2016

# Custody Involving a Non-Parent: The Rights of Step-Parents Under the De Facto and Psychological Parent Doctrines

Katie Sieber

*Custody Involving a Non-Parent: The Rights of Step-Parents Under the De Facto and Psychological Parent Doctrines*

by

Katie Sieber

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Melanie Jacobs
Spring, 2016

## *INTRODUCTION*

In 1993, Michael Holt and Laurie Holt began a romantic relationship and had a son; C.H.[1] The couple separated three years after the child was born, without ever having married.[2] Shortly after the breakup, Laurie Holt became engaged to another man, who died while she was pregnant with his son; B.M.H.[3] Following her fiancé's death, Laurie Holt resumed her relationship with Michael Holt, while still pregnant with B.M.H.[4] Throughout her pregnancy, Michael Holt provided Ms. Holt with emotional support and was present at B.M.H.'s birth.[5] The couple married after B.M.H. was born in 1999, but divorced in 2001.[6]

During the divorce, the couple created a parenting plan giving Mr. Holt parenting time every other weekend with his biological son; C.H.[7] Although B.M.H. was not included in the parenting plan, he followed the same visitation schedule as his brother; C.H.[8] During this time, Mr. Holt played an active role in B.M.H.'s life and treated the child as if he were his own son.[9] Ms. Holt changed B.M.H.'s last name from his biological father's last name to Holt's last name and discussed Mr. Holt adopting the child.[10] However, the parties chose not to have Mr. Holt adopt B.M.H. because adoption would affect the child's survivorship benefits, which he received following his biological father's death.[11] This visitation arrangement continued for eight years

[1] In Re Custody of B.M.H., 179 Wash. 2d 224, 229 (2013).
[2] *Id.* at 229-30.
[3] *Id.* at 230.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 232. Mr. Holt submitted declarations from co-workers stating that "[o]ver the 10 years I have known [B.M.H.], Michael has never treated him any differently than any of his other children. [B.M.H.] is as loved and as nurtured as his brother [C.H.] . . . . I can say state unequivocally that [B.M.H.] sees Michael as his one and only father and he is as loved and bonded with Michael as any boy to his father." *Id.*
[10] *Id.* at 230.
[11] *Id.*

until the child was ten years old.[12] During that time, Mr. Holt and B.M.H developed a strong bond and considered themselves to have a parent-child relationship.[13] In 2009, Ms. Holt planned to move B.M.H. to a new home with her boyfriend, located over 50 miles away.[14] After learning this information, Mr. Holt filed a petition for non-parental custody of the child.[15]

Mr. Holt brought the non-parental custody petition under a Washington statute, which allows third parties to seek custody of a child in cases where the legal parent is unfit or where placement with a fit parent will harm the child.[16] In this case, Mr. Holt did not allege that the child's mother was unfit, but argued that neither parent was a suitable custodian for the child because the mother planned to move the child into an unstable situation with her new boyfriend, and the child's biological father died.[17] The Court found that there were not sufficient extraordinary circumstances present to allow the state to interfere with the legal parent's rights.[18] The court ultimately denied Holt custody of B.M.H. under the Washington third party custody statute.[19]

This case illustrates how difficult it can be for a step-parent to obtain custody under a third party statute and shows the unjust outcomes that often result when the court does not consider if the step-parent is the child's de facto or psychological parent. Courts impose a high burden on step-parents by requiring them to show extraordinary circumstances or that the legal

[12] *Id.*
[13] *See id.* at 231 ("Holt alleged that '[Ms. Holt] held [him] out as the child's father in all respects'; that he and B.M.H. are 'extremely bonded'; and that '[B.M.H.] refers to [him] as his father.'")
[14] *Id.* at 230.
[15] *Id.* at 231.
[16] *See* RCW 26.10.032 (stating that "a [third] party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order.") *See also* In re Custody of Shields, 157 Wash. 2d 126, 142-43 (2006) (holding that "parental rights may be outweighed when a parent is unfit. . . . [or] when actual detriment to the child's growth and development would result from placement with an otherwise fit parent.")
[17] *B.M.H.*, 179 Wash. 2d at 237.
[18] *Id.* at 239 ("The concern that Ms. Holt might interfere with Mr. Holt and B.M.H.'s relationship is insufficient to show actual detriment under *Shields* and to meet the burden of production for adequate cause under *E.A.T.W.*")
[19] *Id.* at 239.

parent is unfit.[20] The court's holding in *In Re B.M.H.* demonstrates how traditional third party custody statutes are not always sufficient to ensure that children maintain their relationships with parental figures in their lives and shows the need for the psychological parent or de facto parent doctrine.[21] Washington State is progressive and recognizes a de facto parent status, which allows for a third party, like Holt, to obtain custody of a minor child if the party meets a number of factors and if it is in the child's best interests.[22] However, the court remanded the issue of whether Holt achieved that status to the lower court in this case.[23] Other states have adopted similar tests using either the term "psychological parent" or "de facto parent" with slight variations in the elements that a party must meet to achieve the status and further variations in whether parties who attain the status automatically overcome the parental presumption or whether the party must still show compelling circumstances exist before overcoming the parental presumption.[24] However, many states refuse to acknowledge any type of de facto parent status or psychological parent status, leaving many step-parents without any legal recourse.[25]

In step-parent custody cases, the current system presumes that a parent acts in the child's best interests,[26] and many states do not allow the court to consider giving custody to a step-parent without overcoming this parental presumption by showing that the legal parent is unfit or that there are extraordinary circumstances present.[27] With so many non-traditional families, this heavy burden is highly detrimental to children in many cases where a step-parent has attained the

[20] *See* In re Custody of S.C.D.-L., 170 Wash. 2d 513, 516-17(2010) (finding that facts that support a finding that non parental custody is in the child's best interest are not sufficient to place the child in custody of the non-parent because the best interest analysis does not apply to non-parental custody cases).
[21] *See infra* Section III.A.
[22] In Re Parentage of L.B., 155 Wash. 2d 679, 706-07 (2005).
[23] *B.M.H.*, 179 Wash. 2d at 245.
[24] *See infra* Part II.
[25] *See* Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997); *see also* Bowie v. Arder, 490 N.W.2d 568 (Mich. 1992).
[26] *See infra* Section I.A.
[27] *See e.g., B.M.H.*, 179 Wash. 2d at 239.

role of parent in the child's mind.[28] While it is important to protect the rights of parents regarding their children, a uniform approach that allows for step-parents to obtain de facto or psychological parent status, overcoming the parental presumption by achieving this status and placing the party in legal parity to the legal party, and then relies on the best interests of the child standard to determine custody, protects both legal parents' and children's rights.[29]

Part I of this paper discusses the legal background of parental rights, non-parental custody law in relation to step-parents, and the emergence of the psychological parent doctrine and the de facto parent doctrine.[30] Part II discusses current state approaches regarding step-parent custody cases.[31] Part III analyzes the differing approaches, the effect of each approach on the well-being of the child and the effect on the legal parent's right to custody of the child.[32] Part IV, finally, offers a proposal to award custody to step-parents and argues that states should adopt the psychological parent doctrine as set out by the Wisconsin Supreme Court in *In Re Custody of H.S.H-K* and then assess the best interests of the child in non-parental custody cases.[33]

