GOING BEFORE SOLOMON WITH A SPECIAL REQUEST: THE NEED FOR CLEARER LEGAL RECOGNITION OF SHARED CUSTODY RIGHTS BETWEEN PARENTS AND NONBIOLOGICAL PARENTS

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I. INTRODUCTION

Today, it is a fairly common occurrence for nonbiological parents[1] to rear children.[2] Both society and the legal system have gladly accepted this reality in some contexts,[3] while offering significant resistance to it in

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[1] Parts I and II of this Comment use the term "nonbiological parent" broadly to refer to a wide variety of situations, including those involving adoptive parents and even individuals who are not legally recognized as parents. For the sake of brevity, the use of the term "nonbiological parent" continues in Parts III, IV, and V, but in those sections, the term primarily references individuals who are not legally recognized as parents of the children they rear (i.e., not biological or adoptive parents).

[2] The number of children in the United States raised by grandparents, stepparents, and their parents' nonmarital partners reaches the millions, even without including adopted children and children in foster care. *See* Am. Acad. of Pediatrics, *Family Pediatrics: Report of the Task Force on the Family*, 111 PEDIATRICS 1541, 1550–51 (2003). Same-sex couples in the United States raise 250,000 children. R. BRADLEY SEARS ET AL., SAME-SEX COUPLES AND SAME-SEX COUPLES RAISING CHILDREN IN THE UNITED STATES 10 (Williams Inst. ed., Sept. 2005). Of those 250,000 children, 11,950 are raised by same-sex couples in Ohio. ADAM P. ROMERO ET AL., OHIO CENSUS SNAPSHOT 2 (Williams Inst. ed., Jan. 2008), *available at* http://williamsinstitute.law.ucla.edu/demographics/ohio/ohio-census-snapshot-2000/.

[3] *See, e.g.*, Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). The purpose of the law is "[t]o promote the adoption of children in foster care." 111 Stat. at 2115. *See also* Alex Stuckey, *Finally, Home for Good*, COLUMBUS DISPATCH, Nov. 17, 2011, at A1; *Kinship Support*, PUB. CHILD. SERVICES ASS'N OHIO, http://www.pcsao.org/KinshipSupports.htm (last visited Nov. 11, 2012) (detailing the fiscal supports in place that promote kinship care, a situation

(*continued*)

others.[4] For example, policymakers generally not only accept, but actively seek to celebrate adoptions.[5] However, these celebrations may never occur in certain households despite their hopes of obtaining legal recognition of their relationships.[6] Adoption is simply not an option for many because state laws do not uniformly permit parents to use the adoption process to share parental rights with their nonmarital partners.[7]

Divergence in the approaches and outcomes associated with cases involving nonbiological parents indicates that issues related to the best interests of children are being trumped by less relevant issues.[8] Courts

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where family members and close family friends raise children whose parents are unable or unavailable to care for them).

[4] *See* Adar v. Smith, 639 F.3d 146, 161 (5th Cir. 2011) (recognizing Louisiana's right to refuse enforcement of a valid New York adoption decree issued to an unmarried couple); Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 431–32 (Ark. 2011) (detailing that Arkansas voters approved a ballot initiative to prohibit individuals from adopting or fostering children if they were cohabitating with another individual outside of marriage); *Adoption and Parenting*, LAMBDA LEGAL, http://www.lambdalegal.org/issues/adoption-and-parenting (last visited Nov. 11, 2012) (stating that an unmarried parent's partner has no realistic possibility of becoming a legally recognized co-parent in some states); Heather Catallo, *Same-sex Couple Fights to Change Adoption Laws so Their Kids Have Same Rights as Other Children*, ABC ACTION NEWS WXYZ (Jan. 22, 2012), http://www.wxyz.com/dpp/news/a-same-sex-couple-fight-to-change-adoption-laws-so-their-kids-have-the-same-rights-as-other-children ("Imagine not being allowed to adopt a child you had raised since birth. That is what some same-sex partners are facing.").

[5] *See* Adoption and Safe Families Act of 1997, § 1, 111 Stat. at 2115; Press Release, White House, Office of the Press Sec'y, Presidential Proclamation—National Adoption Month, 2012 (Nov. 1, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/11/01/presidential-proclamation-national-adoption-month-2012 ("During National Adoption Month, we . . . celebrate the bond that unites adoptive parents with their sons and daughters, ...").

[6] *See* Rita Price, *Gays Dismayed by Adoption-law Issues*, COLUMBUS DISPATCH, May 27, 2012, at A1 (reporting that same-sex couples often adopt from foster care, but are unable to jointly adopt in some states); *Adoption and Parenting*, *supra* note 4.

[7] *See* S.J.L.S. v. T.L.S., 265 S.W.3d 804, 819–20 (Ky. Ct. App. 2008); *In re* Adoption of Luke, 640 N.W.2d 374, 378 (Neb. 2002); Boseman v. Jarrell, 704 S.E.2d 494, 501 (N.C. 2010); *In re* Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998); *In re* Angel Lace M., 516 N.W.2d 678, 683 (Wis. 1994); Jason N.W. Plowman, *When Second-Parent Adoption is the Second-Best Option: The Case for Legislative Reform as the Next Best Option for Same-Sex Couples in the Face of Continued Marriage Inequality*, 11 SCHOLAR 57, 70–72 (2008).

[8] Plowman, *supra* note 7, at 71.

have not been entirely unsympathetic.[9] In deciding legal issues affecting children raised by nonbiological parents, courts have acknowledged the fact that the legal system applies varying approaches to very similar factual scenarios.[10] Moreover, when finding that the legislature has not clearly provided for the situation in which an unmarried parent decides to share parental rights with a nonbiological parent, some courts have even provided a means for parties to obtain legal recognition of their parenting arrangements.[11] Nevertheless, divergence continues even in this narrower subset of child and family law.[12]

Legislators and judges bear a moral obligation to ensure that the well-being of children raised by nonbiological parents never becomes buried beneath less important issues arising in this context.[13] They do not share the general populace's luxury of being able to simply affirm principles and personal convictions that may have little or no practical application to the

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[9] *See, e.g.*, *In re* Bonfield, 780 N.E.2d 241, 247–48 (Ohio 2002). The Supreme Court of Ohio declined to permit an unmarried parent and her partner to use a legislative mechanism for shared parenting agreements, but the court permitted the parties to enter into a shared custody agreement. *Id.* The court "d[id] not intend to discredit [the parties'] goal of providing a stable environment for the children's growth." *Id.*

[10] *Id.* at 246–49. After discussing other states' substitutes for stepparent adoption available to unmarried couples, such as "second parent adoption," the court declined to adopt an alternative test used in states like New Jersey and Wisconsin. *Id.* Instead, the court announced a new standard of its own. *Id. See also S.J.L.S.*, 265 S.W.3d at 816 (declining to treat a mother's nonmarital partner as a stepparent to permit adoption of the child without terminating the mother's parental rights).

[11] *See Bonfield*, 780 N.E.2d at 243–44, 246–49 (discussing various tests and then announcing a different standard for Ohio courts to apply when parent seeks shared custody arrangement with nonparent).

[12] *Id.*

[13] *See* V.C. v. M.J.B., 748 A.2d 539, 554 (N.J. 2000). When a parent alters the child's life by "essentially giving him or her another parent . . . . It is the child's best interest that is preeminent as it would be if two legal parents were in a conflict over custody and visitation." *Id. See also Bonfield*, 780 N.E.2d at 249 ("It is well settled under Ohio law that a juvenile court may adjudicate custodial claims brought by the persons considered nonparents at law."); Schmehl v. Wegelin, 927 A.2d 183, 197 (Pa. 2007) (States have "the power, cloaked in the doctrine of *parens patriae*, to determine in divorce proceedings how, in the best interests of the child, custody should be allocated."); Holtzman v. Knott, 533 N.W.2d 419, 431 (Wis. 1995) ("[T]he legislature has clearly and repeatedly expressed the policy that courts are to act in the best interest of children.").

needs of unique litigants and the children affected.[14] When a child is disadvantaged due to being raised in a nontraditional family setting, the average person may express an opinion and then simply go on about that person's own business.[15] If a situation takes a turn for the worse,[16] an ordinary citizen might ask, "Why didn't someone do something to prevent this from happening?" However, when the courts cite legislative inaction[17] and legislators attempt to shift the blame to the courts,[18] a dramatic irony[19] results: the key players fail to understand the importance of their own actions (and inactions).[20]

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[14] *See, e.g.*, *In re* Mullen, 953 N.E.2d 302, 309–10 (Ohio 2011) (O'Connor, J., dissenting). In her dissent, Justice O'Connor asserted, "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." *Id.* (quoting N.A.H. v. S.L.S., 9 P.3d 354, 359 (Colo. 2000)).

[15] Of course, voters may take matters into their own hands, but this does not always result in well-thought-out decisions. *See, e.g.*, Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 431–32 (Ark. 2011). In *Cole*, Arkansas voters approved a ballot initiative to prohibit individuals from adopting or fostering children if they cohabitate with another individual outside of marriage. *Id.* The court pointed out that "several of the State's and [the initiative's sponsor's] own witnesses testified that they did not believe Act 1 promoted the welfare interests of the child." *Id.* at 440–41.

[16] *See, e.g.*, Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 341 (2002) (describing how thirteen-year-old Micah was on his way to becoming a foster child after his biological mother died tragically, despite telling authorities he had a second mother).

[17] *See* discussion *infra* Part II (discussing strict constructionist approaches to adoption law).

[18] Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH L. REV. 663, 664 (2004).

[19] In literature, one type of dramatic irony occurs when "there is a marked contrast between what the character understands about his acts and what the play demonstrates about them." THE PRINCETON HANDBOOK OF POETIC TERMS 109 (Alex Preminger et al. eds., 1986). A dramatic irony also exists when "there is an incongruity between what is expected and what occurs." 6 THE NEW ENCYCLOPEDIA BRITANNICA 390 (15th ed. 2010).

