Id.* at 500.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Brooke S.B.*, 61 N.E.3d at 500.

²⁹⁷ *Id.* All parties entered into a pre-conception agreement to conceive and raise their child as co-parents. *Id.*

²⁹⁸ *Id.* at 501.

²⁹⁹ *Id.*

³⁰⁰ See discussion *supra* Section IV.

³⁰¹ See generally *Brooke S.B.*, 61 N.E.3d 488.

the respondent and child for a significant period of time allowing for a close parent-child bond to be formed, and both shared major parenting responsibilities.³⁰² Basing the relationship on the day-to-day interaction, companionship and shared experiences of the adult and child helps to ensure third-parties that are too far removed do not infringe on the biological or legal parents fundamental rights.³⁰³ Under this concept, a same-sex former partner would have standing to seek custody and visitation *only* if there was a significant tie to the child and if the above requirements had been met.

The concept of a de facto parent allows for a non-legal, non-biological parent to have standing to seek custody and visitation.³⁰⁴ It requires the person to have lived with the child for at least two years, or since birth if the child is not yet two, and have regularly performed caretaking functions for the child.³⁰⁵ In the consolidated case of *Brooke*, both petitioners would again meet the criteria required to have standing.³⁰⁶ Both women lived with the child for at least two years or since birth and regularly performed caretaking functions, which began with prenatal doctor visits.³⁰⁷ This concept would again prevent far-removed third parties from seeking custody and visitation while infringing on the fundamental rights of biological or legal parents.³⁰⁸

The final principle that could establish standing for custody and visitation is parent by estoppel.³⁰⁹ Typically utilized in paternity cases, this concept could also be used for same-sex parents seeking custody and visitation.³¹⁰ The parent by estoppel doctrine states that a person who is obligated to pay child support or a person who has lived with the child for two years, while having a reasonable, good-faith that he or she is the biological parent, or held the child out to be his or her own is considered to have standing when seeking custody or visitation.³¹¹ Again, in the case of *Brooke*, both petitioners would have satisfied the doctrine of parent by estoppel.³¹² Both lived with the child since birth,

³⁰² *Id.* at 490-93.

³⁰³ Goldstein et.al, *supra* note 140, at 19.

³⁰⁴ See discussion *supra* Section IV.

³⁰⁵ See discussion *supra* Section IV.

³⁰⁶ See generally *Brooke S.B.*, 61 N.E.3d 488.

³⁰⁷ *Id.* at 490-93.

³⁰⁸ See discussion *supra* Section IV.

³⁰⁹ AMERICAN LAW INSTITUTE, *supra* note 186, at 107-08.

³¹⁰ See discussion *supra* Section IV.

³¹¹ See discussion *supra* Section IV.

³¹² See generally *Brooke S.B.*, 61 N.E.3d 488.

held out and accepted the child as their own, and accepted full and permanent responsibilities as parents.³¹³

VI. CONCLUSION

In refusing to establish a bright-line test when considering standing in a custody and visitation petition put forth by a same-sex former partner, the Court has left the nonbiological and non-legal parents of New York in a state of confusion and without an easy to navigate roadmap.³¹⁴ The holding of *Brooke* did, however, allow a small group of nonbiological, non-legal parents to have standing to seek custody and/or visitation—those with a pre-conception agreement.³¹⁵ It is the position of this Note that the Court of Appeals of New York should expand the legal definition of a parent when the Court meets a "legal stranger" who is not a legal or biological parent, but meets the definitions set forth in the ALI Principles of psychological parent, de facto parent, and parent by estoppel.³¹⁶ Respectively, the courts should recognize the bond fused between the would-be parent and child, and allow the would-be parent to have standing to seek custody and/or visitation.

The three proposed doctrines of psychological parent, de facto parent, and parent by estoppel offer an established way for the courts to decide who has standing with regard to custody and visitation.³¹⁷ In providing a clear, well-established test, the Court of Appeals could have prevented what is sure to be an onslaught of cases where there is no pre-conception agreement between same-sex partners. Having this unanswered question will likely to lead to differing standards and a lack of consensus among lower New York courts. As such, the stability and permanence that is fundamental to a child's development will be in jeopardy until the Court adopts a broader test to establish standing.³¹⁸

³¹³ *Id.* 490-93.

³¹⁴ *Id.* at 501.

³¹⁵ *Id.*

³¹⁶ See generally discussion *supra* Section IV.

³¹⁷ See discussion *supra* Section IV.

³¹⁸ See *Brooke S.B.*, 61 N.E.3d 488; *Alison D.*, 572 N.E.2d 27. Compare the holding in *Brooke S.B.*, 61 N.E.3d at 490, with Justice Kaye's dissent in *Alison D.*, 572 N.E.2d. at 30-33.