## I. RIGHTS OF PARENTS AND STEP-PARENTS

The United States Supreme Court deems fundamental the constitutional right of parents to the care, custody, and management of their children.[34] The Court has long recognized legal parents' rights concerning their children and has protected parents from state intervention in raising their children.[35] The Supreme Court uses this fundamental right to protect the parents against the teaching of foreign languages in schools,[36] requiring students to attend public

[28] Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a "Traditional" Family*, PEW RESEARCH CENTER (Dec. 22, 2014), http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/.
[29] *See infra* Part IV.
[30] *See infra* Part I.
[31] *See infra* Part II.
[32] *See infra* Part III.
[33] *See infra* Part IV.
[34] Meyer v. Nebraska, 262 U.S. 390 (1923).
[35] *See infra* Section I.A.
[36] *Meyer*, 262 U.S. at 397.

schools,[37] and requiring a student to attend school until a certain age.[38] However, the Supreme Court has not applied this right to step-parents in any context because step-parents are commonly considered legal strangers to the child.[39] Whereas a legal parent is granted rights over the child including the ability to obtain custody,[40] a legal stranger has no legal standing to seek custody of the child.[41] While nearly all states have some type of third party custody statute[42] allowing the step-parent to obtain custody of the child, these statutes often require the step-parent to show that the legal parent is unfit or that there are extraordinary circumstances before the court will allow the party to overcome the parental presumption and grant custody.[43] Courts created the psychological or de facto parent doctrines as a way to provide an avenue for step-parents and other third parties to have standing in cases that the legislature did not contemplate.[44]

A. Fundamental Rights of Parents

The United States Supreme Court began developing parental rights as fundamental constitutional rights in the case of *Meyer v. Nebraska*.[45] In that case, the Court struck down a statute that did not allow schools to teach foreign languages to students below the eighth grade.[46] In holding this statute impermissible, the Court explained that it interfered with the parent's

[37] Pierce v. Society of the Sisters, 268 U.S. 510 (1925).
[38] Wisconsin v. Yoder, 406 U.S. 205 (1972).
[39] Matthew T. Moore, *Long-Term Plans for LGBT Floridians: Special Concerns and Suggestions to Avoid Legal and Family Interference*, 34 NOVA L. REV. 255, 262 (2009) (defining legal stranger as "someone with no standing to bring suit.")
[40] *See* Monica K. Miller, *How Judges Decide Whether Social Parents Have Parental Rights: A Five-Factor Typology*, 49 FAM. CT. REV. 72, 72-73 (2011); *see also* Jennifer Sroka, *A Mother Yesterday, but Not Today: Deficiencies of the Uniform Parentage Act for Non-Biological Parents in Same-Sex Relationships*, 47 VAL. U.L. REV. 537, 541 n.23 (2012) ("[P]roviding the social parent with legal parental status is beneficial in providing security to the family situation, such as the ability to handle medical situations or estate issues. By being defined as a legal parent, an individual is granted rights over her child that are otherwise unavailable, such as the ability to obtain custody or to make medical decisions.")
[41] *See* Moore, *supra* note 39.
[42] Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS & PUB. POL'Y 43, 73 (2008).
[43] *Id.*
[44] *See B.M.H.*, 179 Wash. 2d at 240 ("De facto parentage is a flexible equitable remedy that complements legislative enactments where parent-child relationships arise in ways that are not contemplated in the statutory scheme.")
[45] 262 U.S. 390 (1923).
[46] *Id.* at 397.

fundamental right to control the education of his child.[47] The Fourteenth Amendment provides the liberty to establish a home and to bring up children.[48] While the Court did not specify what the right entails, *Meyer* is viewed as the origin of parental rights as fundamental rights.[49]

The United States Supreme Court next addressed the issue of a parent's fundamental rights in *Pierce v. Society of the Sisters*.[50] In that case, the Court reaffirmed the liberty of parents to direct the upbringing and the education of their children.[51] The Court explained that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[52] This decision invalidated an Oregon state statute that eliminated the option of private education for students holding that it violated a parent's fundamental right of choice regarding his child's education.[53]

The United States Supreme Court repeatedly reaffirmed the parental fundamental rights recognized in these early decisions.[54] In *Wisconsin v. Yoder*, the Court held that a state statute requiring students to attend high school until the age of sixteen was not constitutional because it violated the Amish parents' rights to the care, custody, and upbringing of their children.[55] The court again cited to its earlier holdings in both *Meyer v. Nebraska* and *Pierce v. Society of the Sisters* regarding the fundamental rights of parents in finding the statute unconstitutional.[56]

---

[47] *Id.* at 401.
[48] *Id.* at 399.
[49] *Id.* ("While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated.")
[50] 268 U.S. 390 (1923).
[51] *Id.* at 534.
[52] *Id.* at 535.
[53] *Id.* at 534-35.
[54] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); *see also* Prince v. Massachusetts, 321 U.S. 158 (1944).
[55] 406 U.S. at 232-33 ("[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.")
[56] *Id.* at 232.

These cases illustrate that the Supreme Court recognizes that legal parents are entitled to a large degree of privacy and autonomy regarding their children.[57] State law presumes that legal parents act in the best interest of their children.[58] However, the Supreme Court has not clearly defined the limits of a parent's fundamental right or the limits of the parental presumption in relation to third parties.

### B. *Troxel v. Granville*

The Supreme Court addressed third party visitation statutes in *Troxel v. Granville*, but did not state clear standards for when a third party may overcome the parental presumption.[59] In *Troxel v. Granville*, the United States Supreme Court ruled on a Washington state statute that allowed for interested third parties to seek visitation of a child.[60] The statute allowed for "any person" to petition the court for visitation rights at "any time" and allowed the court to grant that visitation whenever it was in the best interests of the child.[61] The Washington Supreme Court held that the statute unconstitutionally interfered with legal parents' rights to rear their children.[62]

In *Troxel*, Tommie Granville and Brad Troxel never married, but had two children, Isabelle and Natalie.[63] After the couple separated, Brad moved in with his parents and brought his daughters to his parents' home each weekend for visitation.[64] This arrangement continued for two years until Brad committed suicide.[65] Following his death, the children continued to see their grandparents, the Troxels, regularly for visitation.[66] The children's mother wanted to limit their

[57] *See* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 314 (2007).
[58] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000).
[59] *Id.* at 73.
[60] *Id.* at 60.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

visitation with their grandparents to one visit each month,[67] while the grandparents wanted visitation with the children two weekends each month and two weeks during the summer.[68] The Troxel's petitioned under the Washington Statute seeking greater visitation with their granddaughters.[69]