[20] Not all judges are comfortable with this outcome. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005) ("[S]imply because a statute fails to speak to a specific situation . . . does not . . . operate to preclude the availability of potential redress. This is especially true when the rights and interests of those least able to speak for themselves are concerned.").

A statutory solution is necessary to ensure that the law focuses on what is in children's best interests. While second-parent adoption legislation is the best option for all states, the reality is that many states are unwilling to call an unmarried parent's partner a "parent" or "co-parent" at this time.[21] Nevertheless, this reluctance does not justify subjecting children to the unpredictability of judicial discretion and the political process while difficult religious, philosophical, and moral issues are being debated. Therefore, this Comment proposes legislation based on some of the more positive trends in case law regarding shared custody between parents and nonbiological parents.[22]

Although many states have taken steps to move toward a compromise in the midst of these debates,[23] improvements have been only minor and unpredictable in a number of other states.[24] This Comment focuses primarily on the latter states—Kentucky, North Carolina, Ohio, and Wisconsin—in which the law is unpredictable for certain families because it either clearly excludes the families from or does not give the families access to the adoption process.[25]

Part II of this Comment examines the history of the approaches applied in Kentucky, North Carolina, Ohio, and Wisconsin. Part III highlights more recent developments in these states to better clarify the present state of the law. Part IV analyzes the approaches in light of core children and family law principles. Part V concludes by describing what legislative reform is necessary to take advantage of good things the courts have done in this area of the law and to eliminate the current unpredictability and lack of clarity.

II. BACKGROUND

While debates about nontraditional families have yet to be resolved, state courts have used a variety of different legal theories to offer at least some legal security to children being raised jointly by a parent and a

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[21] *See, e.g.*, *In re* Bonfield, 780 N.E.2d 241, 247 (Ohio 2002) (permitting shared custody grant to parent and nonbiological parent, but finding it inappropriate to broaden statutory definition of "parent"); Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995) (test involves a "parent-like relationship"). *But see* V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (using the term "psychological parent").

[22] *See* discussion *infra* Part V.

[23] *See* discussion *infra* Part II.B.

[24] *See* discussion *infra* Part II.

[25] *See* discussion *infra* Part II.

nonbiological parent.[26] Courts have not always applied these theories consistently,[27] and they have not always given petitioning parties the exact rulings that the parties have requested.[28] Alternatively, courts are reluctant to dismiss completely a parent's attempts to share custody rights with a nonbiological parent.[29] After all, the purpose is to provide the children with more stability and security.[30] This reluctance is in sharp contrast to stricter, more traditional judicial views toward parents agreeing to transfer custody rights to nonbiological parents.[31]

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[26] In *Bonfield*, the Supreme Court of Ohio described "second parent adoption," a new theory, rather than applying either "in loco parentis" or "psychological parent" tests. 780 N.E.2d at 243–48. Ultimately, the court found that a biological mother could still enter into a valid shared custody agreement with her same-sex partner to provide stability for the children. *Id.* *See also V.C.*, 748 A.2d at 551 (discussing the "de facto parent" or psychological parent test); Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to Be a Parent Over the Objections of the Child's Biological Parent*, 21 REGENT U. L. REV. 1, 18–24 (2009) (discussing the different parentage tests that courts have applied in various jurisdictions). Note that this Comment now uses the term "nonbiological parent" to refer to individuals who are neither biological nor adoptive parents of the children they rear.

[27] *E.g.*, *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005). In *L.B.*, the Supreme Court of Washington noted that courts in multiple jurisdictions "interchangeably and inconsistently apply the related yet distinct terms of *in loco parentis*, psychological parent, and *de facto* parent." *Id.* at 167 n.7. Because the tests are very similar in definition, it is not surprising that courts have applied them interchangeably. "In loco parentis" status applies to someone standing "in the place of a parent"; "psychological parent" status applies to someone who has a parent-like relationship with a child; and "de facto parent" status applies to someone who is a "parent in fact," as opposed to a "legally recognized parent." *Id.*

[28] *Bonfield*, 780 N.E.2d at 247.

[29] *Id.*

[30] *Id.*

[31] *See* Stickles v. Reichardt, 234 N.W. 728, 730 (Wis. 1931) ("[T]he great weight of authority is to the effect that, in the absence of a statute, contracts of a parent by which a parent attempts to transfer permanently the custody of his child to another are invalid as contrary to public policy.").

A. Traditional View: Agreements Transferring Custody to Nonbiological Parents Violated Public Policy

In the past, courts often considered parents' agreements to transfer custody to nonbiological parents to be in contravention of public policy.[32] Even courts that were willing to uphold these agreements cautioned that parents might be deemed unfit for contracting away their parental rights.[33] One rationale against agreements to transfer parental rights was that the public has an interest in protecting the relationship between parents and their children.[34] Furthermore, courts expressed concern that children might be viewed as mere property if parents could transfer custody rights.[35]

B. Modern View: Courts Now Look More Favorably on Parents' Agreements to Share Parental Rights with Nonbiological Parents

In 1995, the Supreme Court of Wisconsin issued a decision reflecting a clear change in its thinking.[36] In *Holtzman v. Knott*, the court reasoned that a prior Supreme Court of Wisconsin opinion incorrectly analyzed public policy concerns by failing to consider a statute permitting parents to share parental rights and responsibilities with third parties.[37] The court explained that public policy requires courts to "give effect to a biological or adoptive parent's sharing of parental rights and responsibilities with another adult."[38] Further, the court did not find it necessary to characterize the biological parent's actions as wrongful.[39] The court held that even when a parent's fitness and ability to parent have not been questioned,[40] another adult can still obtain visitation rights because the adult has a "parent-like

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[32] *E.g.*, *In re* Interest of Z.J.H., 471 N.W.2d 202, 211–12 (Wis. 1991) (quoting *Stickles*, 234 N.W. at 730). *See also* Leach v. Leach, 296 P.2d 1078, 1080 (Kan. 1956) ("[C]hildren are not subject to gift as is property."); Commonwealth *ex rel.* Children's Aid Soc'y v. Gard, 66 A.2d 300, 304 (Pa. 1949) ("That a child cannot be made the subject of a contract with the same force and effect as if it were a mere chattel has long been established law.").

[33] *E.g.*, *In re* Perales, 369 N.E.2d 1047, 1052 (Ohio 1977).

[34] *E.g.*, *Z.J.H.*, 471 N.W.2d at 212.

[35] *E.g.*, *Gard*, 66 A.2d at 304.

[36] *See* Holtzman v. Knott, 533 N.W.2d 419, 434 (Wis. 1995) (overruling *Z.J.H.*, 471 N.W.2d 202 and relying on equitable power to grant visitation to a nonbiological parent based on the nonbiological parent's co-parenting agreement with the biological parent).

[37] *Id.*

[38] *Id.*

[39] *See id.* at 420–21.

[40] *Id.*

relationship" with the legal parent's child.[41] To demonstrate the existence of a "parent-like relationship," the nonbiological parent must show:

> (1) [T]hat 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.[42]

Similar to the change that occurred in Wisconsin, a public policy shift in Ohio occurred in 2002 when the Supreme Court of Ohio ruled on a same-sex couple's petition for shared parenting.[43] The court's ruling in *Bonfield* was not a complete victory for the couple. The court declined to adopt the Wisconsin Supreme Court's four-part test, reasoning that to accept it would "inappropriate[ly] . . . broaden the narrow class of persons who are statutorily defined as parents."[44] For the same reason, the court also refused to allow the same-sex couple to enter into a statutorily defined shared parenting agreement.[45] However, the ruling was still a victory for parents who wish to share custody with a nonbiological parent without being declared unfit.[46] The court held that a parent may agree to relinquish

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[41] *Id.* at 421.

[42] *Id.* (footnotes omitted).

[43] *See In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002); Elizabeth A. Embrey, *In Re Bonfield: Are We There Yet? The Ohio Supreme Court's Journey Establishing Adoption and Custody Laws in Ohio*, 32 CAP. U. L. REV. 207, 232 (2003) ("[T]he Ohio Supreme Court opened a new avenue for homosexual couples seeking to secure parental rights in one another's children: joint custody.").

[44] *Bonfield*, 780 N.E.2d at 247.

[45] *Id.*

[46] *Id.* at 249. The court held that while courts must find a parent to be unsuitable before awarding custody to a nonbiological parent in "an actual dispute between parties competing for custody," no finding of unfitness is required when the parent "voluntarily seeks to relinquish her right to sole custody . . . in favor of shared custodial rights" with a nonbiological parent. *Id.*

the right to sole custody in favor of shared custody with a nonbiological parent if the agreement is "in the best interests of the children."[47]

C. Courts Are Stopping Short of a Panacea

The public policy changes in states like Wisconsin and Ohio have not been total about-faces.[48] Although a nonbiological parent in Wisconsin may establish visitation rights under the test applied in *Holtzman*,[49] Wisconsin courts have not been so generous to nonbiological parents when the nonbiological parents seek to adopt the children of their partners to establish a more secure form of shared rights to the children.[50] Similarly, Kentucky and North Carolina courts have issued decisions declining to permit second-parent adoption.[51] Although the Supreme Court of Ohio has not decided the issue, *Bonfield* contains dicta indicating that second-parent adoption is not available in Ohio;[52] at least one Ohio appellate court has explicitly ruled against a second-parent adoption petition.[53]

1. Many Unmarried Couples Would Prefer Second-Parent Adoption Over Less Certain Alternatives[54]

A second-parent adoption involves an adoption petition filed by a parent's nonmarital partner.[55] The Supreme Court of Ohio has described second-parent adoption as "a process by which a partner in a cohabiting and nonmarital relationship may adopt his or her partner's biological or adoptive child, without requiring the parent to relinquish any parental rights."[56] States that permit second-parent adoption clearly recognize a

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[47] *Id.*

[48] *See, e.g.*, *In re* Angel Lace M., 516 N.W.2d 678, 680 (Wis. 1994) (holding that the petitioner could not adopt her nonmarital partner's child).

