Abandoned Equity and the Best Interests of the Child: Why Illinois Courts Must Recognize Same-Sex Parents Seeking Visitation

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INTRODUCTION

A week ago, Alicia and Elijah's mother surprised the children by picking them up from school and taking them on a trip to visit relatives in New Mexico. Now very confused and anxious, the children are ready to go home, and are demanding to know why they cannot call their other mom.

For the thousands of American children like Elijah and Alicia, there are few easy answers. Lesbian and gay parents are raising children in greater numbers, yet their families, like many contemporary American families, do not fit the mold of traditional heterosexual marriages. As a result, if the family breaks up, traditional rules governing child custody and visitation do not neatly encompass these family structures. When making custody or visitation determinations, courts look to the Illinois Marriage and Dissolution of Marriage Act ("IMDMA"), and are guided by an overriding concern for the "best interests of the child."  

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2. Visitation is derived from a custody proceeding and refers to maintaining continuing contact with a child. See Eric G. Andersen, Children, Parents, and Nonparents: Protected Interests and Legal Standards, 1998 BYU L. REV. 935, 953.


4. The best interests standard means that when the parents' desires conflict with the well-being of the child, the court must rule in favor of what serves the child's best interests. Courts have great discretion in making best interests determinations. See Homer H. Clark, Jr., THE
Both statutes and common law tradition recognize a biological parent's legal rights to his or her child. However, nonbiological coparents are not considered in the traditional rules, and often have no legal relationship to the child. Yet nonbiological lesbian and gay parents are increasingly demanding the right to maintain relationships with their children.

Illinois courts engaging in a narrow reading of the IMDMA have declared that these parents are legal strangers to their children. Without standing, lesbian or gay coparents have no legal recourse to maintain relationships with their children. Courts must broaden the definition of parenthood to resolve these disputes in light of the best interests of the children.

A petitioner must have standing, or a legally protectable interest, to seek custody or visitation before a court will address the merits of the petition. If the petitioner falls into one of the categories listed in the IMDMA, she or he can easily establish standing. However, coparents who do not fall neatly into one of the categories have a more difficult time establishing standing and, consequently, maintaining relationships with their children.

In the past, Illinois courts have adopted common law equitable principles such as *in loco parentis*, de facto parent, and psychological parent, to find standing for individuals who play significant parental roles in a child's life, and who seek visitation. Recognizing that it serves the best interests of the child, these courts have exercised their equitable powers to find standing for individuals who are the practical equivalent of parents. Nevertheless, they have not formulated a consistent approach to standing issues for nonbiological parents. As a result, lesbian and gay coparents who do not fall within a narrow reading of the IMDMA may be barred from contact with their children.

LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 789 (2d ed. 1988). When making custody and visitation decisions, Illinois courts consider a variety of factors including: the custody preferences of the child's parents, the child's custody preferences, the child's relationship with his or her family members, the child's interest in maintaining a stable home and school environment, and the parent's willingness to facilitate a close relationship with the other parent. See 750 Ill. Comp. Stat. 5/602 (2000).

5. Adoption is currently the only way a nonbiological coparent can create a permanent legal relationship with his or her child.

In In re C.B.L., an Illinois appellate court was asked for the first time to extend equitable standing to a lesbian nonbiological mother seeking visitation of the child she had raised. She was equally involved in the decision to have the child and she financially supported the family after their daughter was born. Nevertheless, the court refused to apply equitable principles to this case and declared that the petitioner lacked standing under the visitation provision of the IMDMA. In so holding, the C.B.L. court departed from its history of recognizing parental relationships that fall outside the scope of biology.

