BLOOD WILL NOT JUSTIFY MY RELATION: SAME-SEX COUPLES AND THEIR BATTLE FOR STANDING AS DE FACTO PARENTS

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A parent's right to maintain a relationship with his/her child lies within the Fourteenth Amendment of the U.S. Constitution; however, this right does not apply to every type of parent. Although the U.S. Supreme Court granted same-sex couples the right to marry, they still face parental rights issues when their child(ren) are nonbiological or nonadoptive because they lack standing for custody and/or visitation as de facto parents. Moreover, the rise of nontraditional same-sex-couple families has been placing states in a predicament, and the lack of uniform rights for de facto parents creates great inconsistency across the United States. The creation of a uniform statute with specific elements distinguishing de facto parents from mere caretakers will grant same-sex nonbiological parents standing and create uniformity across the United States.

Key Points for the Family Court Community:

- The rise of nontraditional same-sex-couple families places states in a difficult situation when creating parenting laws.
- Many same-sex couples raise children together and choose not to marry, and further, a nonbiological parent may choose not to adopt for personal reasons.
- A de facto parent is a nonbiological person who has acted as a parent in fact by establishing an emotional relationship with the child of the relationship and has assumed day-to-day and major responsibilities for the child for a substantial period.
- In the event that same-sex couples end their relationship, the law does not treat the nonbiological parent fairly because, due to a lack of biological connection, they do not have legal standing to seek visitation or custody even though they behaved as a parent to the child.
- The model uniform statute will grant de facto parents in same-sex-couple relationships legal standing and states may be more inclined to adopt a de facto parent statute that will preclude strangers from seeking standing.

Keywords: *Custody; De Facto Parent; Gay; Lesbian; Model Uniform Statute; Nonbiological; Parent in Fact; Parental Rights; Same-Sex Couples; Standing; Statute; and Visitation.*

I. INTRODUCTION

Brooke was not going to give up easily, at least not without a fight—blood was not going to get in the way of her love for her baby boy; blood was not going to justify her relation.[1] For this reason, Brooke battled until the end.[2] After being in a relationship for a year, Brooke and Elizabeth were engaged in 2007.[3] But at that time, same-sex marriage was illegal in New York.[4] Thus, the couple's engagement was a romantic symbol of their hopeful future.[5] Brooke and Elizabeth had the option to travel to a different state to tie the knot but unfortunately, they did not have the funds to do so.[6] Brooke and Elizabeth, refusing to allow the law to deter them from taking their relationship to the next level, decided shortly after their engagement to jointly raise a child and that Elizabeth would carry the child.[7]

The engagement and decision to bring a child into the world demonstrated the commitment and love Brooke and Elizabeth had for one another.[8] Like most happy couples, they did not contemplate the possibility of ending their relationship nor were they thinking about custody issues.[9] The couple was in a happy place and had every intention of continuing their relationship.[10] However, unbeknownst to them, in the event of a separation, Brooke would not be able to fight for custody because she was not considered a parent under New York law.[11]

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Thereafter, the couple was ecstatic when Elizabeth was artificially inseminated in 2008 and became pregnant.[12] Brooke supported Elizabeth and their child every step of the way.[13] In 2009 when Elizabeth gave birth, Brooke was with her at the hospital and cut the umbilical cord, which is one of the most intimate experiences of life one can experience.[14] When their son was born, the couple decided to give the baby Brooke's last name, which validated their relationship further.[15] Thereafter, Brooke and Elizabeth lived and raised their child together.[16] While Elizabeth returned to work to earn a living, Brooke remained at home for a year to take care of the child.[17] The child referred to Brooke as "Mama B."[18]

Unfortunately, in 2010, the couple ended their relationship.[19] At first, Brooke visited their son regularly.[20] However, by the end of 2012, their relationship deteriorated.[21] By 2013, Elizabeth eliminated all contact with Brooke and did not allow her to see their son.[22] Brooke was heartbroken; not only was her engagement called off, but she was also on the verge of losing her son.[23] Yet she was not going to let that happen.[24] Brooke cared for and raised their child since the day he was born.[25] She then petitioned for custody and visitation.[26]

Brooke was shocked and forlorn when the family court shut the door in her face, ruling that she "lacked standing to seek visitation or custody" because she was not the child's mother by blood or adoption, even though she argued that she was the child's de facto parent.[27] Brooke did not end her battle there; she believed that justice would be served under the law because the love she had for her child was unbreakable.[28] Brooke was inconsolable and gave her case a last chance when the attorney for the child appealed the case to the Court of Appeals of New York.[29] Brooke was overjoyed and proud when the court granted her standing to seek visitation and custody as a de facto parent.[30] Brooke was given the chance to reunite with her child, raise him, and be there for him throughout his life.[31] Brooke's battle was a tough but successful one.[32] Although Brooke succeeded, uncertainties still remained as the New York Court of Appeals failed to provide specific elements explaining what characteristics grant a de facto parent standing.[33] Accordingly, New York and the rest of the United States is in dire need of guidelines to determine what "factors a petitioner must establish to achieve standing as a de facto parent."[34] The creation of a model uniform statute containing such guidelines will provide a set standard as to the characteristics needed to grant de facto parents standing to seek custody and/or visitation.

Part II of this Note presents background information regarding present-day treatment of de facto parents and how the rise of nontraditional families has warranted change in the law. It further presents statistics that represent current law, in regard to recognition of de facto parents, among the fifty states. Part III lays a foundation of significant de facto parent case law across the United States from 1991 through 2016, illustrating the lack of uniformity. Part IV explains an alternative route that some same-sex couples take by marrying and adopting to overcome the lack of legislation protecting their rights. Additionally, it distinguishes same-sex couples who marry and adopt children from same-sex couples who raise children together, choose not to marry, and where the nonbiological parent chooses not to adopt for personal reasons. The situations these couples face are the basis for this Note. Part V presents the need for legislative action and proposes the creation of a model uniform statute that would grant standing to de facto parents in same-sex relationships. It further explains what factors are to be considered in determining what constitutes de facto parenting behavior.

To examine the effectiveness of the statute, Part VI presents the benefits of the model uniform statute, which include the benefits of proposing the requirement of a strict burden of proof and the emotional and educational benefits that the child will incur, along with common misconceptions about the influence lesbian, gay, bisexual, and transgender (LGBT) parents have on raising children. Part VII addresses the counterarguments in connection with the creation of the model statute and offers solutions to the counterarguments. Part VIII presents a conclusion that weighs the benefits of the proposed model uniform statute and how the benefits outweigh the drawbacks.