[49] Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995).

[50] *Angel Lace M.*, 516 N.W.2d at 680.

[51] *E.g.*, S.J.L.S. v. T.L.S., 265 S.W.3d 804, 819 (Ky. Ct. App. 2008); Boseman v. Jarrell, 704 S.E.2d 494, 501 (N.C. 2010); *see also In re* Adoption of Luke, 640 N.W.2d 374, 376 (Neb. 2002) (holding that a Nebraska statute was controlling and, according to the statute, a valid relinquishment by the biological parent was required); Plowman, *supra* note 7, at 70.

[52] *See* 780 N.E.2d at 246–48.

[53] *In re* Adoption of Doe, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998).

[54] *See, e.g.*, *Boseman*, 704 S.E.2d at 501 (voiding adoption where parties had successfully asked a trial court to make the nonbiological parent the child's legal adoptive parent without terminating the biological parent's relationship with the child).

[55] *Bonfield*, 780 N.E.2d at 244.

[56] *Id.*

change in public policy attitudes regarding parents transferring parental rights to third parties because in a second-parent adoption, the legal parent does not relinquish any rights.[57] Thus, there is no need to even consider whether the legal parent should be regarded as unfit for transferring rights, as no rights are being transferred.[58]

2. Some Courts Are Unwilling to Grant Second-Parent Adoption in the Absence of Clear Legislative Approval

While second-parent adoption offers the most security for a child whom is being raised jointly by an unmarried parent and a nonbiological parent,[59] second-parent adoption is not an option in many states.[60] Legislatures expressly authorize second-parent adoptions in only a few states.[61] Although many state courts have been willing to grant second-parent adoptions, even in the absence of clear legislative approval,[62] some courts have construed state adoption statutes more strictly.[63] These courts

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[57] *Id.*

[58] *But see In re* Perales, 369 N.E.2d 1047, 1052 (Ohio 1977) (holding that a finding of parental unsuitability must precede forfeiture of parental custody).

[59] *See Bonfield*, 780 N.E.2d at 244.

[60] *See In re* Adoption of Luke, 640 N.W.2d 374, 376 (Neb. 2002); *Bonfield*, 780 N.E.2d at 244; *In re* Angel Lace M., 516 N.W.2d 678, 683 (Wis. 1994).

[61] *See* COLO. REV. STAT. § 19–5–203(1)(d.5)(I) (2012); CONN. GEN. STAT. ANN. § 45a–724(a)(3) (West 2012); VT. STAT. ANN. tit. 15A, § 1–102(b) (2011). Some state statutes permit adoption by a natural or adoptive parent's domestic partner. *See* CAL. FAM. CODE § 297.5(d) (West 2012) (for registered domestic partners); NEV. REV. STAT. ANN. §§ 122A.200(d), 127.030 (LexisNexis 2012).

[62] *See In re* Hart, 806 A.2d 1179, 1185 (Del. Fam. Ct. 2001); *In re* L.S. and V.L., Nos. A-269-90, A-270-90, 1991 WL 219598, at *3–4 (D.C. Super. Ct. Fam. Div. Aug. 30, 1991); Wheeler v. Wheeler, 642 S.E.2d 103, 103–04 (Ga. 2007) (Carley, J., dissenting); *In re* K.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1995); *In re* Adoption of A.M., 930 N.E.2d 613, 621 (Ind. Ct. App. 2010); Schott v. Schott, 744 N.W.2d 85, 89 (Iowa 2008); Adoption of Tammy, 619 N.E.2d 315, 319 (Mass. 1993); *In re* Adoption of T.A.M., 791 N.W.2d 573, 576 (Minn. Ct. App. 2010); *In re* Adoption of Two Children by H.N.R., 666 A.2d, 535, 538 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, 660 N.E.2d 397, 398–400 (N.Y. 1995); *In re* Adoption of R.B.F., 803 A.2d 1195, 1201–02 (Pa. 2002).

[63] *See Adoption of Luke*, 640 N.W.2d at 378; Boseman v. Jarrell, 704 S.E.2d 494, 501 (N.C. 2010); *Angel Lace M.*, 516 N.W.2d at 682. *But cf.* CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW: THEORY, POLICY, AND PRACTICE 132 (2006) (stating that despite being the most common form of adoption, stepparent adoption is recognized *expressly* by only seventeen states).

typically articulate the principle that adoption law is entirely statutory.[64] Thus, they have refused to grant second-parent adoptions, reasoning that state statutes do not clearly permit them.[65]

3. *It Is Far from Clear How Courts Will Rule on Nonbiological Parents' Shared Custody Requests in States Where Second-Parent Adoption Is Unavailable*

The very same courts that have been unwilling to liberally interpret state adoption statutes have found creative ways to recognize alternatives to second-parent adoptions.[66] The alternatives are typically based on concepts of waiver or relinquishment, perhaps to address the relevant constitutional issues that arise, and they may permit parties to obtain court approval of custody agreements prior to disputes (at least in some states).[67] The primary flaw with the approaches used in the four states examined in this Comment is the lack of guidance given to litigants. When is it too soon to go to court? When is it too late? What kind of evidence is necessary to show that shared custody is warranted? Do the children have any say in the matter? How are the rights of the other biological parent affected?

III. RECENT DEVELOPMENTS

A. Emphasis on Responsible Behavior Is Lacking

A common theme in recent case law is the legal system's failure to encourage responsible conduct.[68] For example, a couple may be concerned

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[64] *E.g.*, *Boseman*, 704 S.E.2d at 498.

[65] *E.g.*, *id.* at 500.

[66] *E.g.*, *id.* at 497; Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995); s*ee also* V.C. v. M.J.B., 748 A.2d. 539, 551 (N.J. 2000) (discussing the de facto parent or psychological parent test); *In re* Bonfield, 780 N.E.2d 241, 245–46 (Ohio 2002) (discussing in loco parentis and psychological parent tests); Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to Be a Parent Over the Objections of the Child's Biological Parent*, 21 REGENT U. L. REV. 1, 18–24 (2009) (discussing the different parentage tests that courts have applied in various jurisdictions).

[67] *E.g.*, *In re* Mullen, 953 N.E.2d 302, 313 (Ohio 2011) (Pfeifer, J., dissenting) (citing *Bonfield*, 780 N.E.2d at 249).

[68] *See generally Adoption of Luke*, 640 N.W.2d at 378 (requiring relinquishment of biological parent's parental rights before adoption can take place); *In re* J.D.M., Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004 WL 2272063, at *2–3 (Ohio Ct. App. Oct. 11, 2004) (denying a shared parenting agreement for same sex partners despite

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about appearing before a court with a shared parenting agreement, fearing that the judge may disapprove of the couple's arrangement.[69] Some judges have arbitrarily refused to accept shared custody agreements from couples.[70] This is unfortunate because it means that courts may hear cases only when the parties can no longer agree on what is best for the children involved.[71]

To make matters worse, the courts have required parties to use unpredictable legal principles to govern their situations.[72] For instance, in a recent Ohio case, a parent agreed to allow a nonbiological parent to be her child's "co-parent in every way."[73] The parent even encouraged her child to call the nonbiological parent "Momma."[74] When the parent later changed her mind, the court declined to hold the parties to the agreement that they probably thought they had made to both be the child's parents forever.[75] Instead, the court framed the issue as whether the biological

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each partner expressly relinquishing any exclusive right to custody that either partner might have otherwise had).

[69] *Mullen*, 953 N.E.2d at 313 (Pfeifer, J., dissenting) (asserting that a juvenile court judge can determine the fate of a nonparent's future relationship with the child).

[70] *E.g.*, *J.D.M.*, 2004 WL 2272063, at *2–3. Here, the appellate court reversed the trial court's denial of the couple's shared custody petition. *Id.* The trial court reasoned that the "lack of a present controversy between [the] parties" was a barrier to their petition, and the trial court also ignored the apparent benefits that would flow to the child from having the parties enter into a shared custody agreement. *Id.* at *2.

[71] *See, e.g.*, Boseman v. Jarrell, 704 S.E.2d 494 (N.C. 2010). The court voided a second-parent adoption at the biological mother's request after the biological mother and her partner ended their relationship. *Id.* at 498–501. Nevertheless, the court upheld the trial court's joint custody award, finding that the mother had "acted inconsistently with her paramount parental status." *Id.* at 503.

[72] *E.g.*, *Mullen*, 953 N.E.2d at 308. Without the support of established legal principles, the Supreme Court of Ohio stated, "The parties' use of [a] term, together with other evidence, . . . may indicate that the parties shared the same understanding of its meaning and may be considered by the trial court in weighing all the evidence." *Id.* In response to the majority, Justice O'Connor claimed that instead of legal principles, "prudence now dictates that the agreement be documented." *Id.* at 309 (O'Connor, J., dissenting). Also in dissent, Justice Pfeifer remarked, "Couples will justifiably wonder what the majority means . . . . Is the couple to describe in a legal document how they expect the family dynamic to develop? Can they not let the circuitous path of family life determine how they together raise the child?" *Id.* at 312–13 (Pfeifer, J., dissenting).

[73] *Id.* at 304.

[74] *Id.* at 311 (Pfeifer, J., dissenting).