This Note will provide an overview of the unique legal issues involved when lesbian or gay couples create families. It will also present the legal realities facing nonbiological parents if the families do not remain intact. Part I presents the complications resulting from the creation of nontraditional families, focusing on same-sex families. It will address the types of family structures affected, the legal ramifications of chosen routes to parenthood, and the issues raised when the parents end a romantic relationship with one another, but intend to maintain their parental relationships with the children. Part II will provide an overview of Illinois's treatment of standing in custody and visitation disputes. It will discuss the historical preference for biological parents and the judicial system's authority to extend standing to parents who are "legal strangers" to their children. Part III critiques the standards and reasoning used by the In re C.B.L. court, and others in similar cases, to determine whether a nonbiological parent has standing to petition for visitation. It presents the reasons for extending equitable principles to lesbian or gay nonbiological coparents seeking visitation. Finally, it will propose a consistent approach to standing issues, focused on the best interests of the child.

8. See id. at 320; see also 750 ILL. COMP. STAT. 5/607 (2000).
9. For example, it includes artificial insemination with known or unknown donors, surrogacy, adoption, open adoptions, and second-parent adoptions.
10. While this Note will briefly address custody disputes, its primary focus is on the standing of nonbiological parents to seek visitation of children they help raise. For a broader review of custody and visitation rights relating to lesbian and gay parents, see Robin Cheryl Miller, Annotation, Child Custody and Visitation Rights Arising from Same-Sex Relationships, 80 A.L.R. 5th 1 (2001).
I. NONTRADITIONAL FAMILIES

Lesbian and gay parents create a variety of family structures.\(^1\) Prior to the "gayby boom," the majority of lesbian or gay parents became parents in the course of heterosexual relationships.\(^2\) However, the number of planned lesbian and gay families has dramatically increased.\(^3\) During the last decade, courts have recognized lesbian and gay parents,\(^4\) numerous researchers have educated the public about sexual orientation and parenting,\(^5\) and

11. In 1990, estimates indicated that as many as ten million children are being raised in lesbian or gay families. See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-Traditional Families, 78 GEO. L.J. 459, 461 n.2 (1990).

12. The custody and visitation battles faced by lesbian or gay parents with their former heterosexual spouses present issues that are beyond the scope of this Note. However, there are jurisdictions that adversely consider the lesbian or gay sexual orientation of the parent when making custody or visitation determinations. See, e.g., Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1992) (holding that social condemnation for lesbians was an appropriate consideration and transferring custody from lesbian mother to grandmother). See generally Lambda Legal Defense and Education Fund, Lesbian & Gay Parenting: A Fact Sheet, at http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=31 (last modified Sept. 28, 1997).

13. See Polikoff, supra note 11; see also Lambda Legal Defense and Education Fund, supra note 12.

14. E.g., E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999), cert. denied, 528 U.S. 1005 (1999) (applying doctrine of de facto parenthood and granting visitation to lesbian coparent); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (granting nonbiological lesbian parent custody and visitation because she was a "psychological parent" entitled to petition); Robano v. Dicenzo, 759 A.2d 959 (R.I. 2000) (finding standing for nonbiological lesbian mother and enforcing visitation agreement). Even courts that fail to adequately assist lesbian or gay families acknowledge the significance of their families. See In re Guardianship of Olivia J., 101 Cal. Rptr. 2d 364 (Cal. Ct. App. 2000) (finding error in the lower court's holding that, in a guardianship proceeding, a nonbiological parent could not, as a matter of law, demonstrate that the biological parent's custody was detrimental to the child); Titchenal v. Dexter, 693 A.2d 682, 690 (Vt. 1997) (refusing to find equitable basis for standing while stating "our opinion should not be read as impeding same-sex partners from child-rearing or as minimizing the importance of maintaining relationships between children and third parties with whom the children have formed significant bonds"). Since Titchenal was decided, the Vermont Supreme Court declared that the state could not exclude lesbian and gay citizens from the rights and privileges of marriage. See Baker v. Vermont, 744 A.2d 864 (Vt. 1999). Subsequently, the legislature enacted a "civil union" system to extend these benefits, including access to the family law system, to lesbian and gay citizens. See VT. STAT. ANN. tit. 15, § 1204(d) (2001) ("[T]he law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union."); 2000 Vt. Acts & Resolves 91 (detailing the revisions to each statute that pertains to civil unions).