On certiorari, the United States Supreme Court again recognized the fundamental rights of parents in the care, custody, and control of their children, explaining that it is "perhaps the oldest of the fundamental liberty interests recognized by this court."[70] The Court explained that the Washington Statute at issue in *Troxel* was "breathtakingly broad," and that a combination of factors demonstrated that the visitation order at issue in this case was an unconstitutional infringement of the mother's parental rights to her daughters.[71] It noted that the case did not present any special circumstances that justified interference with the fundamental right of the legal parent.[72] While the Court held that the statute was unconstitutional as applied to the Troxels, it did not declare that the Washington Statute was unconstitutional for failing to require a party to show harm to the child.[73] Instead, the Court discussed how the Washington trial court judge did not give any weight to the parental presumption, but instead applied the opposite presumption, that children should spend time with their grandparents.[74] The Supreme Court held that the Washington Statute as applied to this particular set of facts was unconstitutional.[75]

---

[67] *Id.* at 61.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 65.
[71] *Id.* at 67-68 ("[T]his case involves a visitation petition filed by grandparents soon after the death of their son—the father of Isabelle and Natalie—but the combination of several factors here compels our conclusion that § 26.10.160(3), as applied, exceeded the bounds of the Due Process Clause.")
[72] *Id.* at 68.
[73] *Id.* at 73.
[74] *Id.* at 58. The Supreme Court emphasized the trial judges reasoning for granting visitation did not consider the parental presumption. ("I look back on some personal experiences. . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.") *Id.* at 72.
[75] *Id.* at 73.

However, the Court's decision in this case was limited and did not answer whether all non-parental visitation statutes require a party to show potential harm to the child before granting visitation.[76] This decision left states with little guidance as to the specific parameters required to allow third party visitation or custody.[77] In his dissent, Justice Stevens discussed how although the Supreme Court has never before addressed the issue, based on precedent, there is an extreme likelihood that a child has a right to maintain intimate relationships.[78] Justice Stevens emphasized that the Court should not create a constitutional rule allowing legal parents to arbitrarily exercise their liberty interest in the care of their children because of the wide variety of family relationships that may arise.[79] He recognized that circumstances may arise where a child has a strong interest in maintaining a relationship with a third party, and a legal parent's decision to prevent visitation is not motivated by the best interests of the child.[80] In these circumstances, courts should be allowed to intervene on behalf of the child.

Following *Troxel v. Granville*, the Supreme Court left states with little guidance regarding the requirements or limitations for third party visitation and custody statutes.[81] Some states responded to the Supreme Court holding by modifying their third party statutes to provide more explicit protections for a legal parent.[82] Several states responded by creating a heightened

[76] *Id.* at 73. ("Because we rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case, we do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.")
[77] *See* Atkinson, *infra* note 82.
[78] *Id.* at 88-89 (Stevens, J., dissenting) ("This is not, of course, to suggest that a child's liberty interest in maintaining contact with a particular individual is to be treated invariably as on a par with that child's parents' contrary interests. we should recognize that there may be circumstances in which a child has a stronger interest at stake than mere protection from serious harm caused by the termination of visitation by a "person" other than a parent.")
[79] *Id.*
[80] *Id.* at 91.
[81] *Id.*
[82] Jeff Atkinson, *Shifts in the Law Regarding the Rights of Third Parties to Seek Visitation and Custody of Children*, 47.1 FAMILY LAW QUARTERLY 1 (2013).

clear and convincing evidence[83] or compelling reasons[84] standard of proof for third parties seeking custody, while others created additional standing for third parties by allowing parties to establish de facto or psychological parent status.[85]

C. The Emergence of the Psychological Parent Doctrine

Beginning in the 1960s, legal scholars began discussing the Psychological Parent Doctrine.[86] Scholars explained that biological events do not create a parent-child relationship, but instead the psychological relationships that children develop create this relationship.[87] Goldstein, Freud, and Solnit developed a proposal to change the law and practices governing third party custody of children, which they laid out in their work, *Beyond the Best Interests of the Child*.[88] The authors believed that this doctrine was necessary because the child's attachment to a parent is not the direct result of his birth.[89] It instead results from the day to day attention to the child's physical and emotional needs.[90] They explained that an absent biological parent will not achieve this status with the child, but a present non-biological parent may.[91]

Goldstein, Freud, and Solnit proposed a framework where courts make child custody decisions based primarily on the child's bonds with their legal parent or psychological parent.[92] Over time, Courts began to recognize the importance of giving weight to a child's emotional

[83] *See, e.g.*, Mch. Comp. Laws Ann. § 722.25(1) (West 2013); Mont. Code § 40-4228(2) (2013); S.C. Code Ann. § 63-15-60 (2013); Utah Code Ann. § 30-5a-103(2) (2013). *See also* Clark v. Wade, 544 S.E.2d 99, 108 (Ga. 2001); In re R.A., 891 A.2d 564, 579 (N.H. 2005); David N. v. Jason N" 608 S.E.2d 751, 753 (N.C. 2005).
[84] *See, e.g.*, In re Hruby, 748 P.2d 57, 63 (Or. 1987); In re Sleeper, 929 P.2d 1028 (Or. Ct. App. 1996).
[85] *See infra* Part II.
[86] *See* Note, *Alternative to Parental Right in Child Custody Disputes Involving Third Parties*, 73 YALE L. J. 151 (1963). This article is often credited with being the first discussion of the doctrine within legal scholarship. *See* Peggy C. Davis, "*There Is a Book Out ...": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1543 (1987).
[87] Note, *Supra* note 86 at 151.
[88] JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973) (Defining a psychological parent relationship as based upon "day to day interaction, companionship, and shared experiences.")
[89] *See* JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 40 (1979).
[90] *Id.*
[91] *See* GOLDSTEIN ET AL., *supra* note 89 at 19.
[92] Davis, *supra* note 86 at 1545. (citing GOLDSTEIN ET AL., *supra* note 89 at 189).

attachments, especially in cases where a legal parent had neglected their duties to the child.[93] A number of state courts adopted either the psychological parent doctrine or the de facto parent doctrine in recognition of a child's attachment to other parties including step-parents.[94]

D. The De Facto Parent Doctrine

The De Facto Parent Doctrine is very similar to the psychological parent doctrine. Some state courts use the terms interchangeably.[95] The doctrine focuses on the relationship that the child develops with a third party and looks at whether the party lives in the same home as the child, providing basic care giving functions.[96] The differences between the de facto parent and psychological parent doctrines are slight and vary from state to state, but each doctrine focuses on the same issue: whether a child has developed a parent-child bond with a third party.[97]

The American Law Institute developed different categories for a parent, including a de facto parent, which some courts have referenced in their decisions.[98] Under the American Law Institute definition, a de facto parent is an individual other than a legal parent or a parent by estoppel, who has lived with the child for more than two years, has formed a parent-child relationship, and regularly performed a share of caretaking functions as much as a parent who lived with the child would.[99] De facto parents have standing to seek custody of the child, but