[75] *Id.* at 304.

mother "entered into an agreement through which [she] *permanently* relinquished sole custody . . . in favor of shared custody."[76] Then, the court noted that the parties could have established in writing "the degree to which [the agreement was to] be revocable or permanent."[77] However, in prior case law, the court said nothing about whether lower courts could even accept permanent agreements.[78]

Likewise, Kentucky and North Carolina require parties to rely on vague concepts of waiver and relinquishment rather than establish clear guidance to encourage parties to resolve issues before disputes occur.[79] Consider a 2010 Kentucky case involving a couple that attempted to obtain recognition of a shared custody arrangement before the couple's relationship fell apart.[80] The couple inappropriately took advantage of a statute permitting nonbiological parents to pursue custody of children under certain circumstances.[81] Oddly, the statute applied only if the parties were not co-parenting—the nonbiological parent had to "literally stand in the place of the natural parent."[82] Declining to grant custody under the statute, the court nevertheless held that the nonbiological parent could be entitled to shared custody under another theory; it reasoned that the biological mother "waived her superior custody right[s]" in favor of shared custody.[83]

A comparable result occurred in North Carolina in 2010 when the Supreme Court of North Carolina voided an adoption granted by a trial court, but still decided to grant a nonbiological parent custody under a waiver theory.[84] Not wanting to question the "wisdom" of the legislature's restrictions in the adoption code, the court refused to allow the couple to take advantage of the adoption process.[85] However, like *Bonfield* and the

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[76] *Id.* at 303–04 (emphasis added).

[77] *Id.* at 308.

[78] *See In re* Bonfield, 780 N.E.2d 241, 241–50 (Ohio 2002).

[79] *See* Mullins v. Picklesimer, 317 S.W.3d 569, 571 (Ky. 2010); Boseman v. Jarrell, 704 S.E.2d 494, 503 (N.C. 2010).

[80] *Mullins*, 317 S.W.3d at 571–73.

[81] *Id.* at 572, 574.

[82] *Id.* at 574 (citing Consalvi v. Cawood, 63 S.W.3d 195, 198 (Ky. Ct. App. 2001)). Apparently, no one raised the possibility that the nonbiological parent could stand in the place of the absent parent, the anonymous sperm donor, to give the child two caregivers under the statute.

[83] *Id.* at 579.

[84] *Boseman*, 704 S.E.2d at 496.

[85] *Id.*

high court in Kentucky, the Supreme Court of North Carolina could not ignore reality—the couple had been acting as co-parents.[86] Thus, the court awarded joint legal custody to the nonbiological mother even over the biological mother's objections.[87] The court reasoned that "by intentionally creating a family unit in which [she] permanently shared parental responsibilities with [the nonbiological parent], [the biological mother] acted inconsistently with her paramount parental status."[88]

B. The Courts Have Good Intentions

One could fairly criticize the Ohio, Kentucky, and North Carolina high courts for articulating "a 'know it when we see it' rubric," [89] but no one should place the blame entirely on the judiciary for articulating vague, minimal standards. In fact, these courts should be applauded for attempting to create solutions to deal with gaps in the law. Other courts have gone further, and perhaps one could fairly accuse those courts of judicial activism.[90] Nevertheless, whether courts have attempted to craft solutions with "trepidation" or with boldness, they have not denied legislators the opportunity to articulate the law.[91]

The reality is that most state legislatures have done very little to clearly articulate public policy regarding shared parenting arrangements between parents and nonbiological parents.[92] Is it possible that legislatures are simply unaware that these litigants are appearing before courts? Have the legislatures been completely oblivious to the possibility that their state courts may have to decide whether to allow second-parent adoption without express legislative approval?[93] This is not likely. The

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[86] *Id.* at 496, 504.

[87] *Id.* at 496.

[88] *Id.*

[89] *In re* Mullen, 953 N.E.2d 302, 314 (Ohio 2011).

[90] *See, e.g.*, Adoption of Tammy, 619 N.E.2d 315, 318–19 (Mass. 1993) (permitting second-parent adoption where the statute neither permitted nor prohibited it).

[91] *Mullen*, 953 N.E.2d at 310 (O'Connor, J., dissenting) (explaining that little legislative action occurred after the court established minimal guidelines with "trepidation" nearly ten years earlier in *Bonfield*).

[92] *Id.*

[93] *Adoption of Tammy*, 619 N.E.2d at 318–19. Some legislators tend to obscure the issue in a polarizing way. Rather than asking, "When a nonbiological parent jointly raises his or her nonmarital partner's child, should we allow legal recognition or should we prohibit it?" they ask, "Should children be raised by a mother and a father who are married to each other?" *See* Thomas Taneff, *Gay Adoption: The Latest Across the Country and in*

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Massachusetts judiciary moved nearly twenty years ago to allow second-parent adoption absent express legislative approval.[94] Perhaps legislators have simply waited for the courts to make the unpopular decisions, and are wondering what the courts will do next.[95] Children and families must be wondering too.

IV. ANALYSIS

The foundational legal principles and policy concerns arising in all child welfare and family law cases[96] should guide discussions about legal issues involving nonbiological parents. This part discusses many of those principles. Unfortunately, courts often reach divergent results in this more specific area without adequately examining the most relevant policies and legal principles.[97] For example, the focus should always be child-centered.[98] Courts should not address parties' petitions without

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Ohio, http://www.tanefflaw.com/resources/adoption/gay-adoption-the-latest-across-the-country-and-in-ohio (last visited Nov. 14, 2011). The latter question is irrelevant in this Comment's context. The children at issue are typically either born to a member of a same-sex couple through assisted reproductive technology or adopted by a member of the same-sex couple because joint adoption is unavailable. *See* Latham v. Schwerdtfeger, 802 N.W.2d 66, 69 (Neb. 2011); Boseman v. Jarrell, 704 S.E.2d 494, 497 (N.C. 2010); *In re* Guardianship of O.G.M-K, 787 N.W.2d 848, 850 (Wis. Ct. App. 2010).

[94] *See Adoption of Tammy*, 619 N.E.2d at 318–19.

[95] *See* Baker & Krawiec, *supra* note 18, at 664 (stating that legislatures sometimes leave statutes incomplete "in an attempt to shift responsibility for the negative impacts of law to other governmental branches").

[96] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) (noting that a parent's interest in "the care, custody, and control" of his or her child "is perhaps the oldest of the fundamental liberty interests recognized by" the Supreme Court of the United States); *In re* Bonfield, 780 N.E.2d 241, 247 (Ohio 2002) ("[W]e . . . 'do not intend to discredit [appellants'] goal of providing a stable environment for the children's growth.'" (citation omitted)).

[97] *Compare In re* J.D.M., Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040 2004 WL 2272063, at *3 (Ohio Ct. App. Oct. 11, 2004) (finding that the lower court arbitrarily refused to recognize the biological parent's shared custody agreement with the nonbiological parent, ignoring the apparent benefits that would flow to the child from the agreement), *with In re* Adoption of Two Children by H.N.R., 666 A.2d 535, 538 (N.J. Super. Ct. App. Div. 1995) (reasoning that the adoption statute should be construed in light of what was in children's best interests).

[98] *Compare* Parham v. J. R., 442 U.S. 584, 602 (1979) (finding that courts generally give weight to a parent's decisions because most people agree that "natural bonds of affection lead parents to act in the best interests of their children"), *with* Santosky v.

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considering what effect a grant or denial will have on the children involved. Regardless of whose interests courts are addressing—even the parent's interest or the state's interest—courts must realize that they can only consider those interests in light of the implications for children. Thus, when a parent tries to give his or her child a second parent, and the legislature remains silent, courts should infer that all actors want a result that will help, not hurt, the child.

Nevertheless, courts use unsatisfactory rationales to defend divergent approaches for cases involving nonbiological parents. These rationales are not child-centered.[99] They typically focus very little on how to best meet the needs of children.[100] Instead, courts have been far too concerned with avoiding the disapproval of legislators, notwithstanding the fact that legislatures have had very little to say.[101] The result has been minimal, unworkable guidelines.[102] Thus, trying to protect a child's relationship with a nonbiological parent through the court system is typically "like rolling the dice" because the outcome varies based on how each individual judge feels about "bless[ing] the relationship" in each particular case.[103]

However, the results have not been completely arbitrary. Even courts that have not recognized second-parent adoption, one of the most child-centered approaches, demonstrated awareness that their decisions must still be rooted in sound law, policy, and common sense.[104] Thus, many of these

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Kramer, 455 U.S. 745, 766 (1982) (noting that the state has "a *parens patriae* interest in preserving and promoting the welfare of the child"), *and In re* Gault, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

[99] *See* Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 245 (2011) (arguing that the law focuses on labeling caregivers based on marital status and the way in which children have been conceived, rather than on ensuring that children have food, shelter, affection, continuity, and stability); Plowman, *supra* note 7, at 70–72 (noting that courts mention the best interests of the child, but then permit this issue to become trumped by the concept of strict statutory interpretation).

[100] Elrod, *supra* note 99.

[101] *See, e.g.*, *In re* Mullen, 953 N.E.2d 302, 310 (Ohio 2011) (O'Connor, J., dissenting) (explaining that little legislative action occurred after the court established minimal guidelines with "trepidation" nearly ten years earlier in *Bonfield*).

[102] *See id.* at 313–14 (Pfeifer, J., dissenting) (arguing for a more workable analysis to provide a benchmark to biological parents and their partners).

[103] *Id.* at 313 (Pfeifer, J., dissenting).

[104] *See In re* Parentage of L.B., 122 P.3d 161, 176 (Wash. 2005) ("While the legislature may eventually choose to enact differing standards . . . and to do so would be within its

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courts adopted some type of standard test or language for parties to invoke to obtain legal recognition of a parent's agreement to permanently share parental rights with a nonbiological parent.[105]

This part of the Comment evaluates and synthesizes these approaches to arrive at the overall proposed solution. As a preliminary matter, Part IV.A discusses a few features that should be limited by any solution. Then, the Comment examines and applies sound child and family law principles that are maximized by the proposed solution.[106] Before laying out the proposed solution,[107] the Comment focuses on one of the most vital goals of the proposal—encouraging parties to go to the courts long before disputes arise.[108]

A. Certain Principles Should Be Less Relevant in the Child and Family Law Context

In defense of the divergent case law involving nonbiological parents, perhaps divergence is a necessary corollary of the American legal system. Some variance in legal outcomes is a consequence of living in a mobile, democratic society such as the United States. If Americans do not like their chances of getting the legal outcomes that they hope to achieve, they can shop around.[109] Nevertheless, this shopping approach is an

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province, until that time, it is the duty of this court to 'endeavor to administer justice according to the promptings of reason and common sense.'" (citations omitted)).