15. See Charlotte Patterson, Children of Lesbian and Gay Parents, 63 CHILD DEV. 1025, 1036 (1992) (reporting that children raised in lesbian or gay households and those raised in heterosexual households have similar psychosocial development); NAT'L ASS'N OF SOC. WORKERS, SOCIAL WORK SPEAKS: NASW POLICY STATEMENTS 93, 162 (1988) (finding that sexual orientation is not relevant to parenting ability); John J. Conger, Proceedings of the American Psychological Association, Incorporated, for the Year 1976: Minutes of the Annual Meeting of the Council of Representatives, 32 AM. PSYCHOLOGIST 408, 432 (1977) (holding that the sex, gender identity, or sexual orientation of natural or prospective adoptive parents should not be the sole or primary consideration in child custody or placement cases).
better reproductive technologies have been available to lesbian and gay parents.\textsuperscript{16} Complications relating to both the creation and maintenance of the families accompany these trends.

\textbf{A. Created Queer Families and Biological Parenthood}

Jennifer and Miriam met and fell in love seven years ago. They talked seriously about having children two years into their relationship, after they had created a household together. They agreed that Miriam would try to get pregnant through artificial insemination. The couple wanted to ask their friend Noah to be the donor and hoped to have him involved in their child’s life. However, they had heard horror stories about using known donors—even if the man was a dear friend—and were concerned about the ramifications of making that decision.

Jennifer and Miriam’s story, although fictional, typifies the concerns of lesbian or gay couples contemplating parenthood. Different state laws apply depending on the method a couple uses to create a family. Artificial insemination and surrogacy each require different procedures and have different legal consequences.\textsuperscript{17} State law will affect the decision of those couples that have the financial and legal resources to choose from these options.\textsuperscript{18}

\textbf{1. Artificial Insemination}

The Illinois Parentage Act\textsuperscript{19} governs the relationship between children conceived by artificial insemination and their parents. Under the Parentage Act, a child conceived through artificial insemination is the legitimate and natural child of both the biological mother and her husband.\textsuperscript{20} However, the husband must first consent to the insemination and the procedure must take place in a licensed physician’s office.\textsuperscript{21} While the Illinois Parentage Act does not specifically address lesbian couples, or even unmarried women in general, it does clarify the legal relationship between the sperm donor


\textsuperscript{18} Countless couples do not have this choice. While lesbian and gay parents share a common sexual orientation, class, racial, gender, and cultural issues contribute to a disparity in the practical options available to many prospective parents.

\textsuperscript{19} 750 ILL. COMP. STAT. 40/1 (2000).

\textsuperscript{20} See id.

\textsuperscript{21} See id.
and the child. As long as the sperm is provided to a licensed physician for artificial insemination, the donor will not be legally recognized as the child's biological parent.

In this context, Jennifer and Miriam's decisions to use Noah, a known donor, or to inseminate at home, or both, have serious legal ramifications. If the couple decides to inseminate at home using Noah's sperm, he may later legitimately claim that he is the father of their child. His right to a relationship with the child will not terminate unless he consents to a legal termination of his rights. Jennifer and Miriam might avoid this problem if their physician performs the insemination in a medical setting. However, if a known donor's sperm is used, he might still be able to successfully assert his paternity.

But many prospective lesbian parents, facing a costly medical and insurance process and the added barrier of sexual orientation discrimination, may decide to use a known donor and inseminate at home. Unfortunately, they may not realize that their insemination method can also create an unintentional legal relationship between their child and the known donor. A couple and a known donor may create a family in good faith and discuss the expectations of each