II. DE FACTO PARENTING TODAY

Not all parents have been as fortunate as Brooke.[35] While Brooke ultimately won her battle,[36] most parents do not experience the same happy ending.[37] Achieving de facto parenting[38] rights in

the same-sex couple community has been an ongoing issue that same-sex couples who dissolve their relationship struggle with every day because the law treats them unfairly. The U.S. Supreme Court decision granting same-sex couples the right to marry under the Due Process and Equal Protection Clauses of the Fourteenth Amendment is novel.[39] Same-sex couples have raised children together long before the right to marry was granted.[40] In 2010, over eighty-one percent of unmarried same-sex couples had children living with them in their household.[41] These couples had not married because the law prevented them from doing so, and even after same-sex marriage became legal, some couples have still chosen to remain unmarried.[42] Nevertheless, many of these relationships have risen to the next level by raising a child together without going through an adoption process.[43] These children are a part of the same-sex couple's relationship and the partners raise them together, even though one partner's parental status is underrecognized by the law.[44] In the event of relationship dissolution, the partner who is the nonbiological parent who has not adopted the child lacks standing to seek visitation or custody even though s/he has behaved as the de facto parent.[45]

Currently there is a significant lack of uniformity regarding de facto parenting laws across the United States.[46] Some states deny de facto parents standing, other states recognize de facto parents but have set out vague standards in case law, and few states have enacted de facto parentage statutes.[47] Today, six states recognize de facto parents, granting them visitation rights.[48] Twenty-four states plus the District of Columbia allow "limited recognition of de facto parents as a basis for visitation and/or custody."[49] Fourteen states pose as uncertain on granting de facto parents recognition.[50] Furthermore, some states, including New York, "may require parents to provide specific evidence" of their relationship with the child, establishing grounds for de facto parentage.[51] Finally, six states do not recognize de facto parents at all.[52] The statistics vary among the states about nontraditional families, placing the states in a difficult situation when deciding whether to recognize de facto parents and granting them standing.[53]

Given the inconsistencies in this area across states, a model uniform statute with rigid standards for determining de facto parent status and granting standing to de facto parents is greatly needed. Pursuant to the Due Process Clause of the U.S. Constitution, parents have a liberty interest to parent.[54] Moreover, "children deserve to have their functional, bonded relationships protected by the courts."[55]

III. STATE VIEWS ON DE FACTO PARENTHOOD STATUTES

Beginning in 1991 and continuing through 2017, states have been inconsistent in granting de facto parents standing.[56]

A. NEW YORK

Same-sex parents have been battling with de facto parenting issues for a while.[57] In 1977, lesbian couple Alison and Virginia agreed to have a child together after being in a relationship for three years.[58] In 1981, Virginia gave birth to their son, A.D.M.[59] He was given Virginia's last name, and Alison's last name became his middle name.[60] Thereafter, the couple raised him together.[61] A.D.M. referred to both parents as "mommy."[62] In 1983, the couple separated and Alison moved out of the home.[63] However, Alison continued her relationship with her son until 1986 when Virginia restricted visitation.[64] A year later, Virginia moved to Ireland; this made Alison's relationship with her son difficult to uphold.[65] Eventually, Virginia terminated all contact between Alison and A.D.M.[66] Alison then sought to obtain visitation.[67] However, her rights were denied by the supreme court and affirmed by the appellate division in New York.[68] When the case was brought to the highest court in New York, the Court of Appeals, Alison alleged she was a de facto parent but was again unsuccessful in her battle because she lacked standing to seek visitation.[69] This ruling was upheld in other state court decisions as well.[70]

In 2016, New York reversed its 1991 decision.[71] In *Matter of Brooke S.B.*, the N.Y. Court of Appeals held that where "a partner showed 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 had standing to seek visitation and custody under Domestic Relations Law § 70."[72] Moreover, Brooke was found to be a parent within the meaning of Domestic Relations Law § 70 based on judicial estoppel.[73] Brooke argued that the court should adopt a test for standing and referred to tests that were accepted in other jurisdictions.[74] Furthermore, although the court granted Brooke standing, New York failed to set a clear test for standing.[75]

B. WISCONSIN

Knott and Holtzman, a lesbian couple, shared the same story as Brooke and Elizabeth; however, a different outcome from New York's 1991 decision was reached.[76] Knott and Holtzman were in a committed and long-term relationship where they both decided to start a family together.[77] Knott was artificially inseminated and both parties planned for the child's birth.[78] Subsequently, Holtzman was present when Knott gave birth to the child in 1988.[79] The parties raised the child together for five years, jointly partaking in the child's major life decisions,[80] but unfortunately, the couple separated in 1993.[81] Upon separation, Knott attempted to limit all contact with Holtzman until all contact was eventually terminated.[82]

Holtzman then sought to obtain visitation and custody of her child.[83] However, Knott's motion for summary judgment was granted at the trial court level.[84] Converse to the decision in Alison and Virginia's case in New York, on appeal the Wisconsin Supreme Court reversed on grounds that the court was permitted to exercise its right of "equitable power to protect the best interest of a child by ordering visitation."[85] Nevertheless, the partner seeking visitation first had to establish an existence of a "parent-like relationship with the child."[86] Next, the partner had to establish a "significant triggering event" that the other partner "interfered substantially" with their relationship, and then had to promptly petition the court.[87] In order to prove a parent-like relationship, the court established a psychological parent doctrine, a four-part test, that Holtzman was required to satisfy in order to have standing for visitation.[88] This test was limited to visitation only, not custody.[89]

C. MASSACHUSETTS

Comparable to Holtzman, the Massachusetts Supreme Court granted de facto parents standing without establishing a factor test.[90] Instead, the court considered the best interests standard.[91] In *E. N.O. v. L.M.M.*, a lesbian couple was in a committed relationship for thirteen years and always intended to have a child together.[92] In 1994, L.M.M. became pregnant through artificial insemination and E.N.O., the "de facto parent," cared for her throughout the pregnancy and when she gave birth in 1995.[93] To demonstrate their intent to co-parent the couple signed a co-parenting contract where they expressed their intent to raise baby O.M. together.[94] E.N.O. took care of most of the financial responsibilities for their family and cared for baby O.M. until the couple separated in 1998, whereupon L.M.M. denied E.N.O. access to their child.[95]

E.N.O. then sought to enforce the agreement and sought permission to adopt baby O.M., giving her custody and visitation rights.[96] The court granted temporary visitation, which was then vacated.[97] When E.N.O.'s petition to reestablish visitation was granted, L.M.M. appealed again.[98] The court affirmed because, "based upon the facts of the case, visitation with plaintiff (E.N.O.) was within the best interests of the child."[99] The court acknowledged that the standard[100] it used to grant the de facto parent standing was "somewhat amorphous."[101] The court attempted to deal with the indefiniteness by interpreting the facts of the case to determine baby O.M.'s best interests.[102] Even though the court clarified the standard in this situation, the court's acknowledgement of the amorphous nature of the best interests standard indicates a lack of uniformity, which illustrates the need for some type of explanation for others to follow.[103]