[105] *See* discussion *supra* Part II.

[106] *See* discussion *infra* Part IV.

[107] *See* discussion *infra* Part IV.

[108] *See* discussion *infra* Part IV.C.3.

[109] *See* OHIO REV. CODE ANN. § 3107.04 (West 2006) (In the adoption context, petitioners may have the ability to choose between county courts x, y, and z); Blythe v. Hinckley, 173 U.S. 501, 508 (1899) (establishing that litigants can sometimes choose between federal court and state court because of the concept of concurrent jurisdiction); *In re* Marriage of Crosby & Grooms, 10 Cal. Rptr. 3d 146, 152 (Cal. Ct. App. 2004) (showing that litigants can sometimes choose between the law of state A and state B).

A case's outcome could vary depending on the viewpoints of the particular judge assigned to a party's case, so litigants may be tempted to "judge shop." *See, e.g.*, *In re* Mullen, 953 N.E.2d 302, 313 (Ohio 2011) (Pfeifer, J., dissenting) (criticizing the majority's approach as being equivalent to "rolling the dice"). Even if a party has little say over which judge hears the case within a particular court, parties can vote and lobby to change the law through the legislative process, and they can sometimes vote to change their judges as well. *See* OHIO REV. CODE ANN. § 2301.02 (West 2006) (judges are elected in Ohio); Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting) ("[S]tate legislatures have the great

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unacceptable solution to many of the problems facing children and families in the law.[110] In fact, the "shop around" approach may not be a realistic solution at all for most families.

Family law does not typically provide many meaningful legal alternatives for families. First of all, family law litigants are generally limited to state court.[111] Moving to a state with more favorable laws may not be feasible.[112] In addition, families may have little say over which state's laws apply to their legal issues,[113] and to the extent that they can benefit from favorable laws in one state, they may not be able to easily carry over the benefits into other states.[114] Moreover, the suggestion that families elect different legislators and judges[115] does not solve the problem. It only sheds more light on the root of the problem—key players in the legal system are not always sensitive to the needs of the children involved in nontraditional families. This allows divisive, less relevant issues to take priority over the needs of children.

For example, the issue of what constitutes a proper family is a major concern.[116] Although this is an important issue, no conversation about

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advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.").

[110] Martin Gill, *Every Child Deserves a Family*, THE HILL'S CONG. BLOG (Nov. 22, 2011, 10:23 AM), http://thehill.com/blogs/congress-blog/civil-rights/195059-every-child-deserves-a-family ("Six states ban same-sex parents from adopting their partner's children. More than two dozen states remain silent on the issue. This harms children as it leaves them vulnerable to the biases of individual agencies and case workers and often results in children being denied the benefit of adoption by well-qualified, loving parents.").

[111] *See* Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States.") (quoting *In re* Burrus, 136 U.S. 586, 593–94 (1890)).

[112] *See Before Your Child Comes Home*, PUBLICATIONS.USA.GOV, http://publications.usa.gov/epublications/adoption/expb.html (last visited Nov. 13, 2012) (noting the many expenses a family will face throughout the adoption process). Assuming that a family is even willing to relocate, moving simply to benefit from more favorable laws makes the process even more expensive.

[113] *Crosby & Grooms*, 10 Cal. Rptr. 3d at 152 (limiting choice of law for parties in proceedings affecting children).

[114] *See* Adar v. Smith, 639 F.3d 146, 161 (5th Cir. 2011).

[115] Troxel v. Granville, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting) (explaining that legislators can quickly correct their mistakes and can be removed from office).

[116] *See, e.g.*, *In re* Mullen, 953 N.E.2d 302, 309 (Ohio 2011) (O'Connor, J., dissenting) ("As our understandings of the family evolve, so do our understandings of parenthood.").

what constitutes a proper family will be complete without debates on more tangential subjects like science, technology,[117] morality, and religion.[118] These discussions typically center on whether society's views on marriage and the family have changed.[119] These debates should continue, but as a practical matter, judges cannot afford to ignore the facts and the legal dilemmas that are immediately before them.[120] Furthermore, placing abstract ideals ahead of children is inconsistent with the values which decision-makers should primarily seek to protect.[121]

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[117] Elrod, *supra* note 99, at 246–48 (discussing issues of whether a child has been produced by sexual intercourse or assisted reproductive technologies).

[118] *See, e.g.*, Taneff, *supra* note 93 (explaining that a group attempted to tout the Arkansas measure to ban adoption and foster parenting by unmarried, cohabitating couples to Christians as a battle against the gay agenda).

[119] *See generally* William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1905, 1909 (2012) (discussing society's shifting views on nontraditional marriage, including same sex marriage).

[120] *See* Ark. Dep't of Human Servs. v. Cole, 380 S.W.3d 429, 440 (Ark. 2011). In *Cole*, the official justification for the Arkansas ban on adoption and foster parenting by unmarried, cohabitating adults was that it is in children's best interests to be reared in homes where the parents do not cohabitate outside of marriage. *Id.* The court held that the justifications for the categorical ban could be addressed through individualized screening of prospective adoptive and foster homes, noting that the evidence presented "militate[d] against a blanket ban." *Id.* at 441. Thousands of U.S. children are in foster care, waiting to be adopted, but many age-out of the system each year without an adoptive family. Gill, *supra* note 110.

[121] *See, e.g.*, 1 *Kings* 3:16–28. The people of Israel perceived "that the wisdom of God *was* in [King Solomon] to do" justice after hearing about his decision concerning the parentage of a child claimed by two harlots. *Id.* Rather than focus on the women's immoral lifestyles or demand that they produce some type of evidence of a biological connection, the king declared that the child's mother was the woman who wanted to save the child's life. *Id.* Should the result have changed if the other woman, having expressed her willingness to let the child be cut in half, could have conclusively proven that she was the biological mother? *See* Parham v. J.R., 442 U.S. 584, 602–03 (1979) ("Parents generally do act in the child's best interests. . . . Nonetheless . . . a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) ("Parents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children.").

B. Decision Makers Should Seek to Promote Children's Best Interests and Prevent Harm in Deciding Nonbiological Parents' Custodial Rights

The Supreme Court of the United States has provided minimal guidance on what due process requires with respect to visitation and custody issues between parents and third parties.[122] However, what the Court said it will not do speaks volumes. The Supreme Court refused to define rigid due process requirements for third party visitation and custody that might impair a trial court judge's ability to rely on experience and common sense.[123] However, in *Troxel v. Granville*, the Court provided at least three key hints on what is permissible, implying that: (1) it is willing to give family court judges much flexibility;[124] (2) best interests and harm are both reliable concepts in this area;[125] and (3) regardless of what tests courts use to decide visitation and custody issues, they should always account for the legal parent's fundamental right to make parenting decisions.[126]

Interestingly, the plurality spoke very favorably of dissenting Justice Kennedy's reasoning on these points.[127] Justice Kennedy reasoned that a parent's due process right should be "elaborated with care" because while "a fit parent's right vis-à-vis a complete stranger is one thing, [that same parent's] right vis-à-vis another parent or a *de facto* parent may be another."[128] The plurality agreed that it was not only unnecessary to

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[122] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 73 (2000) ("[T]the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied . . . the constitutional protections in this area are best 'elaborated with care.'" (quoting Kennedy, J., dissenting)).

[123] *Id. But cf.* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (establishing that due process requires the state to prove allegations against a legal parent by at least clear and convincing evidence before it may "*completely and irrevocably*" terminate the parent's rights) (emphasis added).

[124] *See Troxel*, 530 U.S. at 73. The Court agreed with dissenting-Justice Kennedy that it did not need to define "the precise scope of the parental due process right in the visitation context." *Id.*

[125] *See id.* at 73–74.

[126] *See id.* at 75 (reaffirming a parent's due process right to make decision's concerning his or her child's "care, custody, and control").

[127] *Compare id.* at 73–74 ("[M]uch state-court adjudication in this context occurs on a case-by-case basis."), *with id.* at 101 (Kennedy, J., dissenting) ("We must keep in mind that family courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise.").

[128] *Id.* at 100–01 (Kennedy, J., dissenting).

clearly define due process limits in the third party visitation context, but that it was also imprudent.[129] Thus, the Court left plenty of room for policy to develop the constitutional analysis in the nonbiological parenting rights context. This should have meant something to courts and lawmakers—they should now work together to ensure that they follow sound policy in developing third party visitation law.

For ages, sound policy has indicated that decision-makers should act in children's best interests when making decisions about children.[130] Despite its apparent reasonableness, the best interests concept is not without criticism.[131] Some believe that as a legal standard, it is "both vague and indeterminate," giving "precious little guidance to judicial decision makers."[132] Nevertheless, it has withstood the test of time—and for good reasons.[133] Judges typically implement the best interests concept as a flexible, multifactored standard.[134] One of its advantages is that it does not usually involve rigid, preconceived notions.[135] In fact, judges often rely on experts to assist them when making best interests determinations.[136]

A decision-maker's obligation to prevent harm is perhaps even more widely accepted.[137] Some courts have even opined that due process necessitates a showing of harm or potential harm in visitation statutes as a

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[129] *Id.* at 73–74.