[93] See Phillip F. Schuster, *Constitutional and Family Law Implications of the Sleeper and Troxel Cases: A Denouement For Oregon's Psychological Parent Statute?*, 36 WILLIAMETTE L. REV. 549, 577 (2000). ("At least in a closely-knit stepparent household, the delicate interplay between the psychological parent's 'opportunity interest' and the child's emotional and physical needs may form the basis for the psychological parent's substantive custodial claim. This claim, in turn, interrelates ultimately with the child's best interest, at least where the noncustodial biological parent has abrogated his or her parental responsibilities.")
[94] *See infra* Part II.
[95] *See L.B.*, 155 Wash 2d at 706 (adopting the test from *In re Custody of H.S.H.-K.* as a test to establish that the party is a de facto parent); *but see* Middleton v. Johnson, 369 S.C. 585 (2006) (adopting the same test from *In re Custody of H.S.H.-K.* in to establish that a party is a psychological parent).
[96] Nicole M. Onorato, Note, *The Right to Be Heard: Incorporating the Needs and Interests of Children of Nonmarital Families into the Visitation Rights Dialogue*, 4 WHITTIER J. CHILD & FAM. ADVOC. 491, 522 (2005).
[97] *See infra* Part II; *see also* Principles of the Law of Family Dissolution, *Definitions* §2.03 (2002).
[98] *See* In re R.A., 891 A.2d 564 (N.H. 2005); *see also L.B.*, 155 Wash 2d at 706.
[99] Principles of the Law of Family Dissolution, *Definitions* §2.03 (2002).

unlike psychological parents, they do not automatically overcome the parental presumption and therefore, are not placed in parity with the legal parent.[100] Instead, the court is instructed not to allocate custodial responsibility to a de facto parent when the legal parent is fit and willing to care for the child unless the party can show that the legal parent has not taken on a reasonable degree of parenting functions or that the child will be harmed if placed with the fit parent.[101] State courts vary on the elements required to establish psychological parent status and on whether a party must show additional circumstances to overcome the parental presumption.

The United States Supreme Court has explained that legal parents have fundamental rights concerning their children, but the extent of those rights in relation to third parties is not clear. This lack of clarity has resulted in many states having third party custody statutes allowing parties to overcome the parental presumption in cases with compelling circumstances. Others adopted the psychological parent doctrine or de facto parent doctrine to give third parties rights more extensive rights. Some states have adopted these doctrines with varying elements, while others have rejected the doctrines entirely.

## II. DIFFERING STATE APPROACHES TO STEP-PARENT CUSTODY

State Courts take varying approaches to the legal rights of step-parents. Some courts have adopted the psychological parent doctrine and consider parties who achieve the status to have overcome the parental presumption, placing these parties in parity with a legal parent.[102] Other states have adopted the doctrine, but only allow the party to overcome the presumption if

[100] *See* Principles of the Law of Family Dissolution, *Allocations of Responsibility to Individuals Other than Legal Parents*, §2.18 (2002).
[101] *Id.*
[102] *See* Subsection II.A.1.

compelling circumstances are present.[103] Others have a modified approach which allows for a party to become a psychological parent and then assesses a variety of factors, some of which are unrelated to parental fitness, to determine if the party can overcome the parent presumption.[104] The final approach commonly taken by states is to offer no rights for third parties in cases where the legal parent is fit.[105] While it is important to protect the rights of parents regarding their children, it is sometimes in a child's best interests to allow for third parties who meet certain requirements to obtain visitation or custody of a child.[106] Without these rights, many step-parents are left powerless.[107]

A. States Adopting the Psychological Parent Doctrine

A number of states have adopted the psychological parent doctrine.[108] Although the doctrine is similar in many respects, states have adopted varying tests to determine if a party is a psychological parent and have different requirements for the party to meet before overcoming the presumption.[109] Further, states differ in the method of adoption of the doctrine, with many state courts creating standing for psychological parents through judicial holdings and others creating standing through statutes.

1. *In Re Custody of H.S.H.-K.*

In *In Re Custody of H.S.H.-K.*, the Wisconsin Supreme Court created the leading judicial test for determining whether a step-parent is a psychological parent thereby placing a party in

[103] *See* Subsection II.A.2.
[104] *See* Subsection II.A.3.
[105] *See* Section II.B.
[106] *See* Section III.A.
[107] *See e.g.*, *Bowie*, 490 N.W.2d 568; *Titchenal*, 693 A.2d 682.
[108] *See* Christina Spiezia, *In the Courts: State Views on the Psychological Parent and De Facto-Parent Doctrines*, 33 CHILDRENS'S LEGAL RIGHTS J. 402, 404 (2013) (explaining that 21 states currently allow a party to seek custody under the psychological or de facto parent doctrines).
[109] *See infra* Subsections II.A.1-3.

parity with the legal parent.[110] A number of state courts have cited and adopted this test.[111] To establish the existence of a parent-child relationship, the party must show:

> (1) 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;
>
> (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.[112]

In addition to the factors listed in the test, the court explained that in order to justify state intervention with the legal parent's relationship with the child, the third party needs to show that the legal parent has "substantially interfered" with the third party's relationship with the child.[113] Parties are also required to show that they sought visitation or custody of the child within a reasonable time after the legal parent interfered with their relationship with the child.[114] After proving all of these elements, the psychological parent overcomes the parental presumption and the court can look at whether having visitation or custody with the third party is in the best interests of the child.[115] The court cautioned that the proceedings must focus on the children, not

[110] 533 N.W.2d 419 (Wis. 1995).
[111] *See L.B.*, 155Wash. 2d. 679; *Middleton*, 369 S.C. 585.
[112] *H.S.H.-K.*, 533 N.W.2d at 421.
[113] *Id.*
[114] *Id.*
[115] *Id.*

the third party because children are subject to as much hostility in these types of cases as they are in a divorce proceeding between two legal parents.[116]

After a party meets all of the above elements, this approach allows for the court to consider whether having visitation or custody with a third party is in the child's best interests.[117] The psychological parent is placed in parity with the legal parent before the court.[118] Washington State adopted the Wisconsin Supreme Court's test and argued that the test properly balances the rights of a legal parent with the rights of the child.[119]

In *In Re Parentage of L.B.*, the Washington State Supreme Court adopted the test laid out by the Wisconsin Supreme Court in *In Re H.S.H.-K.* to allow parties in Washington to establish standing as de facto parents.[120] The court found that once a party is able to establish that they are a de facto parent, the party stands in legal parity to the legal parent.[121] The court explained that the United States Supreme Court's decision in *Troxel* did not establish that de facto parent status or psychological parent status infringes on the fundamental liberties of a legal parent.[122] Instead, the Court reasoned that the United States Supreme Court in *Troxel* only disapproved of the courts granting of visitation in that case, but did not address the issue of state law determination of who may be considered a parent.[123] The Washington Supreme Court referenced Justice Stevens' dissent in *Troxel*, arguing that courts could, in some circumstances, award visitation or custody to a third party.[124]

---

[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *L.B.*, 155 Wash. 2d. at 712.
[120] *Id.* at 708.
[121] *Id.*
[122] *Id.* at 710-11.
[123] *Id.* (Explaining that "*Troxel* does not imply any constitutional infirmity in our holding today, and importantly, nor does it place any constitutional limitations on the ability of states to legislatively, or through their common law, define a parent or family. Neither the United States Supreme Court nor this court has ever held that 'family' or 'parents' are terms limited in their definition by a strict biological prerequisite.")
[124] *Id.* at 711.