D. UTAH

Conversely, in 2007, the Supreme Court of Utah declined to grant Keri Jones de facto parent standing.[104] Cheryl Barlow and Keri Jones were in a romantic relationship where they entered into a civil union and moved in together.[105] They then decided to have a child together and agreed that Barlow would be artificially inseminated.[106] Barlow gave birth in 2001, with Jones participating in all major birth events followed by caring for the child for the first two years of her life.[107] Unfortunately, the parties ended their relationship in 2003 and Barlow ended all contact with Jones and did not allow her to see their daughter.[108] Thereafter, Jones sued in district court to seek custody and visitation.[109] Jones was successful when the district court gave her standing, but Barlow appealed the decision.[110] Unfortunately, the Utah Supreme Court reversed the decision, declining to recognize de facto parent standing.[111]

E. DISTRICT OF COLUMBIA

In 2007, the District of Columbia passed a statute granting de facto parents standing.[112] This was the same year that Utah declined to recognize de facto parents, indicating again the inconsistency between states on this issue and the need for a unified solution.[113] The District of Columbia statute grants a de facto parent standing to seek "legal" and "physical custody" upon the breakup of a relationship.[114] To qualify as a de facto parent, the statute is unique in that it considers two types of situations where an individual must satisfy one of two standards.[115] The first set of criteria establishes standards in situations where the individual was present at the birth of the child.[116] The second set of standards establishes standards to be met where the individual was present for a specific period but not necessarily from the time of the child's birth.[117] Both standards require the individual to prove that they have taken on a substantial amount of responsibilities.[118] Subsequently, other states have passed statutes similar to that in the District of Columbia.[119]

IV. ALTERNATIVE ROUTES

Many same-sex couples take alternative routes by marrying their partners and adopting the child of the relationship to avoid taking legal risks.[120] Currently in the United States, there are about 400,000 married same-sex couples.[121] The reasons why same-sex couples marry vary, but some do so to start a family.[122] Yet currently sixty-eight percent of identifying LGBT persons live in states that are silent on gay adoption rights, which can make the process of adoption more difficult.[123] The adoption process that same-sex couples experience is undeniably different than the process for heterosexual couples.[124] Moreover, the process has proven to be long, difficult, tiring and expensive.[125] Additionally, a third of adoption agencies in the United States reject gay or lesbian applicants.[126] The reason for rejection varies from religious beliefs and state laws prohibiting gay fostering to policies that require couples to be married to adopt.[127] Furthermore, the managers of these adoption agencies have a negative outlook on gay and lesbian adoption where they subject them to a stricter evaluation process.[128] Even if these same-sex couples truly want to adopt a child, adoption may not always be the most realistic process for them. This further proves the need for a model uniform statute that protects LGBT parents who realistically cannot adopt.[129] This Note focuses on the same-sex couples who start a family but choose to remain unmarried and not to go through the difficult process of adoption.

V. THE NEED FOR LEGISLATIVE ACTION: MODEL UNIFORM STATUTE

Even as nontraditional family arrangements have become increasingly common, the U.S. Supreme Court has thus far ignored the idea of de facto parenting.[130] Consequently, there remains great disparity between states in granting de facto parents standing.[131] Children of LGBT relationships are often raised by both parents, one being nonbiological, and in the event of the

couple's separation, this de facto parent may be treated unfairly under the law in his/her state.[132] To alleviate these inconsistencies, a model uniform statute should be enacted recognizing de facto parents and granting them standing to seek visitation and custody of the child of the relationship. The uniform statute should require the de facto parent to satisfy a set of elements setting forth a strict burden of proof.[133]

A. DE FACTO PARENT MODEL UNIFORM STATUTE

The model uniform statute should consider the following for a de facto parent to have standing to seek visitation and custody for the child of the relationship.[134] The de facto parent must:

(1) (a) Provide clear and convincing evidence that there was an express agreement of both partners to raise the child together before[135] or after the birth of the child[136]; and
    (b) Establish that s/he obtained the knowing consent and support of the child's biological parent to foster a parent-like relationship with the child[137];
(2) Provide clear and convincing evidence proving that s/he has devoted a substantial amount of time to the child's life and has lived with the child for a substantial amount of time[138];
(3) Provide clear and convincing evidence that s/he established an emotional bond/connection with the child[139];
(4) Provide clear and convincing evidence of the ways in which s/he has contributed to the child's life, such as time spent with the child, major day-to-day responsibilities taken on for the child, and financial contributions for the child; and[140]
(5) Provide clear and convincing evidence of a positive nature of the overall relationship with the child.[141]

VI. BENEFITS OF THE DE FACTO MODEL UNIFORM STATUTE

With the disparity in de facto parenting laws across the country, a model uniform statute will benefit individuals in several ways. First, it will clearly lay out the qualifications for the petitioner to achieve de facto parent status.[142] Next, the statute's strict burden of proof will preclude strangers, babysitters, and the like from seeking standing.[143] Most importantly, those same-sex partners who truly deserve the right for standing to seek custody and visitation, despite the lack of a blood relationship or legal relationship through adoption, will be afforded the constitutional right to do so regardless of where they reside.[144] Lastly, the statute will reunite the children with their de facto parent, benefiting the children's overall wellbeing.[145]

A. TO DE FACTO OR NOT TO DE FACTO

The de facto parent statute will preclude petitioners who are essentially strangers from seeking standing and will determine who is considered as a de facto parent and who is not.[146] In creating hypothetical situations, we can analyze the statute's effectiveness.[147]

1. Scenario 1

Consider a scenario where a bisexual woman, Betty, with a one-year-old child, Kim, (ex-husband/father deceased) enters into a relationship with Lauren.[148] Betty and Lauren remain in a relationship for one year, where Lauren spends three to four nights a week at Betty's house.[149] During the year, Lauren and Kim spend time with one another as Lauren helps take care of Kim from time to time, such as cooking her food and taking her to school, and Kim becomes fond of Lauren.[150] When the relationship ends, Lauren continues to visit Kim for a short time until Betty does not

allow Lauren to see Kim anymore.[151] Betty then rekindles her relationship with former ex-girlfriend, Sam.[152] After six months with Sam, Betty and Sam agree that they will raise Kim together and even discuss adoption options.[153] Kim starts to grow attached to Sam and calls her "Mom" and Sam takes on major day-to-day responsibilities to raise Kim.[154] Lauren then petitions the court to obtain visitation rights and claims that she is Kim's de facto parent.[155]

In applying the proposed model uniform statute, Lauren would not have standing to seek visitation or custody as a de facto parent[156] because, even though Lauren took care of Kim and established a bond with her for one year,[157] there was no express pre-conception agreement nor was there an express agreement between Lauren and Betty that they would raise the child together.[158] However, in the event that Betty and Sam ever decide to end their relationship, and Sam never adopts Kim, Sam may have grounds to seek visitation and custody of Kim as her de facto parent because Sam's behavior toward Kim is likely to fulfill the factors in the model uniform statute.[159]