22. See 750 ILL. COMP. STAT. 40/3(b) (2000).
23. See id.
24. But see Leckie v. Voorhies, 875 P.2d 521 (Or. Ct. App. 1994) (upholding summary judgment motion against donor seeking filiation order, where parties entered into written agreement, and where Oregon statute terminates donor's parental rights). This is a potential problem in Illinois, because Illinois's statute is not like Oregon's, which terminates all parental rights of a man who donates semen to any woman besides his wife. See id.
25. Although Illinois is one of few states requiring insurance companies to cover infertility treatment, lesbian couples may be forced to pay for artificial insemination out of pocket. See generally American Society for Reproductive Medicine, State Infertility Insurance Laws, at http://www.asrm.org/Patients/insur.html (last visited Mar. 26, 2001). Typically, health insurance plans are not required to cover infertility treatment (such as artificial insemination or in vitro fertilization) until after the prospective mother has unsuccessfully attempted to become pregnant for one full year. See 215 ILL. COMP. STAT. 5/356(m), 125/5-3 (2000). Because lesbian couples must use artificial insemination to become pregnant, regardless of whether there are additional infertility problems, the couple must pay out of pocket, or lie about their infertility, before any infertility treatment is covered. See, e.g., Robin Eisner & Paula Murphy, Two Women and a Baby, Columbia University Graduate School of Journalism New Media Workshop, at http://newmedia.jrn.columbia.edu/1996/twomens/insem2.html (last visited May 29, 2001) (discussing the expenses of insemination units and suggesting that a lesbian could submit an infertility claim to her insurance company that states she had been unable to become pregnant after months of unprotected sex).
26. See Lambda Legal Defense and Education Fund, supra note 12 (stating that surveys reflect that only ten percent of doctors in the nation will inseminate an unmarried woman).
27. A legal parent must provide for the care and support of his or her child. In addition, he or she can establish standing to seek visitation or custody of the child. On the other hand, support obligations could be imposed on the donor, even if he had never agreed to take on these parental duties.
party in advance. However, the individuals may feel differently about their agreement after the child's birth or if the relationship with the other involved adults changes. In either situation, both biological and legal relationships then become paramount.28

2. Surrogacy

Taylor and Mel have always wanted to have children. Over the course of their ten-year friendship with Margaret, playful conversations about her carrying their child have developed into a serious decision. Unlike Taylor and Mel, Margaret has never wanted to make the constant commitment to child raising that parenthood demands. However, she is willing to carry the child, and is content to play the favorite aunt and babysitter. Margaret conceived through artificial insemination with Mel and is now six months pregnant with the couple's child. When the child is born, Margaret will give up her legal parental rights and Taylor will adopt the baby.

Unlike a lesbian couple in which one parent carries the pregnancy to term, gay men who wish to become biological parents must rely upon a surrogate mother. In Illinois, no statutory provision exists for gay parents who have a surrogate carry their child.29 A growing number of other states have enacted statutes declaring surrogacy agreements void and unenforceable as contrary to public policy.30

The legislature recently revised the Illinois Parentage Act of 198431 to identify the legal relationships between a surrogate mother, the child, and the heterosexual married couple whose egg and sperm were inseminated in the surrogate.32 As a result of the revisions,

28. Parenting agreements are rarely enforceable in the face of a clear biological, and thus legal, parental relationship between an adult and a child. See infra Part II.C.
32. See 750 ILL. COMP. STAT. 45/6 (providing that a legal relationship between the biological parents and the child before the child's birth, requires satisfaction of six preconditions: (1) the surrogate must acknowledge that she is not the biological parent and that she is carrying the biological mother and father's child; (2) if the surrogate is married, her husband must acknowledge that he is not the biological father and that the child is the biological parents'; (3) the egg used to conceive the child must be the biological mother's; (4) the sperm used to conceive the child must belong to the biological father, and not the surrogate's husband or partner; (5) a licensed physician must certify to each of the above conditions; and (6) all of the certifications must be in writing, witnessed by uninvolved parties, and filed with the Illinois Department of Public Health).
heterosexual married couples may legally establish a parental relationship *prior* to the birth of a child carried by a surrogate. The parties must satisfy the statutory requirements to overcome the rebuttable presumption that the child belongs to the surrogate mother and her husband.