The Washington court further reasoned that the test did not create a slippery slope, opening the door to too many parties, because nannies, teachers, friends, grandparents, or other third parties could not easily attain de facto parent status.[125] The court explained that there should be a high threshold for attaining the status to ensure that the court can only consider those who have truly developed a parent-child relationship.[126] Further, the state would not be interfering for a third party in an insular family, but would instead be enforcing the rights of a de facto parent that arise because the legal parent consented to and fostered the relationship between the de facto parent and the child.[127] The court recognized that the current statutes in Washington failed to account for all of the potential scenarios which could arise within the changing definition of a family.[128] It explained that when the rights and interests of children are at stake, the court must be especially aware that the legislature's silence does not leave a party without redress under the common law.[129] While many courts have adopted the Wisconsin Supreme Court's test for psychological parents outright, others have created a modified version of the test allowing psychological parents to overcome the parental presumption only in cases with compelling circumstances.[130]

### 2. *States Requiring Compelling Circumstances*

The South Carolina Court of Appeals has adopted the test from *In Re Custody of H.S.H.-K.*, but does not place the psychological parent in parity with the legal parent.[131] Instead, the court requires the party to show compelling circumstances before it will consider awarding

[125] *Id.* at 712.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 706.
[129] *Id.*
[130] *See infra* Subsection II.A.2.
[131] 369 S.C. 585, 604 (2006).

custody to the psychological parent.[132] In *Middleton v. Johnson*, the South Carolina Court of Appeals heard a case involving a stepfather seeking custody of a child who he had helped raise and had a relationship with since the child was born.[133] The South Carolina Court of Appeals adopted the Wisconsin Supreme Court's test from *In Re Custody of H.S.H.-K.* explaining that it provides a strong framework and ensures that the factors strictly limit a party's ability to attain the status.[134]

The court explained that the first factor recognizes that in cases where a legal parent has encouraged and fostered a relationship between a third party and the child, that parent has reduced his right to unilaterally severe that relationship.[135] The factor provides legal parents with control over who will be allowed to become a psychological parent.[136] The court explained that the right of a legal parent does not allow for that parent to erase a relationship between the child and the third party.[137] While the court recognized that parents have a right to privacy in raising their children, it stated that legal parents cannot maintain that complete zone of privacy when they invite a third party to function as a parent of the child.[138] The South Carolina Court of Appeals argued that the second prong of the test should allow for parties who have both lived in the same home as the legal parent and parties who have supervised the child at their home in a custody-like arrangement to meet the prong.[139]

The court reasoned that the final two elements were the most important because they focused on the actual relationship between the party and the child.[140] It explained that legal

[132] *Id.* ("The standard to be applied is whether compelling circumstances exist to overcome the presumption that a fit, legal parent acts in the child's best interest, and of course, visitation must actually be in the child's best interest.")
[133] *Id.* at 589.
[134] *Id.* at 597.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.* at 598.
[140] *Id.*

parents are further protected from claims from various third parties like caretakers, nannies, and babysitters because they had to assume the role of caring for the child without expectation of financial gain.[141] The court narrowed the doctrine further by stating that in cases where there are already two legal parents in the child's life, a third party could never attain the status of psychological parent because there is no need for an additional parental figure in the child's life.[142] Finally, the court recognized the importance of the degree of attachment that the child has to the third party as being pivotal in the determination of whether the party is a psychological parent.[143]

Although the South Carolina Court of Appeals adopted the Wisconsin Supreme Court test, the court explicitly stated that attaining the status of psychological parent does not automatically give the party the right to custody of the child.[144] The court explained that the standard the court should apply is whether there are compelling circumstances to overcome the presumption that a fit legal parent is acting in the child's best interests.[145] While Wisconsin placed the parent in parity with the legal parent's standing, the South Carolina Court of Appeals still required some showing of compelling circumstances to overcome the parental presumption.[146]

### 3. *Adoption of the Psychological Parent Doctrine by Statute*

A number of states have adopted the psychological parent doctrine by statute.[147] The Oregon Legislature adopted the psychological parent doctrine by statute in 1985.[148] Oregon's statute provides a slightly modified approach consisting of varying factors and different

[141] *Id.*
[142] *Id.*
[143] *Id.* at 598-99. The relationship needs to be substantial and not temporary. *Id.*

[144] *Id.* at 604
[145] *Id.*
[146] *See In Re Custody of H.S.H.-K.*, 533 N.W.2d at 421.

considerations upon finding that a party is psychological parent.[149] The statute provides for a step-parent or other third party to show that they have a parent-child relationship, with the following differences from the test in *In Re Custody of H.S.H.-K.*:

> 10(a) A Child-parent relationship . . . exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section. . . . A relationship between a child and a person who is the nonrelated foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding twelve months.[150]

After establishing that a parent-child relationship exists, the court is allowed to consider a number of factors to determine if the party has overcome the parental presumption to grant visitation or custody.[151] In order to grant custody, the court may look at whether

> (1) the legal parent is unwilling or unable to care adequately for the child; (2) The petitioner or intervenor is or recently has been the child's primary caretaker; (3) Circumstances detrimental to the child exist if relief is denied; (4) The legal parent has fostered, encouraged or consented to the relationship between the child and the petitioner or intervenor; or (5) the legal parent has unreasonably denied or limited contact between the child and the petitioner or intervenor.[152]

The Oregon statute requires the party to prove slightly different elements than the Wisconsin Court.[153] The statute sets specific time requirements that parties must meet for the court to find that they are a psychological parent.[154] The thresholds are relatively low, but by including specific time requirements, courts have slightly less discretion to determine if the party and the child have developed a sufficient relationship.[155] Oregon does not allow a psychological parent to automatically overcome the parental presumption, but instead requires that the party show by a preponderance of the evidence that the legal parent is not acting in the best interest of

---

[147] *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-415(G)(1); Minn. Stat. Ann. § 257.022(2b); Or. Rev. Stat. § 109.119 (2001); Tex. Fam. Code Ann. § 102.003(a)(9); Nev. Rev. Stat. Ann. § 125C.050.
[148] *See* OR. REV. STAT. §109.119 (1985).
[149] *See id.*
[150] *Id.* §109.119 (10)(a).
[151] *Id.* §109.119 (4)(b).
[152] *Id.*
[153] *See H.S.H.-K*, 533 N.W.2d at 421; *cf.* OR. REV. STAT. §109.119 (2001).
[154] OR. REV. STAT. §109.119 (10)(a).
[155] *See id.*

the child based on the factors laid out in the statute.[156] Then when the psychological parent overcomes the presumption, the court may consider if custody with the third party is in the best interests of the child.[157] Despite the number of protections that some states provide to legal parents while still allowing for third parties to obtain custody in certain circumstances, some state courts have refused to adopt the psychological parent doctrine.[158]

B. State Courts Rejection of the Psychological Parent Doctrine

Of the fifty states, only twenty-one states have any type of psychological parent doctrine or de facto parent doctrine.[159] Without any avenue to pursue custody or visitation of a child many step-parents and children are left without recourse.[160] Some states have declined to adopt the doctrine because of the lack of legislative action,[161] while others have rejected it explaining that third party claims create a heavy burden for legal parents to bear.[162]