2. Scenario 2

Consider a scenario where lesbian couple, Janice and Sasha,[160] who have been in a relationship for two years and lived together for the past eight months, decide to have a child.[161] Janice and Sasha jointly and expressly agree that Janice will be artificially inseminated and they will both raise the child together as parents.[162] During Janice's pregnancy, Sasha attends all doctor appointments with Janice and cares for her throughout the pregnancy.[163] When Janice gives birth to baby Stephen, Sasha and Janice raise him for the next two years together, living in the same home.[164] The couple shares all major responsibilities of taking care of Stephen and he calls both of his parents "Mama."[165] When Stephen cries, Sasha is usually the one who soothes him by giving him attention.[166]

Unfortunately, after two years the couple separates, and Sasha moves out of the house but continues to visit Stephen very often and even attends Mommy and Me classes with him.[167] After a year, Janice does not allow Sasha to visit Stephen anymore.[168] Sasha petitions for custody of Stephen, claiming that even though she never married Janice nor adopted the child because they lacked financial resources, she is his de facto parent because of all her involvement in his life.[169] In this situation, the couple lived in Tennessee, which does not recognize de facto parenting; thus Sasha would not have standing to seek custody of Stephen.[170] But if the proposed model statute were applied here, Sasha would most likely qualify as a de facto parent.[171]

B. EMOTIONAL AND PSYCHOLOGICAL BENEFITS OF THE MODEL STAUTE

The proposed model uniform de facto parenting statute is essentially designed to give de facto parents the right to continue a relationship with their children which benefits the children emotionally and psychologically.[172] Studies demonstrate that children benefit in many ways from being raised by two parents, rather than being brought up by a single parent.[173] Children who are raised in "single-parent families typically have access to fewer economic or emotional resources than children in two-parent families."[174] Studies suggest that children who go through multiple changes in family structure "may be far worse developmentally than children raised in stable two-parent families."[175] Moreover, the overall well-being of children is affected negatively when they are raised by single parents.[176] Children who are exposed to divorce or divorce-like situations, which are emotional, "may have difficulties into adulthood that range from feelings of sadness and vulnerability, to problems with relationships with other adults, to more serious mental health issues."[177] Children raised by single parents are "more likely to be in poor physical health, have a higher rate of suicide and mental illness, and suffer more accidents and injuries than children in two-parent families."[178] Once parents separate, children begin to have educational problems and continue to deteriorate thereafter.[179] This is because the parents are more likely to invest "less in their development."[180]

Furthermore, the parent who does not live with the child is less likely to be involved with their education, which ultimately contributes to their educational downfall.[181]

C. COMMON MISCONCEPTIONS OF LGBT PARENTING

When children are raised by same-sex parents, our society is quick to presume that LGBT parents negatively affect children, which is a common misconception.[182] In reality, children raised by same-sex parents are just as well adjusted as children raised by heterosexual parents.[183] Many studies have been conducted to analyze the developmental outcomes and eminence of relationships among gay and lesbian parents and their children.[184] One study performed in 2008 used nineteen studies to analyze the outcomes of children and parents and did so by focusing on six different factors.[185] Results indicated that same-sex parents were found to have better relationships with their children by far than heterosexual parents had with their children.[186] Moreover, the other five factors determined no significant difference in child gender-role development, gender identity, cognitive development, psychological adjustment, and children's sexual preferences between children raised by heterosexual parents and those raised by same-sex parents.[187]

An additional misconception about children being raised in LGBT relationships is that "[b]eing raised by gay parents will cause kids to be gay."[188] This is a fallacy because people do not choose who they are attracted to, so parents cannot ultimately dictate children's attractions.[189] Moreover, even though children learn about relationships and sexuality from "observing their parents and other couples in society," their own sexual orientation is not something that is learned or ultimately controlled by parents.[190] Finally, studies have shown that most people who identify themselves within the LGBT community were raised by heterosexual parents and "the large majority of children of gay parents grow up to be straight."[191]

VII. COUNTERARGUMENTS AND RESPONSES

A. BLOOD ALWAYS RULES

States that oppose the idea of granting LGBT de facto parents standing will argue against the adoption of the model uniform statute on the basis that a nonbiological or non-adoptive parent is not considered to be a parent under most state laws and that the biological, blood-related parent should have full physical and legal custody and essentially have all the power to make all decisions related to their child.[192] Furthermore, this argument extends to include that the common-law doctrine of *in loco parentis* "did not independently grant standing to seek visitation against the wishes of a fit legal parent."[193] This argument further declines to grant standing by means of the psychological-parent doctrine or to recognize the abundant amount of cases in the past where the LGBT de facto parent has behaved as a parent in fact by caring for the child emotionally and financially, bonding with the child, living with the child, spending time with the child, having a genuine desire to remain in the child's life as a parent, and the fact that there was an agreement between the parties to raise the child together.[194] The proposed model uniform statute is not designed to infringe upon the biological parent's rights over his or her child or to give the de facto parent excessive rights but rather to allow for the de facto parents to have the equal rights, when deserving, that they are entitled to.[195] Moreover, the test that the statute proposes ultimately sets a high bar for establishing the status of a de facto parent, which cannot be achieved without knowing participation by the biological parent.[196]

B. FREE FOR ALL

An additional argument that opposing states may have is that the proposed model uniform statute may infringe upon the rights of a biological parent to make decisions on how their children will be

raised and who will have permission to participate in their lives, which makes reference to strangers.[197] Moreover, the states against de facto parenting will argue that anyone may claim that they are a de facto parent and bring an action to seek visitation and custody.[198]

While this is a valid argument, the proposed factors set out in the model uniform statue preclude strangers from seeking standing such as neighbors, babysitters, nannies, au pairs, relatives, and family friends through a satisfaction of a strict burden of proof.[199]

VIII. CONCLUSION

It has become evident that the rise of nontraditional families has become a confusing challenge for the states to decipher, leaving LGBT families blindsided by the law.[200] In fact, blood does not always justify relation. Moreover, in the event that a custody dispute arises, states have unfortunately been inconsistent in recognizing de facto parents and in granting them standing.[201] But given the fact that states protect heterosexual parents across the country, it would only be fair to provide consistent protections for all parents, which include same-sex parents of the LGBT community. To alleviate this discrepancy, all fifty states should recognize de facto parents by adopting a model uniform statue.[202] The model uniform statute will grant nonbiological/de facto parents standing to petition for custody and visitation.[203] Furthermore, the statute is uniquely designed to guide states in determining what constitutes a de facto parent by assessing five factors, eliminating confusion across the country.[204] Additionally, the proposed factors set a strict burden of proof to preclude strangers from seeking standing.[205] The adoption of this statute will promote equal rights for all parents across the country, whether LGBT or heterosexual.[206] Finally, children can continue their relationship with their de facto parent, which contributes to their overall well-being.[207]