[130] *See, e.g.*, 1 *Kings* 3:16–28; *see also* Parham v. J. R., 442 U.S. 584, 602 (1979) ("[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children."). Note that the "best interests" concept provides the basis for recognizing a parent's fundamental right to custody. *Troxel*, 530 U.S. at 100–01 (Kennedy, J., dissenting).

[131] *See* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 387 (1998).

[132] *Id.*

[133] *E.g.*, Boseman v. Jarrell, 704 S.E.2d 494, 496 (N.C. 2010) (approving of the best interests standard once a parent has agreed to share custody rights with a nonbiological parent); *see also* Myers v. Myers, 867 N.E.2d 848, 855 (Ohio Ct. App. 2007) ("[T]he overriding concern of courts in custody cases must be the best interests of the child, which may, at times, conflict with the due-process rights of the parents.").

[134] Lauren F. Cowan, *There's No Place Like Home: Why the Harm Standard in Grandparent Visitation Disputes Is in the Child's Best Interests*, 75 FORDHAM L. REV. 3137, 3145 (2007).

[135] *Id.*

[136] *Id.* at 3146.

[137] *E.g.*, Gregory, *supra* note 131, at 352 ("[D]ecisions of fit natural parents concerning who may visit their children should be controlling, absent a showing of significant harm or danger to the child.").

condition precedent for ordering third-party visitation.[138] As the Comment previously discussed, the Supreme Court has not gone that far.[139] Even so, preventing harm should always be a relevant concern in the context of shared custody rights between parents and nonbiological parents.[140] When challenging parents' decisions, the state can justify intervention on the basis that parents cannot prevent every evil that legislators seek to avert, including psychological harm.[141]

In a 2002 case, the Supreme Court of Alaska addressed the relevant type of harm involved in most custody cases.[142] The case involved a nonbiological stepparent who had not legally adopted her spouse's child.[143] Nevertheless, the trial court granted shared custody, reasoning that the child would be devastated if the court removed the nonbiological parent from her life.[144] The Supreme Court of Alaska affirmed on the basis that the child's welfare required that the nonbiological parent receive custody.[145] In reaching this determination, the court explicitly rejected the best interests standard in favor of the harm standard.[146] The relevant type of harm was psychological—that is, the potential loss of the "strong emotional bond" between the child and her "psychological parent."[147] Yet, one can see how the line between these two standards can easily become blurred.[148] In any event, the court did not disregard the legal parent's

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[138] Troxel v. Granville, 530 U.S. 57, 62 (2000) (citing *In re* Custody of Smith, 969 P.2d 21, 30 (Wash. 1998)). *But see id.* at 73 (declining to decide whether due process requires a showing of harm or potential harm before courts can grant visitation to third parties over parents' objections).

[139] *Id.* at 73–75 ("[W]e would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.").

[140] Prince v. Massachusetts, 321 U.S. 158, 169–70 (1944) (describing the limits of the State's power, the Court explained that the State may govern the conduct of children to prevent "harmful possibilities," including "emotional excitement and psychological or physical injury").

[141] *Id.*

[142] Kinnard v. Kinnard, 43 P.3d 150, 154–55 (Alaska 2002).

[143] *Id.* at 151.

[144] *Id.* at 153 (applying the term "psychological parent").

[145] *Id.* at 154.

[146] *Id.*

[147] *Id.* at 155.

[148] *See id.* at 154. Indeed, "the trial court [had] initially suggested that the 'best interests' test would apply" before ultimately applying a "detriment" standard. *Id.* In *Prince*, the Court described the State's *parens patriae* power as follows: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people

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fundamental rights.[149] The legal parent received shared custody despite the trial court's statement that it would have stripped the legal parent of custody had the stepmother been the child's natural parent.[150]

C. Stability Is an Important Concern

Implicitly at issue in *Kinnard*,[151] stability is an important concern related to achieving best interests and preventing harm. A child's stability and continuity are "essential for healthy development."[152] Thus, children and their caregivers should not be left wondering what will happen if they approach the courts to obtain legal recognition of their family settings, especially if the caregivers stop getting along.[153] The child's emotional health is at risk when it is unclear whether the child's relationship with the nonbiological parent will continue.[154] Yet, like other factors relevant to a child's well-being, stability loses priority to other issues when nonbiological parents seek the aid of the legal system.[155]

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into full maturity as citizens . . . . [The state] may secure this against impeding restraints and dangers, within a broad range of selection." 321 U.S. at 168. *See also* Schmehl v. Wegelin, 927 A.2d 183, 197 (Pa. 2007) ("[States have] the power, cloaked in the doctrine of *parens patriae*, to determine in divorce proceedings how, in the best interests of the child, custody should be allocated.").

[149] *See Kinnard*, 43 P.3d at 155 (citing Troxel v. Granville, 530 U.S. 57, 60–63 (2000)) (pointing out that the Supreme Court did not decide psychological parent issues in *Troxel*).

[150] *Id.* at 153.

[151] *Id.* at 151 (stating that the trial court emphasized the devastating impact removing the psychological parent would have on twelve-year-old girl).

[152] Greg Waller, *When the Rules Don't Fit the Game: Application of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act to Interstate Adoption Proceedings*, 33 HARV. J. ON LEGIS. 271, 272 (1996) (citing JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 31–39 (1979)).

[153] *See* Myers v. Myers, 867 N.E.2d 848, 855 (Ohio Ct. App. 2007) ("[T]he overriding concern of courts in custody cases must be the best interests of the child, which may, at times, conflict with the due-process rights of the parents."); *Schmehl*, 927 A.2d at 197 (stating that states' *parens patriae* power to allocate custody in divorce proceedings to promote the child's best interest).

[154] *See Schmehl*, 927 A.2d at 196–97. Completely removing a nonbiological parent from a child's life may "be not only detrimental but also devastating to the child." *Kinnard*, 43 P.3d at 155.

[155] *See* discussion *supra* Part I.

1. Separation and Loss Can Be Extremely Damaging

Separation and loss can be extremely damaging to a young child, leading to anxiety, depression, and other forms of adult pathology.[156] To a child, losing a nonbiological parent because of breakup can be just as bad as having a parent die, if not worse.[157] When a parent dies, the child can grieve, while holding on to the belief that the parent cares for the child. However, when the child's parental figures part ways, the child may think that the adult who moved out no longer accepts the child. This problem has been recognized in the context of traditional families that breakup due to divorce.[158]

For example, Ohio law recognizes that the trauma associated with divorce is an adequate justification for placing a divorced couple's child not simply with one parent over the other parent's objection, but even with neither parent in some circumstances.[159] Even legally fit parents can become so embroiled in the bitter issues arising in a breakup that the state can no longer assume that the parents' decisions will always be in their children's best interests.[160] As the Massachusetts high court explained, "[C]hildren whose parents are unmarried and live apart may be at heightened risk for certain kinds of harm when compared with children of . . . intact families."[161] Thus, these children are likely to "be vulnerable to the feelings of loss, inadequacy, and insecurity."[162]

These feelings can be especially problematic for children with nonbiological parents, who may have no legal way to interact with the

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[156] JOHN BOWLBY, SEPARATION: ANXIETY AND ANGER 4–5 (1976). *See also* DANIEL J. SEIGEL, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 67 (1999).

[157] Richard Bowlby & Jennifer McIntosh, *John Bowlby's Legacy, and Meanings for the Family Law Field: In Conversation with Sir Richard Bowlby*, 49 FAM. CT. REV. 549, 549 (2011).

[158] *See* Boyer v. Boyer, 346 N.E.2d 286, 286 (Ohio 1976) (affirming lower court decision to award custody to grandparent under best interests standard without finding child's parents to be unsuitable).

[159] *See id.* at 288.

[160] *See* OHIO REV. CODE ANN. § 3109.04(D)(2) (West 2012) ("If the court finds, with respect to any child under eighteen years of age, that it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian of the child, it may commit the child to a relative of the child . . . .").

[161] Blixt v. Blixt, 774 N.E.2d 1052, 1064 (Mass. 2002).

[162] *Id.* at 1065.

children—at least not until after litigating for months or even years.[163] If a nonbiological parent can no longer continue to see and care for a child,[164] how can the nonbiological parent put the child's doubts to rest? Policymakers should not artificially distinguish between children in traditional broken families and those in nontraditional broken families.

2. All Children Deserve Permanency

Both federal and state legislatures have long agreed on a goal related to stability, separation, and loss—the goal of permanency.[165] Child welfare policy recognizes permanency as a critical need for children.[166] Child welfare experts have recognized that "legally secure permanent placement" is necessary for a child's "psychological stability" and "sense of

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[163] Mullins v. Picklesimer, 317 S.W.3d 569, 569 (Ky. 2010) (reversing the appellate court decision denying a nonbiological mother standing to pursue custody). While Zachary was a little over a year old when his mother started denying visitation, he was almost five-years-old by the time the Supreme Court of Kentucky issued a decision giving the nonbiological parent standing to seek custody. *Id.* at 571–72. *See also* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 125 (1997) (describing the irreparable damage to child-parent relationships due to protracted litigation, which many children are too young to understand).

[164] *Mullins*, 317 S.W.3d at 572–73. In Holtzman v. Knott, 533 N.W.2d 419, 422 (Wis. 1995), the nonbiological parent petitioned for custody and visitation in September 1993, received interim visitation more than four months later while the case was still being resolved, and finally, got her *opportunity* to argue only for visitation in June 1995—nearly two years after filing her initial petition. The child was almost five when the litigation started and nearly seven when the Supreme Court of Wisconsin remanded to the circuit court to determine if the nonbiological parent could meet the court's new test that merely gave her standing to seek visitation. *Id.* at 436. Ironically, one of the issues on remand was whether Holtzman "promptly" petitioned the court after Knott's interference. *Id.*

[165] Jill Sheldon, *50,000 Children Are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 78 (1997) (focusing on both family preservation and permanency).