In Michigan, the Supreme Court has repeatedly declined to apply the psychological parent doctrine. In *Bowie v. Arder*, the court recognized that the doctrine existed, but explained that is was not in the position to apply the doctrine because the state legislature had not taken any action to put it in place.[163] In 1999, the Michigan Supreme Court again held in *Van v. Zahorik* that policy issues that involved child custody should be handled by the legislature and not the

[156] *See* In re Marriage of Southard, 275 Or. App. 538, 550 (2016).
[157] *Id.* at 551.
[158] *See infra* Section II.B.
[159] *See* Spiezia, *supra* note 108.
[160] *See* Section III.A.
[161] *Bowie*, 490 N.W.2d 568.
[162] *Titchenal*, 693 A.2d 682.
[163] *Bowie*, 490 N.W.2d at 579 ("[W]e are not in a position to make such policy judgments, especially in light of the fact that the Legislature appears to have chosen a different course in its consideration of the competing interests involved. Therefore, we leave to the Legislature the task of creating substantive rights, subject to any constitutional restraints, if it finds that public policy so requires.")

courts.[164] While this court relied on the inaction of the legislature, other courts have expressed concerns about the application of the doctrine and the rights of a legal parent.[165]

The Vermont Supreme Court rejected the psychological or de facto parent doctrines.[166] The court explained that a test for de facto parent status would result in a "full blown evidentiary hearing" and would infringe on the constitutional rights of the legal parent.[167] The court feared that by allowing parties to claim parentage under these doctrines, this would require parents to defend against a large number of third parties seeking to establish de facto or psychological parent status.[168] They feared that this test would not prevent legal parents from having to defend against the merits of petitions, and stated that the possibilities of who could bring a petition were nearly "limitless."[169] The court explained that it feared adopting the doctrine would open the door to the possibility of third parties abusing this ability and attempting to harass an individual or to continue a relationship that the child did not want.[170] The court did not view the doctrine as a proper balance between the rights of a legal parent and a child, but instead believed that the doctrine focused too much on the rights of the third party.[171] These concerns ultimately lead to the court rejecting the doctrine.[172]

State Courts take a number of approaches to the psychological parent doctrine.[173] A number of state courts have adopted the leading judicial test from the Wisconsin Supreme Court.[174] Other state legislatures have chosen to adopt the doctrine.[175] While the elements for

[164] 460 Mich. 320, 327-28 (1999).
[165] Spiezia, *supra* note 108 at 403.
[166] *Titchenal*, 693 A.2d 682.
[167] *Id.* at 688.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.* at 687 ("The movement for wider visitation is in large part based on desire to vindicate rights of those seeking parent-child contact rather than to further children's interests; visitation petitions impose serious psychological stresses on children and heavy financial burdens on custodians who often do not have adequate financial resources to defend against suits.")
[172] *Id.* at 689.
[173] *See supra* Sections II.A-B.
[174] *See L.B.*, 155Wash. 2d. 679; *Middleton*, 369 S.C. 585.

each test are similar, even after finding that a party meets the test, states put psychological parents on different levels in comparison to legal parents by requiring some parties to still show compelling circumstances before they can overcome the parental presumption and allowing others to automatically overcome the parental presumption.[176] Other states reject outright the psychological parent doctrine leaving step-parents and children with no redress.[177] This situation has clear implications for both the well-being of children involved in these disputes and for the legal parent's fundamental rights.[178] Courts must balance these rights to arrive at the best outcome for families.

## III. THE EFFECT OF DIFFERING STATE APPROACHES ON CHILDREN IN STEP-PARENT CUSTODY DISPUTES

Although traditionally parental rights belonged exclusively to legal parents of children, the concept of family has changed dramatically in recent decades.[179] It is common for families in our society to be comprised of people who may not be biologically related to a child, but care for the child in the same way that a legal parent would.[180] In these types of situations it is extremely beneficial to the well-being of a child to allow that person to have some rights to the child.[181] Psychologists recognize that children form relationships with step-parents that are valuable and important to the child's well-being.[182] Courts in the United States are beginning to change their interpretations of parentage to fit with more modern views of families, but many states have been

---

[175] *See* OR. REV. STAT. §109.119 (1985).
[176] *See L.B.*, 155Wash. 2d. 679; *Middleton*, 369 S.C. 585.
[177] *See e.g.*, *Bowie*, 490 N.W.2d 568; *Titchenal*, 693 A.2d 682.
[178] *See infra* Part III.
[179] *See* Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a "Traditional" Family*, Pew Research Center (Dec. 22, 2014), http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/.
[180] *See e.g.*, *B.M.H.*, 179 Wash. 2d at 229.
[181] J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 111 (2013).
[182] Ana H. Marty, Christine A. Readdick, & Connor M. Walters, *Supporting Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CH. DEVEL.& CARE 271, 277 (2004).

slow to made changes to the detriment of both step-parents and children.[183] While it is important to protect a legal parent's rights, allowing step-parents to attain psychological parent status properly balances a parent's fundamental right with the right of a child to maintain intimate relationships.[184] The decision of whether to allow a step-parent to become a psychological parent has implications for both children's rights to continue their relationships and parents' fundamental rights to the care, control, and custody of their children.[185]

### A. Implications for the Well-Being of the Child

Children in families with nontraditional parents may form attachments to step-parents, and the step-parent's lack of rights is detrimental to the children's well-being.[186] Continuity of personal relationships in a child's life allows them to have healthy growth and development.[187] While a child's need for continuity changes as they grow, it is clear children benefit from stability and maintaining relationships with caregivers.[188] Those parties who have attained the level of a psychological parent or de facto parent have developed strong bonds with the child that courts should recognize.[189] Children who experience divorce often deal with sadness and depression if they are not permitted to see their noncustodial parent.[190] Even though third parties are not legal parents, the effect of the loss of a relationship with a third party may be as detrimental to the child as the loss of a relationship with a legal parent depending on the attachment of the child to that third party.[191]

---

[183] *See e.g., L.B.*, 155 Wash 2d at 706 ; *but see Bowie*, 490 N.W.2d 568; *Titchenal*, 693 A.2d 682.
[184] *See infra* Sections III.A.-B.
[185] *Id.*
[186] Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879 (1984).
[187] *Id.* at 904.
[188] *Id.* at 904-05.
[189] *See* JOSEPH GOLDSTEIN ET AL., *supra* note 89; *see also B.M.H.*, 179 Wash. 2d at 229.
[190] J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 254-57, 248 (1980).
[191] *See* JOSEPH GOLDSTEIN ET AL., *supra* note 88.