∼In memory of Professor J. Herbie DiFonzo for his invaluable help, knowledge, and inspiration throughout writing this Note∼

NOTES

1. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (2016).
2. *Id.*
3. *Id.* at 491.
4. *Id.* at 490.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. For the purposes of this Note, the story of Brooke and Elizabeth has been enhanced in the introduction.
11. *Brooke S.B.*, 61 N.E.3d 491 ("Under Domestic Relations Law § 70 as interpreted in Alison D. because, in the absence of a biological or adoptive connection to the child, petitioner was not a 'parent' within the meaning of the statute.").
12. *Id.*
13. *Id.* (explaining that Brooke was there for Elizabeth as her partner, from "prenatal doctor's appointments" to "the emergency room where she had a complication during the pregnancy").
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. N.Y. Dom. Rel. L. § 70 (a) (West 2018) ("Where a minor child is residing within this state, 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 for such time.").

28. *Brooke S.B.*, 61 N.E.3d 491 (explaining the case was appealed but, yet again, Brooke's argument was rejected where the appellate division affirmed).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 501 ("We conclude that a person who is not a biological or adoptive parent may obtain standing to petition for custody or visitation under Domestic Relations Law § 70 (a)…").

33. *Id.*

34. *Id.* at 491 ("We simply conclude where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child 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. Whether a partner without such an agreement can establish standing and if so, what factors a petitioner must establish to achieve standing based on equitable estoppel is a matter left for another day, upon a different record.").

35. *Id.*

36. *Id.*

37. *See infra* note 44.

38. *De Facto Parent Information (JV-295)*, Advokids, http://www.advokids.org/legal-tools/information-for-caregivers/de-facto-parent-information-jv-295-to-297 (last visited Sept. 20, 2016) (a de facto parent is a nonbiological person that established an emotional relationship with the child for several years and took on major responsibilities for the child, "fulfilling both the child's physical and psychological need for care and affection," behaving as a parent in fact).

39. Obergefell v. Hodges, 135 S. Ct. 2584 (2015) ("Under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples have a fundamental right to marry.").

40. Daphne Lofquist, *Same-Sex Couple Households, American Community Survey Briefs*, U.S. Census Bureau (Sept. 2011), https://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

41. *Id.*

42. *Id.*

43. *Id.* at 2.

44. These couples are referred to later in my Note. Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997); Holtzman v. Knott, 533 N.W.2d 419 (Wis. 1995); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); Jones v. Barlow, 154 P.3d 808 (Utah 2007).

45. Standing is, "a right of people to challenge the conduct of another person in a court." *What is Standing?*, Black's Law Dictionary, https://thelawdictionary.org/standing/ (last visited Sept. 20, 2016).

46. *See supra* note 44.

47. *See supra* note 36.

48. *De Facto Parenting Statutes*, Fam. Equality Council (2017), https://www.familyequality.org/get_informed/resources/equality_maps/de_facto_parenting_statutes/ (the states recognizing de facto parenting today are: Massachusetts, Delaware, Maryland, Kansas, Oklahoma, and New Mexico).

49. *Id.* (the twenty-four states include Montana, Oregon, California, Arizona, Texas, Washington, Nevada, Colorado, Nebraska, Minnesota, Arkansas, Wisconsin, Mississippi, North Carolina, South Carolina, Indiana, Ohio, Kentucky, West Virginia, Pennsylvania, Maine, Rhode Island, Connecticut, and New Jersey).

50. *Id.*

51. *Id.* (the fourteen states include Idaho, Wyoming, North Dakota, South Dakota, Missouri, Louisiana, Alabama, Georgia, Florida, Virginia, Hawaii, Alaska, New York, and New Hampshire).

52. *Id.* (the six states that do not recognize de facto parenting are Vermont, Michigan, Tennessee, Illinois, Iowa, and Utah).

53. *Id.*

54. *Parental Rights, Constitutional Right to Be a Parent*, MKG4583 (July 28, 2010, 7:32 PM), https://mkg4583.wordpress.com/2010/07/28/constitutional-right-to-be-a-parent/ ("The parent-child relationship is a liberty interest protected by the Due Process Clause of the 14th Amendment. … A parent's right to the custody of his or her children is an element of 'liberty' guaranteed by the 5th Amendment and the 14th Amendment of the United States Constitution.").

55. Joanna L. Grossman, *Midcourse Correction: Maryland Court Endorses De Facto Parentage Doctrine*, Verdict (Aug. 2, 2016), https://verdict.justia.com/2016/08/02/midcourse-correction-maryland-court-endorses-de-facto-parentage-doctrine.

56. For the purposes of this Note, I will be focusing on the states of New York, Wisconsin, Massachusetts, Utah, the District of Columiba, Delaware, and Maryland.

57. Christina Spiezia, *In the Courts: State Views on the Psychological-Parent and De Facto-Parent Doctrines*, 33 CHILD. LEGAL RTS J. 402, 404 (2013).

58. Alison and Virginia began their relationship in 1977 and moved in together in 1978. In 1980, "they decided to have a child and agreed that respondent would be artificially inseminated. Together, they planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing." Alison D. v. Virginia M., 77 N.Y.2d 651, 655 (1991).

59. *Id.* at 655.

60. *Id.*

61. Alison contributed to "all birthing expenses" and after their son was born, for two years Alison and Virginia financially supported and "jointly cared for and made decisions regarding the child." *Id.*

62. *Id.*

63. Alison and Virginia jointly owned the home. *Id.*

64. *Id.*

65. *Id.*

66. Alison and Virginia created a "visitation schedule" and Alison continued to see her son a few times a week. Alison continued to pay "major household expenses" and mortgage payments. Alison visited the child until 1986, "at which time respondent bought out petitioner's interest in the house and then began to restrict petitioner's visitation with the child. In 1987 petitioner moved to Ireland to pursue career opportunities, but continued her attempts to communicate with the child." Virginia then ended all contact between Alison and their son. *Id.*

67. *Id.*

68. Alison brought the case to the supreme court seeking visitation pursuant to Domestic Relations Law § 70 where the "[c]ourt dismissed the proceeding concluding that petitioner is not a parent under Domestic Relations Law § 70 and, given the concession that respondent is a fit parent, petitioner is not entitled to seek visitation pursuant to section 70. The Appellate Division affirmed." *Id.* at 656.

69. Alison claims that she was not the child's parent because she is not biologically related to him nor did she adopt him, but she "claims to have acted as a 'de facto' parent or that she should be viewed as a parent 'by estoppel.'" Moreover, she has standing. The court rejected this argument because Virginia who is the biological parent was a fit mother who has the "right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent." Allowing third parties to have standing would "impair" the parents' rights to control to custody over their child and the right to decide what the best interests of the child are. *Id.* at 656–57.