Certainly these revisions help enforce family creation agreements between married couples and surrogate mothers, but they fail to protect nontraditional families who wish to avail themselves of surrogacy. For example, a gay couple may use an anonymous egg donor and one partner’s sperm to conceive a child. If that couple enters into a surrogacy agreement with a different woman, they cannot legally prevent her from claiming to be the biological mother of the child. In the above example, Taylor, Mel, and Margaret carefully considered the surrogacy arrangement long before she became pregnant. Nevertheless, Margaret has an enforceable legal right to the child she is carrying, until she gives up that right after the baby’s birth. Because there are far fewer legal protections for gay men creating families, in some ways, surrogacy presents a riskier entry into parenthood than artificial insemination. One solution is to extend the statute to place gay men in the same position as heterosexual married couples when entering into surrogacy arrangements. In other words, the biological father of the child carried by the surrogate should retain his full parental rights even if the surrogate is married and attempts to assert parental rights to the child. In this way, the surrogate will not be able to bar the biological father from establishing a legal relationship with his child. Even if the courts are unwilling to extend this protection to both the nonbiological and the biological father, it will at least place gay coparents in the same position as lesbian coparents who adhere to the statutory requirements of providing sperm to a licensed physician for insemination. Barring this option, unless surrogate mothers, and the couples whose children they carry, strictly adhere to their agreements, gay couples remain vulnerable to losing the families that they create.

33. *See id.*
34. *See id.*
35. The Illinois Adoption Act requires more than seventy-two hours to pass before a woman’s consent to adoption will be effective. 750 ILL. COMP. STAT. 50/9 (2000).
37. *See GAY & LESBIAN ADVOCATES & DEFENDERS ET AL., PROTECTING FAMILIES: STANDARDS FOR CHILD CUSTODY IN SAME-SEX RELATIONSHIPS* (1999); *see also* Hollandsworth, *supra* note 29, at 206 n.102 (discussing other difficulties facing gay men using surrogacy to create families).
B. Adoption

Other couples may choose adoption as a route to parenthood. Illinois follows a neutral approach to sexual orientation in adoption. In In re K.M., the court permitted a lesbian coparent to adopt her partner’s biological child, without requiring the biological mother to give up her parental rights. The court announced that “nothing in the [Illinois Adoption] Act suggests that sexual orientation is a relevant consideration, and lesbians and gay men are permitted to adopt in Illinois.”

Three types of adoption are relevant to lesbian and gay parents: agency adoptions, private adoptions, and “second-parent” adoptions. Agency adoptions include situations where a lesbian or gay man adopts a foster child placed in her or his home by a state welfare agency. Private adoptions include both “stranger” adoptions and “open” adoptions. Stranger adoptions occur where an unrelated individual or a married couple adopts a child after the biological parents have given up their parental rights. In open adoptions, the biological parent relinquishes his or her parental rights in favor of the adoptive parents, but may be allowed contact with the child postadoption. Finally, “second-parent” adoptions are similar to stepparent adoptions, where the biological parent need not relinquish his or her parental rights for the coparent to adopt the child.

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40. Id. at 892.
43. See id.
44. See id.
45. See id.
46. See id.
47. One distinction lies in the legal relationship between the stepparent and the biological parent. Stepparents adopting their spouse’s children have a legally recognized relationship—marriage—with the biological parent. Lesbian or gay second-parents do not have a legally
relationship between a child and an individual who is not his or her biological parent. Adoption by lesbian or gay parents may be hindered by lack of appropriate legislation or by cultural bias against the creation of these legal relationships.