[166] *See* Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(7) (2006) (defining "legal guardianship" in terms of permanency); DONALD N. DUQUETTE & MARK HARDIN, U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, I-5 (June 1999); Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 8 (2001) (describing Congressional efforts to increase focus on permanency through the Adoption and Safe Families Act).

belonging . . . ."[167] Thus, "disruption of the parent-child relationship" can have negative emotional and psychological consequences for children when the legal system refuses to recognize the relationship between a child and the child's nonbiological parent.[168]

Apparently, permanency is not as clear of a goal in custody determinations involving nonbiological parents and parents absent allegations of abuse or neglect.[169] Lawmakers can agree on the importance of permanency with respect to children in the foster care system.[170] Why then would legislators be less active with respect to children raised by nonbiological parents alongside their legal parents? One possibility is that legislators fear limiting the rights of legal parents.[171] However, this fear seems ill-conceived in situations where the legal parent is completely on board with sharing parental rights with a nonbiological parent.[172] At this point in a couple's relationship, permanency should take priority over a lawmaker's or judge's concern about interfering with the rights of some theoretical version of the parent.[173] While it is possible that parents may

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[167] CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES 525 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010) [hereinafter CHILD WELFARE LAW AND PRACTICE].

[168] *Id.*

[169] *Compare In re* Mullen, 953 N.E.2d 302, 308 (Ohio, 2011) (ruling that merely calling a former partner, "coparent," did not necessarily indicate the parent's intention to create a permanent parenting arrangement), *with In re* M. & N.P., No. 10AP-478, 2010 WL 4926578, at *3 (Ohio Ct. App. Dec. 2, 2010) (affirming lower court's grant of permanent custody motion where guardian ad litem stated children understood meaning of "forever family" and attorney supported motion so children could be placed for adoption). *But see* Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010) (waiving a parent's right to exclusive custody because the parent failed to indicate that the parenting arrangement was only temporary).

[170] *See* CHILD WELFARE LAW AND PRACTICE, *supra* note 167, at 525.

[171] *See Mullen*, 953 N.E.2d at 305 (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)) ("Parents have a constitutionally protected due process right to make decisions concerning the care, custody, and control of their children, and the parents' right to custody of their children is paramount to any custodial interest in the children asserted by nonparents.").

[172] *E.g.*, *In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) (emphasizing the lack of a dispute between the parties).

[173] *See In re* J.D.M., Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004 WL 2272063, at *3 (Ohio Ct. App. Oct. 11, 2004). In this case, the trial judge denied the couple's petition, ignoring the apparent benefits that would flow to the child from having the parties enter into a shared custody agreement; the appellate court reversed. *Id.* Instead,

(*continued*)

later change their minds, it is paternalistic to deny a couple's request on this ground (assuming that there is no evidence that the parent is wavering when making the request). Moreover, this inappropriately shifts the focus of the proceeding away from the goal of permanency and thus, away from the goal of promoting a child's best interests.

3. The Damage Is Likely Done by the Time the Courts Decide Custody Disputes

There is little doubt that courts can interfere with a parent's fundamental right to custody to prevent harm to a child,[174] but intervention at the point of dispute will most likely be too late.[175] The problem with forcing couples to wait until after disputes arise is that by the time a court resolves a case, the nonbiological parent may have become uninvolved in the child's life for several years.[176] This not only disadvantages the nonbiological parent when the court finally decides the case, it also disadvantages the child, who may suffer the loss of the relationship with the nonbiological parent while the litigation is pending.[177]

Even the more well-structured analyses, like those involved in *Holtzman*, may not be very helpful. While proponents trumpet this decision for being "pioneering"[178] and providing "benchmarks"[179] for

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the trial judge emphasized the fear that granting the petition would "circumscribe[] the discretion of [J.D.M.]'s mother to determine what might be in his best interest." *Id.* at *1.

[174] *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (stating a "*parens patriae* interest in preserving and promoting" children's welfare).

[175] *See, e.g.*, *Mullen*, 953 N.E.2d at 303–04 (affirming judgment that dismissed shared custody complaint almost four years after litigation commenced); *see also* V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000) (issuing final judgment after nearly three years of litigation and after nearly four years of noninvolvement by the nonbiological parent with respect to any decision-making).

[176] *V.C.*, 748 A.2d at 555.

[177] *Id.* ("[D]ue to the pendency of th[e] case, [the former domestic partner] has not been involved in the decision-making for the twins for nearly four years. To interject her into the decisional realm at this point would be unnecessarily disruptive for all involved."). An Ohio appellate court held that a nonbiological parent had no interim visitation rights while her appeal was pending. *In re* Mullen, 924 N.E.2d 448, 452 (Ohio Ct. App. 2009). The Supreme Court of Ohio temporarily reinstated the interim visitation rights when it granted the nonbiological parent's motion to stay the intermediate court's decision through final appeal to the high court. *In re* Mullen, 922 N.E.2d 968, 968 (Ohio 2010).

[178] William B. Turner, *The Lesbian De Facto Parent Standard in* Holtzman v. Knott*: Judicial Policy Innovation and Diffusion*, 22 BERKELEY J. GENDER L. & JUST. 135, 135 (2007). *See also Mullen*, 953 N.E.2d at 314 (Pfeifer, J., dissenting).

litigants, the *Holtzman* test fails to encourage responsible behavior just like the waiver and relinquishment theories. The test does not create parental rights, it merely permits a nonbiological parent to obtain visitation, treating the nonbiological parent as a third party similar to a grandparent.[180] This would hardly be helpful to a nonbiological parent who continues to cohabitate with the legal parent. The couple would not likely benefit from a test intended to apply after a breakup.[181] This kind of test would not be practical for the couple unless it clearly established legal recognition before a breakup—for example, the nonbiological parent's right to "authorize medical care or obtain medical insurance coverage for the children."[182] The more forward-looking *Bonfield* agreement appears to be a step toward solving this problem.[183]

D. How Should the Constitutional Issues Be Resolved?

Unfortunately, similar to the waiver and relinquishment-based tests concerning nonbiological parents in Kentucky and North Carolina, the *Bonfield* decision did not adequately explain the nature of the legal parent's custody decision in light of *Troxel v. Granville*. *Bonfield* simply referred to the Supreme Court decision in passing,[184] as did the more recent *Mullen* decision, although the latter somewhat mischaracterized the *Troxel* holding.[185] Similarly, the Supreme Court opinions in both *Boseman*[186] and

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[179] *Mullen*, 953 N.E.2d at 314 (Pfeifer, J., dissenting).

[180] *See Holtzman v. Knott*, 533 N.W.2d 419, 423–24 (Wis. 1995) (citing *In re* Z.J.H., 471 N.W.2d 202, 205 (Wis. 1991)) (declining to give nonbiological or adoptive parents standing to obtain custody absent raising a triable issue of legal parent's fitness). *But see V.C.*, 748 A.2d at 550 (giving psychological parent standing to obtain custody under virtually identical test).

[181] *V.C.*, 748 A.2d at 555 (declining to give psychological parent any custody because she was uninvolved for several years during pendency of litigation).

[182] *In re* Bonfield, 780 N.E.2d 241, 243 (Ohio 2002).

[183] *Id.* at 245. *See also In re* J.D.M., Nos. CA2003-11-113, CA2004-04-035, CA2004-04-040, 2004 WL 2272063, at *3 (Ohio Ct. App. Oct. 11, 2004) (allowing two caregivers to be legally responsible for child's care, both of whom can make medical decisions for child and interact with school officials without executing further documentation).

[184] *See Bonfield*, 780 N.E.2d at 247.

[185] *In re* Mullen, 953 N.E.2d 302, 305 (Ohio 2011) declared that "the parents' right to custody is paramount to any custodial interest in the children asserted by nonparents," whereas *Troxel* reaffirmed parents' fundamental right to custody without defining the right in relation to custodial interests asserted by nonparents, 530 U.S. at 66. Moreover, *Troxel* declared the visitation statute unconstitutional as applied because of its "sweeping breadth," and noted, "We do not, and need not, define today the precise scope of the parental due

(*continued*)

Mullins v. Picklesimer[187] based their analytical frameworks on the federal Constitution without discussing a single United States Supreme Court case. Although the *Holtzman* decision preceded *Troxel*, it provided perhaps the most clearly articulated framework for the purpose of analyzing the relevant constitutional issues.

The framework in *Holtzman* accounts for all three *Troxel* "hints" that this Comment previously identified.[188] First, it gives family court judges flexibility.[189] The Supreme Court of Wisconsin explained that courts have equitable power, under the *parens patriae* doctrine, to protect children's best interest by ordering visitation under circumstances not included in statute.[190] Second, the framework gives weight to the reliable concepts of best interests and harm-prevention.[191] Petitioners must prove that they have a parent-child bond that the court must protect. Once a petitioning party demonstrates the applicable elements, the *Holtzman* framework permits courts to order visitation if visitation is, in fact, in the child's best interest.[192] Finally, the framework accounts for the legal parent's fundamental right to make parental decisions.[193] The court may not act absent a "triggering event"—the legal parent's consent and assistance.[194]

As this Comment previously pointed out, however, the *Holtzman* test has its flaws.[195] The test is backward-looking: it provides standing for visitation after breakups, but not custody before, or even after breakups.[196] Thus, it fails to give enough consideration to the psychological harm that can occur when a child loses a nonbiological parent during pending litigation. This backward-looking approach does not effectively pursue the

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process right in the visitation context." *Id.* at 73. *See also* Kinnard v. Kinnard, 43 P.3d 150, 155 (Alaska 2002) ("*Troxel* involved neither a claim of psychological parenthood nor a determination that depriving the child of a psychological parent would negatively affect the welfare of the child.").

[186] 704 S.E.2d 494, 502–03 (N.C. 2010).