70. In *Titchenal v. Dexter*, the defendant had adopted a child but her partner did not do so and later when they split up, the plaintiff was not recognized as a de facto parent even though she was involved in the child's life. The Supreme Court of Vermont affirmed the trial court's decision, explaining that "absent statutory authority extending the family court's jurisdiction to adjudicate third-party visitation requests… legal parents retain the right to determine whether third-party visitation is in their children's best interest." Titchenal v. Dexter, 166 Vt. 373, 376 (Vt. 1997).

71. *Alison D.*, 77 N.Y.2d 651; Matter of Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016).

72. *Matter of Brooke S.B.*, 28 N.Y.3d at 1.

73. Elizabeth had previously obtained an order requiring that Brooke pay child support in which she alleged that Brooke was the parent to the child. This estopped Elizabeth from "arguing that petitioner was not a parent for purposes of visitation." *Id.*

74. Brooke argued for endorsement of the psychological-doctrine found in Holtzman v. Knott (*In re* H.S.H-K), 193 Wis. 2d 649 (Wis. 1995), later adopted in the State of Maryland in *Conover v. Conover*, 141 A.3d 31 (Md. 2016).

75. The court stated that "they reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered." Matter of Brooke S.B., 28 N.Y.3d at 10.

76. Alison D. v. Virginia M., 77 N.Y.2d 651, 655 (1991); Holtzman v. Knott (*In re* H.S.H-K), 193 Wis. 2d 649, 659 (Wis. 1995).

77. Holtzman and Knott were in a relationship for over ten years. They met in 1983 and began to live together eight months later in a home they both purchased in Boston. In 1984 they had a private ceremony where they celebrated their commitment to each other by exchanging vows and rings. They then decided to start a family together. *Holtzman*, 193 Wis. 2d at 659.

78. *Id.*

79. During the marriage, the parities attended doctor visits and took childbirth classes together before the child was born in 1988. Holtzman was there for the birth of the child and took off work to help Knott with the child. *Id.* at 660.

80. The parties selected the name for the child together using both of their names. From 1998 until 1993 Holtzman provided "primary financial support" and they shared the primary responsibilities. The family went on outings and celebrated holidays together. Holtzman "devoted herself" to the child. *Id.*

81. *Id.*

82. In 1993, Knott moved out of the house with their child. Holtzman attempted to spend time with the child as much as Knott would allow. In 1993, Knott obtained a restraining order against Holtzman and at a hearing Knott dismissed the petition and Holtzman agreed to end all contact with her and the child. *Id.* at 661.

83. *Id.*

84. *Id.*

85. *Id.* at 683.

86. *Id.* at 658.

87. *Id.*

88. "(1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature." *Id.* at 694–95.

89. *Id.* at 699.

90. E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999).

91. *Id.* at 889.

92. *Id.* at 888.

93. Even before the defendant was artificially inseminated, both parties "attended workshops to learn about artificial insemination and parenting issues" and plaintiff was engaged in all medical aspects of the process. In 1995 when defendant gave birth, plaintiff cut the umbilical cord and stayed with plaintiff overnight. The hospital treated plaintiff like a parent and both parties were named as parents when the child was given a last name consisting of both of their last names. *Id.* at 888–89.

94. The contract also planned for separation and expressed that plaintiff would "retain her parental status" even if they separated. *Id.* at 889.

95. *Id.*

96. *Id.*

97. Temporary visitation was vacated on appeal. *Id.*

98. Plaintiff petitioned for visitation pursuant to Mass. Gen. Law Ch. 211, § 3. *Id.* at 888.

99. "The court held that plaintiff acted, in all respects, as a de facto parent, and participated in the birthing process, choosing the child's last name, signing a co-parenting agreement, providing financial support, and caring for the child." *Id.*

100. The standard referred to is the "best interests of the child" standard. *Id.* at 890.

101. *Id.*

102. In this case, the judge stressed the role of the plaintiff as a parent to the child and considered the "nontraditional family." *Id.* at 891.

103. *Id.*

104. Jones v. Barlow, 154 P.3d 808 (Utah 2007).

105. *Id.* at 810.

106. In 2000, when the parties decided that Barlow would be artificially inseminated, they also planned that Jones would bear the next child later. They both selected a sperm donor to start the process. *Id.*

107. When Barlow gave birth to a girl, both cared for the child during the first two years of her life and in 2002 the couple obtained an order granting Barlow and Jones co-guardians hip of their daughter. *Id.*

108. Barlow also sought to remove Jones as the child's guardian and the district court granted the petition. *Id.*

109. Jones claimed that she was "claiming that she had standing under the common-law doctrine of in loco parentis." *Id.*

110. The district court held that Jones was "in loco parentis" and ordered her to pay child support, as well, then Barlow appealed. *Id.* at 811.

111. The supreme court held that the common-law doctrine of in loco parentis "did not independently grant standing to seek visitation against the wishes of a fit legal parent" and declined grant standing by means of the psychological-parent doctrine or to recognize Jones as a de facto parent. *Id.* at 810.

112. D.C. Code § 16-831.01 (2001).

113. Jones v. Barlow, 154 P.3d 808 (Utah 2007).

114. D.C. Code §§ 16-831.01(3) – (4) (2001).

115. *Id.* §16-831.01(1).

116. The individual must have "[l]ived with the child in the same household at the time of the child's birth or adoption by the child's parent." *Id.* §16-831.01(1)(A).

117. The individual must have "[l]ived with the child in the same household for at least 10 of the 12 months immediately preceding the filing of the complaint…[and] [h]as formed a strong emotional bond with the child with the encouragement and intent of the child's parent that a parent-child relationship…" *Id.* §16-831.01(1)(B).

118. For both situations, the individual must have "taken on full and permanent responsibilities as the child's parent; and Has held himself or herself out as the child's parent with the agreement of the child's parent…" *Id.* §16-831.01(1)(A)-(B).

119. In 2009, the State of Delaware passed a statute granting de facto parents standing. The Family Court must establish three factors, that the individual, "(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 … 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." 77 DEL. LAWS c. 97 §§1–3 (2009); 13 DEL. CODE ANN. tit. 13, §8-201 (2006).

120. When a LGBT parent elects not to adopt the child of the relationship, the parent then takes the legal risk of losing their child. The child is cut off from someone who cared for them as a parent. Jennifer Chrisler et al., *Securing Legal Ties for Children Living in LGBT Families Lack of Recognition Puts Kids' Well-Being at Risk*, CTR. AM. PROGRESS (July 17, 2012, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2012/07/17/11855/securing-legal-ties-for-children-living-in-lgbt-families/.

121. *Measuring Same-Sex Couples, Sexual Orientation, and Gender Identity on Census Bureau and Federal Surveys*, U.S. CENSUS BUREAU (Sept. 15, 2016), at 16, https://www.census.gov/hhes/samesex/files/FinalPresentation.pdf.