The implications of a state court's refusal to allow the psychological parent doctrine are widespread.[192] In the United States, only 46% of children under the age of eighteen live in a home with two heterosexual parents in their first marriage.[193] The number of children living in a traditional family has been rapidly declining in recent decades.[194] The Supreme Court plurality recognized this shift in *Troxel v. Granville*, explaining that "the demographic changes of the past century make it difficult to speak of an average American family."[195] The Court understood that many of these families needed to bring in parties outside of the nuclear family to help with the everyday tasks associated with raising a child.[196] In his dissenting opinion in *Michael H. v. Gerald D.*, Justice Brennan of the United States Supreme Court noted that it is destructive to pretend that we agree on the meaning of terms like "family" or "parenthood."[197] He cautioned that states should not attempt to compel only one definition of parent because many children's families will not fit within that definition and it will be the child who suffers most.[198]

Further, legal parents' fundamental rights to the care of their children should be balanced against children's needs to maintain their relationships.[199] In *Troxel v. Granville*, Justice Stevens' language in his dissenting opinion supports that children's rights to maintain intimate relationships should be given consideration along with the legal parent's rights.[200] Justice Stevens suggests a statute must consider the parental presumption, but a state should not be

[192] *See* Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a "Traditional" Family*, Pew Research Center (Dec. 22, 2014), http://www.pewresearch.org/fact-tank/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/.
[193] *Id.*
[194] *Id.* Explaining that ("[46%] is a marked change from 1960, when 73% of children fit this description, and 1980, when 61% did.")
[195] *Troxel*, 530 U.S. at 63.
[196] *Id.* at 64.
[197] Michael H. v. Gerald D., 491 U.S. 110, 141 (1989) (Brennan, J., dissenting) ("We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that 'family' and 'parenthood' are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do.")
[198] *Id.*
[199] *See Troxel*, 530 U.S. at 88-89 (Stevens, J., dissenting).
[200] *Id.* Explaining that ("[I]t seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.")

prevented from protecting children against a parent's decision that is not actually motivated by a child's best interests.[201] He recognizes that cases will likely arise where a parent is not acting in the child's best interest, and the court should be able to protect the child in those circumstances.[202] Because of the implications for the well-being of children, courts should balance a legal parent's fundamental rights with a child's need to maintain intimate relationships.

B. Implications for a Legal Parent's Fundamental Rights

While it is clear that a legal parent has a fundamental right to the care, control, and custody of their child, it is not clear how far that right extends.[203] The Supreme Court noted in *Troxel v. Granville* that "the court must accord at least some special weight to the parent's own determination" of a third parties access to visitation with a child.[204] In that case, the mother had already offered to allow the grandparents visitation with their granddaughters, but the Troxels wanted additional visitation.[205] This case suggests that while in that particular situation the court was not permitted to grant visitation in the way that it did, a legal parent's right to the care of the child is not without limits.[206] The Court recognized that because families vary widely, circumstances may arise where visitation would not violate a parent's right to due process under the fourteenth amendment.[207]

State courts reasons for adopting the psychological parent doctrine support that the doctrine does not ignore a parent's fundamental right to control and care for their child, but

[201] *Id.* at 89.
[202] *Id.* Justice Stevens strongly cautioned "against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily." *Id.*
[203] *See supra* Sections I.A-B.
[204] 530 U.S. at 70.
[205] *Id.* at 72.
[206] *See id.* at 73 ("Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.")
[207] *Id.* Explaining that the court was not addressing whether visitation statutes required the third party to show harm to the child before being granted visitation.

instead balances this right with the child's rights and the psychological parent's rights.[208] The Washington Supreme Court addressed the issue as balancing the rights of a legal parent with the rights of a de facto parent.[209] In *In Re Parentage of L.B.*, the Washington Supreme Court noted that the state was not interfering with a legal parent's fundamental rights, but was instead enforcing the rights of the de facto parent that the legal parent created by encouraging and fostering a relationship between the child and the third party.[210] The South Carolina Court of Appeals framed the issue as a balance between the rights of a legal parent and the rights of the child.[211] The court explained that because a legal parent allowed for the third party to create a relationship with the child, they should not be permitted to unilaterally end that child's relationship with the party.[212] The court balanced a legal parent's right to privacy in raising their child, with the rights of both the child and the third party to continue their relationship.[213]

While the Supreme Court has not clearly defined the extent of legal parents' fundamental right to the care, custody, and control of their children, it is clear that in some cases severing a relationship with a party with whom the child has developed a parent-child bond is detrimental to the child's well-being.[214] By requiring a party to meet a number of factors and then allowing the court to consider if custody is in the child's best interests, the legal parent's fundamental rights are properly balanced with the rights of the child and the de facto party to maintain their relationship.[215] Therefore, states should adopt the psychological parent doctrine as set out by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.* to allow for parties to petition for custody of a child in cases where they have developed a parent-child relationship, overcoming

[208] *See L.B.*, 155 Wash. 2d at 712.
[209] *Id.*
[210] *Id.*
[211] *Middleton*, 369 S.C. at 597.
[212] *Id.*
[213] *Id.*
[214] *See supra* Sections III.A-B.
[215] *See infra* Part IV.

the parental presumption and placing the party in parity with the legal parent, in order to properly balance the rights of the legal parent with the rights of children to maintain their relationships.[216]

## IV. A PROPOSAL FOR A UNIFORM APPROACH TO STEP-PARENT CUSTODY CASES

To ensure that children's and step-parents' rights to maintain their relationships are properly balanced with legal parents' fundamental rights, states should adopt the Wisconsin Supreme Court's test allowing for psychological parents to obtain custody.[217] This serves the child's best interests in families that do not have a traditional structure, while still ensuring that the court does not violate a legal parent's constitutional rights.[218] By requiring high standards to establish that a person is a psychological parent, only those who have a parent-child relationship with the consent of the legal parent will be permitted to be considered for custody or visitation.[219] State courts should adopt the test from the Wisconsin Supreme Court in *In Re Custody of H.S.H.-K.*,[220] and place the psychological parent in parity with a legal parent's standing.[221] A court can then consider the best interests of the child factors to determine what custody and visitation arrangement is in the best interests of the child.[222]

### A. *In Re Custody of H.S.H.-K* . Test

The test laid out by the Wisconsin Supreme Court properly balances the fundamental rights of the legal parent with the rights of the child and the psychological parent to maintain their relationship.[223] First states should require that "(1) the biological or adoptive parent

[216] *Id.*
[217] *See L.B.*, 155 Wash. 2d at 712; *see also Middleton*, 369 S.C. at 597.
[218] *Id.*
[219] *H.S.H.-K.*, 533 N.W.2d at 421
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *See L.B.*, 155 Wash. 2d at 712; *see also Middleton*, 369 S.C. at 597.

consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child."[224] Second, states should require "(2) that the petitioner and the child lived together in the same household."[225] Third, states should require "(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."[226] Finally, "(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."[227] By considering each of these factors, courts will balance the rights of the legal parent with the rights of the child and the psychological parent.