1. Agency Adoptions

Same-sex couples or individual lesbian or gay men may choose to become foster parents. After living with a family for the duration proscribed by statute, a foster child may be eligible for adoption. Before a child welfare agency will place a child in foster care, the prospective foster parents must be approved. Prior to approval, the agency will investigate the prospective foster parent’s personal life, living environment, and lifestyle. Prospective lesbian or gay foster parents may be denied the opportunity to adopt, regardless of their parenting skills, simply because of their sexual orientation. For example, an agency investigator might be personally prejudiced against lesbian or gay people and believe them to be inherently unfit to parent. That investigator could withhold approval of the application based on a fabricated reason, such as a messy house or a bad temperament, even if the actual reason was anti-gay animus. Thus, even in Illinois, where considerations of sexual orientation alone in adoption or foster care decisions is against the law, a prospective lesbian or gay foster parent might never have the opportunity to raise a child in his or her home.

2. Private Adoptions

Both Taylor and Mel were in the delivery room when Margaret gave birth to their daughter. Margaret threw a party for the family after the adoption process was completed and Taylor was legally the baby’s father. Maggie, now eleven, spends two weeks every summer visiting with her Aunt Margaret in California. She lives with both of her fathers during the rest of the year.

recognizable relationship to their spouse, who is the biological parent.

48. See Lambda Legal Defense and Education Fund, supra note 12, at 4 (noting that agency foster care is designed to reunite children with their natural parents, and is not a recommended method of adoption).

49. See id. (discussing a lesbian couple’s complaint against Illinois Department of Children and Family Services after it denied their foster parent application).

50. See id.

Private adoptions may also be obstructed by the private biases of individuals at the agencies and the courts. All private adoptions require court approval. If a couple is using a private agency, they must receive prior agency approval of the adoption before they ever reach the courtroom. Just as a public agency investigator could fabricate a reason to deny approval to lesbian or gay parents, so could private agencies or judges. In a particularly egregious second parent adoption case, one Illinois circuit court judge *sua sponte* appointed an anti-gay organization as a "secondary guardian" to the children and released confidential information about the parties to the organization, because she believed that its position that "homosexual lifestyle[s] are not in the best interests of children" was necessary to evaluate the case.

Private adoptions can also be expensive and protracted. The current adoption law does not permit unmarried couples to adopt jointly. In Illinois, lesbian and gay couples cannot marry. One practical effect of this restriction on adoption law is that each parent must adopt the child separately. Once the court approves of one

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52. See Lambda Legal Defense and Education Fund, *supra* note 12, at 5 (discussing biases of agencies, court-appointed investigators, and judges).

53. See id.

54. See id.

55. See id; see also *In re C.M.A.*, 715 N.E.2d 674 (Ill. App. Ct. 1999) (reversing anti-gay judge's vacation of lesbian coparent's adoption petitions).

56. *C.M.A.*, 715 N.E.2d at 678. Fortunately, the judge's conduct has been severely criticized by the Illinois judiciary. In addition to reversal of her decisions by the Appellate Court, the Illinois Judicial Inquiry Board had filed an eight-count complaint against the judge for her conduct, which the board described as "prejudicial to the administration of justice and conduct that brings the judicial office into disrepute." Complaint, *In re Judge Susan J. McDunn*, No. 01-CC-2, (Cts. Comm'n of the State of Ill.) (filed Feb. 2, 2001).


60. See Starr, *supra* note 41, at 1505. One author has proposed joint adoption by two unmarried, nonromantically involved adults as an alternative to the rigid construction of the rule permitting only individuals or married couples to adopt. See Angela Mae Kupenda, *Two Parents Are Better Than None: Whether Two Single, African American Adults (Who Are Not in a Romantic or Sexual Relationship with Each Other) Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 713 (1997). The author cited reasons for supporting joint adoptions (including stable relationship and home, the parents' equal commitment to child rearing, community and extended family support, and the best interests of the child), and support for this alternative model in the lesbian and gay community, as the basis for her argument. *See id.* at 714. Unfortunately, in attempting to bolster her proposed model, the author implicitly supports the homophobic reasons that joint
parent's adoption, the couple can begin the process of petitioning for a second-parent adoption. This double-adoption process is time consuming and costly.