122. "[G]ay couples were more likely to get married to combine incomes and resources; lesbians tended to use marriage as a stepping stool towards creating a family…. Having kids is especially expensive for gay men, who need to find an egg and a gestational carrier—a problem lesbian couples don't have." Tanya Basu, *Gays and Lesbians Have Different Reasons to Get Married, Study Says*, TIME (July 8, 2015), http://time.com/3946541/same-sex-gay-lesbian-marriage/.

123. Furthermore, fifteen states outright allow same-sex couples to petition for second-parent adoption. Utah prohibits unmarried couples from adopting altogether. Michigan, Mississippi, North Dakota, and Virginia allow state child welfare agencies to deny adoption in general, which allows same-sex couples to be denied. Texas and Nebraska ban same-sex couples from fostering altogether, despite the U.S. Supreme Court decision in *Obergefell v. Hodges. Joint Adoption Laws*, FAM. EQUALITY COUNCIL, http://www.familyequality.org/get_informed/equality_maps/joint_adoption_laws/ (last visited Mar. 19, 2018).

124. *Id.*

125. *LGBT Adoption Facts*, LIFELONG ADOPTIONS, http://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-facts (last visited Mar. 19, 2018).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. "Of the 594,000 same-sex couple households in the United States, 115,000 have children." *LGBT Adoption Statistics*, LIFELONG ADOPTIONS, https://www.lifelongadoptions.com/lgbt-adoption/lgbt-adoption-statistics (last visited Mar. 19, 2018).

131. Alison D. v. Virginia M., 77 N.Y.2d 651 (1991); Titchenal v. Dexter, 166 Vt. 373, 376 (Vt. 1997); Holtzman v. Knott (In re H.S.H-K), 193 Wis. 2d 649 (Wis. 1995); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); Jones v. Barlow, 154 P.3d 808 (Utah 2007). D.C. CODE §16-831.01 (2001); 77 DEL. LAWS c. 97 §§1–3 (2009); 13 DEL. CODE ANN. tit. 13, §8-201 (2006).

132. De facto parents are treated unfairly by law because they do not have standing to seek custody or visitation. *Joint Adoption Laws, supra* note 123.

133. *See* model uniform statute *infra* section V.A.

134. The model uniform statute is a proposal for the purposes of this Note.

135. The proposed factor of a preconception agreement is adopted from the standard established in the New York Court of Appeals case that states: "where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child 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." Matter of Brooke S.B. v Elizabeth A.C.C., 28 N.Y.3d 1, 28 (2016). D.C. CODE §16-831.01(1)(A)-(B) also addresses the preconception agreement, which requires the de fact parent to hold "himself or herself out as the child's parent with the agreement of the child's parent…" *See supra* note 104.

136. The proposed model uniform statute deems agreements to raise a child together after birth valid because there may be situations where a partner provides evidence that satisfies all other elements of the statute except for a preconception agreement. *See supra* note 103; *see also* hypothetical *infra* note 148.

137. The proposed factor of establishing a parent-like relationship is adopted from the four-factor test established in *Holtzman v. Knott. See supra* note 75.

138. This proposed factor is adopted from elements two and four in *Holtzman v. Knott* and is also adopted from D.C. CODE § 16-831.01(1), which addresses the requirement that the de facto parent must have lived with the child for a certain period whether they were present when the child was born of afterwards. Holtzman v. Knott (*In re* H.S.H-K), 193 Wis. 2d 649 (Wis. 1995); *see supra* notes 102 & 103.

139. This proposed factor is adopted from the fourth element of four-factor test established in *Holtzman v. Knott* and later adopted in Maryland, which provides that the de facto must show that they have a "bonded, dependent relationship parental in nature" with the child. Holtzman v. Knott (*In re* H.S.H-K), 193 Wis. 2d 649 (Wis. 1995); Conover v. Conover, 141 A.3d 31 (Md. 2016).

140. Providing evidence that the de facto parent took on major responsibilities for the child is required in the tests and statutes set out in Wisconsin, Delaware, and the District of Columbia. *Holtzman*, 193 Wis. 2d 649; D.C. CODE § 16-831.01 (1)(A)-(B); DEL. LAWS c. 97 §§ 1–3 (2009); 13 DEL. CODE ANN. tit. 13, § 8-201 (2006).

141. Evidence of a positive nature of the overall relationship between the de facto parent and child should be required because this factor takes the child's interests into consideration along with the de facto parent's efforts. This factor is adopted from the story of Brooke and Elizabeth because after the couple split up, Brooke still had a continued "longstanding parental

relationship" with the child and made effort to spend time with the baby thereafter. Matter of Brooke S.B. v Elizabeth A.C.C., 28 N.Y.3d 1, 15 (2016).

142. *See* model uniform statute *supra* section V.A.

143. Precluding strangers from seeking standing is essential in creation of this statute because often "strangers" will claim they are de facto parents when they are not. The proposed five rigid factors of the statute work together to preclude strangers from seeking standing. *See supra* notes 121–126 and accompanying cases.

144. *See* states cited *supra* note 40–43; *see also* Parental Rights, *supra* note 54.

145. "[D]ivorce, particularly with often-attendant drops in income, parental involvement, and access to community resources, diminishes children's chances for wellbeing." Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent. What Hurts, What Helps*, ERIC (1994), https://eric.ed.gov/?id=ed375224.

146. The proposed five rigid factors of the statute work together to preclude strangers from seeking standing. *See supra* notes 121–26 and accompanying cases.

147. The following hypotheticals were created to analyze the effectiveness of the proposed model uniform statute for the purposes of this Note.

148. This is a hypothetical scenario created for this Note. The scenario was inspired by the Connecticut case of *Temple v. Meyer*, where the boyfriend/plaintiff lived with the girlfriend/defendant for two years. They then separated and got back together and a month later the defendant found out that she was pregnant and told plaintiff it was his child even though she doubted it. When the child was born, the mother listed the boyfriend as the father, gave the child his last name, and he took care of the child for a year. When the couple separated, the mother began to live with Scott Barton; the plaintiff continued to visit the child and sought custody as well. The mother married Barton a year later and a blood test of the child revealed that the plaintiff was not the father, but he still sought visitation because he bonded with the child. The court ultimately held that Barton took over the "role of a psychological father," also known as de facto parent, because he achieved "a relational status to [the child] never achieved by [the plaintiff], that of step-father" and the child even called Barton "Papa." The court went on to point out that "[f]or two competing father figures to become a permanent reality in the child's life would appear to be well beyond the level of the child's comprehension at this time." Furthermore, the mother and Barton were looking forward to Barton's adoption of the child, which further proved his commitment as a father and the mother's consent. *Temple v. Meyer*, 544 A.2d 629 (Conn. 1988).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Lauren's situation is similar to the plaintiff/boyfriend's situation in *Temple v. Meyer*, where he did not satisfy the "role of a psychological father" and it was not in the best interests of the child for the boyfriend to continue to remain in the child's life where the child has a father figure like Barton already. *See supra* note 133.