[187] 317 S.W.3d 569, 578–79 (Ky. 2010).

[188] *See* discussion *supra* Part IV.B.

[189] *See Holtzman*, 533 N.W.2d at 421 (deciding that courts should determine existence of a parent-like relationship).

[190] *Id.* at 433.

[191] *See id.* at 436.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *See* discussion *supra* Part IV.C.3.

[196] *See Holtzman*, 533 N.W.2d at 421.

goal of preventing harm. At the same time, the test fails to give enough weight to the legal parent's right to make custody decisions by giving weight to the parent's decision only in hindsight. Moreover, it looks only at what the parent did outside of court and therefore fails to include the formalities and procedural safeguards associated with adoption cases. Such procedural safeguards give parents an opportunity to think carefully before making serious decisions concerning rights to their children.[197]

The Kentucky and North Carolina tests suffer from similar flaws. They too use backward-looking approaches to affect a parent's fundamental rights based on the parent's out-of-court conduct.[198] These tests apparently rely on the concept of waiver, indicating that the parents have waived a fundamental right by allowing others to co-parent their children.[199]

In the Kentucky case, for example, the court pointed out that "a myriad of . . . factors" were present in the case—out of a voluminous list of at least sixteen possible factors—that supported a finding of waiver.[200] The court listed as relevant the following facts: (1) the couple jointly decided to start a family; (2) the two selected a sperm donor based on the nonbiological parent's characteristics; (3) they gave the child "a hyphenated surname combining both parties' last names"; (4) they listed that name on the child's birth certificate; (5) the nonbiological parent was involved in the pregnancy—she was there for the delivery and cared for the child when he was in the neonatal unit; (6) the couple and nonbiological parent "functioned as a family unit for nearly a year"; (7) the couple shared custody for another five months thereafter; (8) the child called the nonbiological parent "momma"; and (9) it was undisputed that the legal mother "encouraged, fostered, and facilitated an emotional and psychological bond between" between the nonbiological parent and the child.[201] The court continued on, pointing out that the parties' attempt to

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[197] *See, e.g.*, OHIO REV. CODE ANN. § 3107.06 (West 2012) (providing procedural protections for consenting parent); *see also* ARIZ. REV. STAT. ANN. § 8-105(N)(2) (2012) (requiring homestudy and investigative reporting in stepparent adoptions unless waived by going through waiting period); N.C. GEN. STAT. §§ 48-3-601, 48-2-501 (2012) (addressing minors' rights to consent to adoptions); OHIO REV. CODE ANN. §§ 3701.12, 3107.084 (West 2012).

[198] *See* Mullins v. Picklesimer, 317 S.W.3d 569, 579–81 (Ky. 2010); Boseman v. Jarrell, 704 S.E.2d 494, 498 (N.C. 2010).

[199] *E.g.*, *Mullins*, 317 S.W.3d at 579.

[200] *Id.* at 580.

[201] *Id.* at 580–81.

enter into a parental agreement was relevant.[202] Reading this long list of "factors" makes it evident that the court simply applied a case-by-case analysis to determine the waiver issue.[203] This is not the most principled way to deal with "perhaps the oldest of the fundamental liberty interests" that the Supreme Court has recognized.[204]

Is this the way waiver of fundamental rights normally occurs? While it may be easier to waive some constitutional rights as opposed to others,[205] perhaps the right to parent one's child is not the type of right that a person should be able to waive easily. The formality required in the law when one loses the right to parent should indicate that the answer to this question is a resounding "no!"[206] Even when a parent agrees to share parental rights with another through the processes of stepparent adoption or second-parent adoption, formality permeates the processes.[207]

At least one redeeming aspect of the Kentucky and North Carolina waiver tests, however, is that the courts require proof of waiver by clear and convincing evidence.[208] In contrast, the Ohio relinquishment test only requires relinquishment to be proven by a preponderance of the evidence, and trial court decisions will be upheld as long as there is "some reliable, credible evidence" supporting the finding.[209] This low evidentiary standard could possibly violate the Constitution but for the emphasis on the parent's voluntary decision to relinquish.[210] Moreover, parties in Ohio have the option of getting their custody agreements approved by the court prior to

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[202] *Id.*

[203] *Id.*

[204] Troxel v. Granville, 530 U.S. 57, 65 (2000).

[205] *See, e.g.*, Marsh v. First USA Bank, 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000) (finding that agreement to a valid arbitration clause waives a party's rights to a judicial forum, including the corollary Seventh Amendment right to trial by jury in a civil case).

[206] *See* Santosky v. Kramer, 455 U.S. 745, 747–48 (stating that due process requires the state to prove allegations against a legal parent by at least clear and convincing evidence before it may "completely and irrevocably" terminate the parent's rights). *But see* Lehr v. Robertson, 463 U.S. 248, 262 (1983) ("[T]he Federal Constitution will not automatically compel a State to listen to [a biological father's] opinion of where the child's best interests lie" if the father fails to accept "some measure of responsibility for the child's future, ...").

[207] *See* MABRY & KELLY, *supra* note 63, at 187–97.

[208] *Mullins*, 317 S.W.3d at 578; Boseman v. Jarell, 704 S.E.2d 494, 504–05 (N.C. 2010).

[209] *In re* Mullen, 953 N.E.2d 302, 306 (Ohio 2011).

[210] *See Santosky*, 455 U.S. at 747–48.

disputes, which lessens the possibility that the parent can later claim a constitutional violation.[211] It also helps to involve expert witnesses, although this is not clearly required.[212]

One thing that may not be apparent is that the courts are basing their standards not just on waiver, but also on the existence of parental conduct that comes as close as possible to unsuitability without actually crossing that line.[213] North Carolina, for example, comes very close to requiring a showing that the parent is unsuitable, but stops just short of this point.[214] Although it requires that the legal parent *intentionally* and *voluntarily* act to create the family unit at issue, it characterizes the effect as the loss of the parent's paramount interest.[215] Similarly, in Ohio, an older case established the following legal principle, which is still binding today: "[A] parent can grant custody rights to a nonparent and will be bound by the agreement."[216] Interestingly, a long-standing decision stated that fit parents can forfeit the paramount right to custody by "contract, abandonment, or by becoming totally unable to care for and support" their children.[217]

Courts should rely more on terms like "consent" and "agreement" to clarify that the legal parent's fitness is not at issue when that parent chooses to share custody with a nonbiological parent. Suggesting relinquishment, waiver, or loss of parental rights does not reflect the reality of what couples are doing. It is likely the parties involved in such arrangements do not think that anyone is losing rights.[218] Relying on the

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[211] *Mullen*, 953 N.E.2d at 308 (allowing the parties to take a written agreement and apply to a juvenile court for an order establishing the scope of the legal custody that the parent desires to share).

[212] *See In re* J.D.M., Nos. CA2003-11-113, CA 2004-04-035, CA 2004-04-040, 2004 WL 2272063, at *3 (Ohio Ct. App. Oct. 11, 2004).

[213] *See, e.g.*, *Boseman*, 704 S.E.2d at 503 ("A parent loses this paramount interest if he or she is found to be unfit or acts inconsistently 'with his or her constitutionally protected status.'" (quoting David N. v. Jason N., 608 S.E.2d 751, 753 (N.C. 2005)).

[214] *Id.*

[215] *Id.*

[216] *Mullen*, 953 N.E.2d at 306 (citing *In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002)).

[217] Masitto v. Masitto, 488 N.E.2d 857, 859–60 (Ohio 1986).

[218] *See Mullen*, 953 N.E.2d at 305–06 ("The essence of such an agreement is the purposeful relinquishment of some portion of the parent's right to exclusive custody of the child."); *Bonfield*, 780 N.E.2d at 249 (second parent adoption does not require parent to "relinquish any parental rights," but the court's test does).

concept of consent would make it easier to defend shared custody agreements when disputes arise because, like *Mullen*, courts do not explicitly require a finding of unsuitability.[219] Particularly in Ohio, all that appears to matter is that the parent consented to the arrangement at some point.[220] If so, a court can enforce the agreement as long as the nonbiological parent is suitable and the agreement is in the child's best interests.[221]

V. CONCLUSION

This Comment proposes that state legislatures enact laws clearly articulating the grounds for recognizing a permanent custodial relationship between a nonbiological parent and a child when state law does not permit second-parent adoption. Parties will benefit from a specific statute entitling them to a court order that is effective even against third parties. In deciding whether such an order is warranted, courts should use a workable framework like that employed in Wisconsin,[222] but not just for visitation, for custody as well. The framework needs to address the consent of biological parents, the relationship between the child and the petitioner, and the nature and duration of custody. When all parties agree, the issues should be simpler. Even when the parties do not agree, the same framework is appropriate, although a higher evidentiary standard may be necessary to adequately protect existing legal relationships.

The legislatures should primarily seek to provide clear guidance to courts and litigants. Clear guidance would translate into more stability for children and encourage parties to decide custody rights before disputes arise. Involving the courts early provides important procedural safeguards. Courts should follow many of the procedures found in adoption proceedings, albeit uniquely-tailored to fit the needs of the litigants at issue.[223] For example, it may sometimes be necessary for the court to require a report before issuing an order.[224] Regardless of the procedures, the legislation must: (1) provide courts with needed flexibility, (2) give weight to both the reliable concept of best interests and harm-prevention, and (3) provide adequate constitutional protection to parents.

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[219] *Mullen*, 953 N.E.2d at 306.

[220] *Id.*

[221] *Id.*

[222] *See, e.g.*, Holtzman v. Knott, 533 N.W.2d 419, 421 (Wis. 1995).

[223] *See* N.C. GEN. STAT. § 48-2-501 (2012); OHIO REV. CODE ANN. § 3107.12 (West 2012).

[224] N.C. GEN. STAT. § 48-2-501; OHIO REV. CODE ANN. § 3107.12.