Unlike many private adoptions, open adoption is a process that allows the adoptive parents and the biological parent(s) to know each other. The parental rights of known sperm donors or surrogates are terminated in favor of the adoptive parents. Thus, open adoption creates a legal relationship between the nonbiological coparents and the child, like other forms of adoption. The distinction here lies in the adoptive parents' decision to allow the biological parent to develop some form of relationship with their child, without a legal obligation to do so. Thus, for both Jennifer and Miriam, and Taylor and Mel, open adoption will legitimate and enforce the parties' parental agreement, regardless of whether the couple intends to involve the surrogate or donor in the child's life.

In some cases, couples that face sexual orientation discrimination by agencies, investigators, or judges attempt to adopt children from outside of the United States. In recent years, there has been a surge in international stranger adoptions by lesbian and gay individuals. However, if the child's home country discriminates on the basis of sexual orientation, a lesbian or gay couple may face the same barriers as at home.

Adoptions have been denied to lesbian and gay parents. See id. at 715-16. She states that

reasons to deny joint adoptions based on the sexual orientation of the potential co-parents are myriad: fear that a homosexual parent will molest the child; fear that the child will become homosexual from the co-parents' influence... and belief that the developmental needs of a child require a stable heterosexual household and, without addressing the validity of this laundry list, argues that her proposed model should be readily accepted because the relationship between her proposed coparents is not sexual or romantic. Id. (citations omitted). In reaching this conclusion, the author fails to recognize that lesbians and gay men may also choose to coparent in stable, nonsexual relationships.

61. Anecdotal evidence suggests that courts are most willing to grant lesbians and gay men adoptions of orphaned blood relatives. See LAMBDA LEGAL DEFENSE & EDUC. FUND, INC., supra note 42, at 5.

62. See Christensen, supra note 16, at 1407; see also Lambda Legal Defense and Education Fund, Inc., Overview of State Adoption Laws, at http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=399 (last visited Mar. 30, 2001) (noting that "while it would appear that a lesbian or gay man should be permitted to adopt a child in all states, the reality is that in many, their petitions for adoption will be denied, if they even get that far along in the process").

63. Before an individual can adopt a foreign-born orphan, he or she must apply to the INS for an orphan petition. See 8 U.S.C. 1101(b)(1)(F) (2001). The adoptive parent may be screened in the home country of the child as well as by the courts in the United States. See LAMBDA LEGAL DEFENSE & EDUC. FUND, INC., supra note 42, at 6.

64. See LAMBDA LEGAL DEFENSE & EDUC. FUND, INC., supra note 42, at 6. For example, in countries like China, where the status of being lesbian or gay may be criminalized, an open
3. Second-Parent Adoption

Illinois permits second-parent adoptions to protect the legal relationship between a nonbiological parent and his or her child. A second-parent adoption is like a stepparent adoption in that the biological parent joins the nonbiological parent's adoption petition. The biological parent must consent to adoption but is not required to relinquish his or her parental rights. Because a nonbiological parent is not automatically accorded legal rights to his or her child, the availability of second-parent adoptions is essential to protect the relationship between that parent and child. Where second-parent adoptions are not legal, many nonbiological parents cannot legally protect their relationships with their children. Thus, second-parent adoption is currently the best solution for intact same-sex families, with two caveats. First, it must be a legal option in the home state of the parents. Second, there also must be no other biological parent who claims parental rights, including known donors or surrogates.

C. Maintaining Created Families

Families created by lesbian and gay parents rarely have a legal safety net. Without adoption or a biological link, a nonbiological parent has few legally cognizable rights to the child. Consequently, the dissolution of a same-sex family with children can be damaging to the parents as well as the children. In response to this crisis, in early 1999, a number of national lesbian and gay organizations created a set

lesbian couple might have their adoption petition denied, but a single lesbian might have no difficulty.  