157. This may help satisfy elements two through four of the model uniform proposed statute because Lauren took care of Kim for a year, established a relationship with her, and any further evidence Lauren can provide in this respect. *See* the model uniform statute *supra* section V.A.

158. Lauren will fail to satisfy element one of the model uniform statute because there was no preconception agreement nor was there any agreement between Betty and Lauren that they would raise Kim together. *See id.*

159. If Sam ever petitions for custody as a de facto parent, she may have standing because her situation is analogous to Scott Barton's situation in *Temple v. Meyer. See supra* note 133. Furthermore, Sam, like Barton, established an emotional bond with Kim, took care of her, agreed with Lauren to raise her, and even had intentions to adopt the child, which will most likely satisfy all five proposed elements of the statute. This scenario further establishes the need to deem agreements to raise the child after birth to be valid because here Betty gave full consent to Sam and they expressly established that they would raise Kim together as a couple. *See* model uniform statute *supra* section V.A.

160. Tennessee is a state that does not recognize de facto parents. *Joint Adoption Laws, supra* note 123.

161. This is a hypothetical scenario created for this Note. The scenario was inspired by the Utah case of *Jones v. Barlow. See supra* notes 106–11. Unfortunately, the Utah Supreme Court reversed the lower-court decision, holding that the common-law doctrine of in loco parentis "did not independently grant standing to seek visitation against the wished if a fit legal parent" and declined grant standing by means of the psychological-parent doctrine or to recognize Jones as a de facto parent. Jones v. Barlow, 154 P.3d 808 (Utah 2007).

162. *Jones*, 154 P.3d 808.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Joint Adoption Laws, supra* note 123.

171. In Scenario 2, Sasha and Janice had an express preconception agreement, which satisfies the first proposed factor one of the model uniform statute. Next, Sasha lived with baby Stephen for two years, which will most likely satisfy the second proposed factor, which requires her to devote a substantial amount of time to the child's life and to live with the child. Furthermore, Sasha will most likely be able to satisfy the third proposed factor, which requires an establishment of an emotional bond, because Stephen calls her "Mama," she is usually the one to soothe him when he is upset and crying, and she attent mommy-and-me classes with him after the couple separated. Moreover, Sasha will most likely be able to satisfy the fourth factor, which requires her to prove commitment to Stephen in respect to major day-to-day responsibilities, because she raised Stephen with Janice for two years and shared all responsibilities with her. Finally, Sasha will most likely satisfy the fifth proposed factor, which requires her to prove a positive overall relationship with Stephen, because based on the evidence she will likely provide from the previous four factors, the nature of her overall relationship with Stephen seems to be positive and loving hence giving her standing to seek custody and visitation as his de facto parent. *See* model uniform statute *supra* section V.A.

172. McLanahan & Sandefur, *supra* note 145.

173. *Id.*

174. For example, "[c]ompared with children in married-couple families, children raised in single-parent households are more likely to drop out of school, to have or cause a teen pregnancy and to experience a divorce in adulthood." Kids Count Data Center, *Children In Single-Parent Families*, Nat'l Kids Count (2017), http://www.aecf.org/m/resourcedoc/aecf-the2016kidscountdatabook-2016.pdf.

175. Paula Fomby & Andrew J. Cherlin, *Family Instability and Child Well-Being*, Am. Sociol. Rev. 181, 181-204 (2007).

176. The well-being of children raised with two parents is higher, "with respect to aggregate measures of emotional health, behavioral adjustment, economic well-being, and educational achievement." Rebecca L. Kourlis et al., *Iaals' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 Fam. Ct. Rev. 351, 358 (2013).

177. *Id.* at 358.

178. Andrew I. Schepard, Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families 37 (2004).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Debunking Myths about LGBT Parents*, Adoptions from the Heart, https://afth.org/debunking-myths-about-lgbt-parents/ (last visited Mar. 19, 2018).

183. "Results revealed no significant differences between the 2 groups of children, who also compared favorably with the standardization samples for the instruments used. In addition, no significant differences were found between dyadic adjustment of lesbian and heterosexual couples. Only in the area of parenting did the 2 groups of couples differ; lesbian couples exhibited more parenting awareness skills than did heterosexual couples." David K. Flaks et al., *Lesbians Choosing Motherhood: A Comparative Study of Lesbian and Heterosexual Parents and Their Children*, 31 Dev. Psychol. 105, 112 (1995).

184. Alicia Crowl et al., *A Meta-Analysis of Developmental Outcomes for Children of Same-Sex and Heterosexual Parents*, 4 J. GLBT Fam. Studies 385 (2008).

185. The six factors tested consisted of, "(a) parent and child relationship quality; (b) children's cognitive development; (c) children's gender role behavior; (d) children's gender identity; (e) children's sexual preference; and (f) children's social and emotional development." *Id.* at 390.

186. *Id.* at 396.

187. *Id.* at 396–98.

188. *Debunking Myths about LGBT Parents, supra* note 182.

189. *Id.*

190. *Id.*

191. *Id.*

192. "Custody refers to who has legal decision-making authority in the life of a child. The decision-making authority is usually in regard to major life issues such as religion, education, health and activities." Gary Direnfeld, *What is Custody?*, Interaction Consultants (2015), http://www.yoursocialworker.com/s-articles/Custody.pdf

193. *Id.*

194. *See* model uniform statute *supra* section V.A.

195. *Id.*

196. *Id.*

197. "[T]erms" like "de facto parent" and "equitable parent," "are not seeking to inject a stranger into the natural family." J. Herbie DiFonzo & Ruth C. Stern, *Special Issue Family Court Review's Fiftieth Anniversary: Looking into the Future: Breaking the Mold and Picking Up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 Fam. Ct. Rev. 104, 113 (2013).

198. *Id.*

199. *See* model uniform statute *supra* section V.A.

200. "The nature of parenthood has not changed. But the identity of the parents is now more than ever a contested terrain. As the Colorado, Supreme Court noted, 'Parenthood in our complex society comprises much more than biological ties, and litigants increasingly are asking courts to address issues that involve delicate balances between traditional expectations and current realities.' When these modern families experience legal turmoil, they must turn to judges who have little or no statutory guidance in dealing with these new domestic configurations. These clashes over parentage, custody, and visitation often present novel and knotty issues for the courts because society is evolving faster than legislatures can—or choose to—keep up." DiFonzo & Stern, *supra* note 197, at 106–07.

201. *Id.*

202. *See* model uniform statute *supra* section V.A.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. McLanahan & Sandefur, *supra* note 145.

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