1. *Factor One*

First a party must show that "the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child."[228] This factor recognizes that legal parents should have control over who is allowed to have a relationship with their children.[229] Only those parties who a legal parent chooses to allow to establish this type of bond will be able to meet this element.[230] This factor also recognizes, like the South Carolina Court of Appeals noted, that when a legal parent consents to this type of relationship with a third party and the child, that parent reduces his right to unilaterally severe that relationship.[231] Further, it protects a child who has formed a strong bond with a third part

[224] *H.S.H.-K.*, 533 N.W.2d at 421.
[225] *Id.*
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *See Middleton*, 369 S.C. at 597(explaining that the factor provides legal parents with a great degree of control over who is be allowed to bring a petition as a psychological parent).
[230] *See id.*
[231] *Id.*

from the negative effects of severing that relationship.[232] This creates the proper balance between a legal parent's right to privately raise a child and the right of the child and the psychological parent to maintain an intimate relationship because parties will only meet this factor when legal parents choose to reduce that zone of privacy by allowing a third party to have a parent-child relationship with their children.[233]

2. *Factor Two*

The second factor requires that "the child lived together in the same household with the third party."[234] This factor ensures that legal parents have even greater control over who may become the psychological parent of their children.[235] The South Carolina Court of Appeals stated that the second prong of the test should allow for parties who have both lived in the same home as the legal parent and parties who have supervised the child at their home in a custody-like arrangement to meet the prong.[236] This interpretation supports the intent behind the doctrine because if the child has already lived in a custody arrangement with the third party, the child has likely formed a psychological bond with that party.[237] Finally, this factor does not impose any specific time requirements on how long party must have lived with the child. This gives the court more discretion to determine whether the parties have formed a parent-child relationship, without excluding parties who have developed this relationship in a shorter time than a factor with specific time requirements might allow.[238] This factor balances legal parents' rights because

[232] *See* Barlett, *supra* note 186 at 904.
[233] *See Middleton*, 369 S.C. at 597.
[234] *H.S.H.-K.*, 533 N.W.2d at 421.
[235] *See e.g.*, *B.M.H.*, 179 Wash. 2d at 230. (Mother sent the child to the step-father's home to bond with the child following the couple's divorce); *Middleton*, 369 S.C. at 589 (Mother often sent the child over to the third party's home to visit and spend the night after telling him that he was the child's father).
[236] *See Middleton*, 369 S.C. at 598.
[237] *See e.g.*, *B.M.H.*, 179 Wash. 2d at 230. (Legal parent sent the child to the third party's home on the same visitation schedule as his brother for eight years, creating a custody-like arrangement).
[238] *See* OR. REV. STAT. §109.119 (requiring the party and the child to have had a relationship for at least one year).

they control who the child lives with, but also allows the court to focus on whether a parent-child relationship was formed, protecting the rights of the child and the psychological parent.

### 3. *Factor Three*

The third factor requires 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."[239] This factor ensures that the party has developed the type of relationship that a legal parent would normally have with the child by caring for his day to day needs.[240] It also addresses many of the concerns raised by courts by further limiting who will meet this element of the test. The Vermont Supreme Court expressed concerns with this test becoming a slippery slope because it could open the door for anyone, including caregivers and nannies, to seek custody of a child.[241] However, because the factor requires that the party has not received any financial compensation, both of these types of parties would fail under the test and would not attain psychological parent status.[242]

The South Carolina Court of Appeals, in adopting this test, explained that in cases where there are already two legal parents in the child's life, a third party could never attain the status of psychological parent because there is no need for an additional parental figure in the child's life.[243] However, this is not the interpretation that aligns with the purpose behind the doctrine.[244]

---

[239] *H.S.H.-K.*, 533 N.W.2d at 421.
[240] *See* GOLDSTEIN ET AL., *supra* note 88 (explaining that a psychological relationship develops as a result of the day to day interaction, companionship, and shared experiences between the party and the child).
[241] *Titchenal*, 693 A.2d at 688.
[242] *See L.B.*, 155 Wash. 2d. at 712 (Arguing that the test does not create a slippery slope because only those who have truly developed a parent-child relationship will be able to petition under the doctrine).
[243] *Middleton*, 369 S.C. at 598.
[244] *See* Barlett, *supra* note 186 at 904 (explaining that while a child's need for continuity changes as they grow, it is clear children benefit from stability and maintaining relationships with caregivers).

Because the focus of the doctrine is on whether the person has developed a parent-child relationship, the harm to the child would still be the same if he or she is separated from a party that the child was bonded with.[245] Therefore, multiple parents should not automatically be excluded by the test; instead the court should determine on a case by case basis if a party meets the test and then determine a custody arrangement among all parties with whom the child has a parent-child bond.[246]

#### 4. *Factor Four*

The fourth factor requires the third party to show 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."[247] This factor recognizes that a temporary relationship does not rise to the level of a psychological parent.[248] If the party has been in the child's life for only a short period of time, it is less likely that the parent-child relationship has developed, but unlike the statute created by the Oregon Legislature, the court still has discretion to determine on a case by case basis if the relationship exists.[249] This factor balances the legal parent's fundamental right with the child's need to maintain a relationship by allowing the court to determine if the relationship existed for a sufficient length of time.

### B. Third Parties in Parity with Legal Parents

Once a party meets the standard for a psychological parent, the court should place the party in parity with the legal parent without requiring the party to show compelling

[245] *See* J. WALLERSTEIN & J. KELLY, *supra* note 190 (explaining that children who are not permitted to see their noncustodial parent following a divorce often experience sadness and depression).
[246] *See id.*
[247] *H.S.H.-K.*, 533 N.W.2d at 421.
[248] *See Middleton*, 369 S.C. at 58-99 (explaining that the relationship must be substantial and not just temporary).
[249] *See* OR. REV. STAT. §109.119 (requiring the party and the child to have had a relationship for at least one year).

circumstances, that the biological parent is unfit, has abandoned the child, or is going to cause harm to the child.[250] By requiring a stringent standard to achieve psychological parent status, the court can only consider those whose loss will have a great detriment to the child.[251] The court must consider what is in the child's best interest as long as a parent-child relationship has been established.[252] This approach better balances the needs of the child with the rights of the legal parent and the psychological parent and ensures that all parties' interests are protected.

## V. CONCLUSION

In order to protect the best interests of children, all states should permit step-parents to obtain the status of a psychological parent. The Wisconsin Supreme Court's test in I*n Re Custody of H.S.H.-K.* provides strict standards that only those step-parents or individuals who have formed a parent-like relationship with the child are able to meet to become psychological parents. Once parties have met those requirements, they should be able to obtain custody if it is in the best interests of the child, without a showing that the legal parent is unfit. While this does limit the rights of parents, it balances those rights with the child's rights. Further, the court will only balance the legal parent's rights when the parent has fostered that relationship between the step-parent and the child. This would help to ensure that children whose family includes non-traditional roles would be able to maintain those close relationships with third parties. All state courts should adopt the test created by the Wisconsin Supreme Court to consider whether step-parents have become psychological parents, allow them to overcome the parental presumption without showing compelling circumstances, placing them in parity with legal parents, and then determine if it is in the child's best interests to maintain that relationship.

---

[250] *See e.g.*, *L.B.*, 155 Wash. 2d. at 708; *cf.*, Middleton, 369 S.C. at 604; Principles of the Law of Family Dissolution, *Allocations of Responsibility to Individuals Other than Legal Parents*, §2.18 (2002) (requiring the party to show compelling circumstances before allowing the court to grant custody).

[251] *See e.g.*, *L.B.*, 155 Wash. 2d. at 712.

[252] *See H.S.H.-K.*, 533 N.W.2d at 421.