66. See supra note 48 and accompanying text.

67. See Lambda Legal Defense and Education Fund, supra note 12.

68. See generally GAY & LESBIAN ADVOCATES & DEFENDERS ET AL., supra note 37. In many respects, this was the problem in C.B.L., because A.B. and H.L. lived in a state where second-parent adoption was not legal. See In re C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999), reh’g denied, (Jan. 24, 2000).
of model standards for same-sex couples that have children. The organizations developed the model standards to encourage same-sex families to adhere to their original intentions and agreements. The standards, while nonbinding, are necessary to protect not only the interests of nonbiological parents, but more importantly, to ensure that children raised by same-sex parents can preserve stable relationships with their parents.

1. Parenting Agreements

Miriam, Jennifer, and Noah had extensive discussions about who would be the child’s parents and the extent of Noah’s involvement in the baby’s life. They drafted parenting agreements and detailed each party’s expectations and promises in the contract. However, as the end of Joey’s first year approached, Noah still refused to relinquish rights as the biological father so that Jennifer could complete the second-parent adoption of the baby.

Many lesbian mothers who choose to involve the donor in their child’s life face the same situation as Miriam and Jennifer. Lesbian and gay parents may create parenting agreements with each other and with known donors or surrogates whom they want to have limited involvement in their child’s life. Courts may or may not enforce these agreements. Courts refusing to extend equitable parental rights to nonbiological parents reason that a biological parent cannot contract away his or her constitutional rights. Nevertheless, formalizing the agreement outlines the expectations and promises of each involved adult before the child is born. Courts also tend to favor biological

69. See GAY & LESBIAN ADVOCATES & DEFENDERS ET AL., supra note 37.
71. Compare Sporleder v. Hermes, 471 N.W.2d 202 (Wis. 1991) (refusing to enforce coparenting agreement between lesbian parents and regarding visitation petition as a challenge to the biological mother’s parental fitness), with A.C. v. C.B., 829 P.2d 660, 664-65 (N.M. Ct. App. 1992) (enforcing the parenting agreement between lesbian coparents where evidence showed that the parties jointly decided to have and raise a child together). Sporleder was subsequently overruled by the Wisconsin Supreme Court in In re Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995), cert. denied sub nom. Holtzman v. Knott, 516 U.S. 975 (1995), when the court applied its equitable powers to grant a lesbian coparent standing to seek visitation.
73. See GAY & LESBIAN ADVOCATES & DEFENDERS ET AL., supra note 37, at 5.
parents, regardless of whether the only substantial contribution made by the "biological parent" was sperm or an egg for conception. Although a couple and a known donor created a parenting agreement, if the donor later sues for custody or visitation, courts have generally ruled in favor of the donor. Similarly, when a lesbian couple creates a family without a known donor, courts do not enforce coparenting agreements. Unfortunately, courts accepting this narrow perspective reject the reality of planned parenthood by lesbian and gay individuals.

There is no evidence to suggest that same-sex couples are not deciding to have children in the face of these risks. Even if a court might not enforce a parenting agreement, formalizing the agreement in writing will outline the expectations and promises of each involved adult before the child is born. If the parties are later locked in disagreement about parenting rights and obligations, or are involved in mediation, a written agreement can serve as a concrete and specific reminder about their respective moral obligations to one another and to the child they brought into the world.

2. Custody and Visitation Disputes

In adjudicating custody and visitation disputes between same-sex parents, courts have typically addressed a scenario just like that found in In re C.B.L., where a lesbian couple plans a family together and one partner is the biological parent. Although the couple may sign a coparenting agreement and share all parenting duties, they do not petition for a second-parent adoption. At the end of the relationship, the couple informally agrees to a custody or visitation


75. See, e.g., Sporleder v. Hermes, 471 N.W.2d 202 (refusing to enforce coparenting agreement between lesbian parents and regarding visitation petition as a challenge to biological mother's parental fitness).


77. In re C.B.L., 723 N.E.2d 316 (Ill. App. Ct. 1999), reh'g denied, (Jan. 24, 2000); see also Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997). Ironically, in each case, the court criticized the nonbiological parent for not seeking a second-parent adoption. Unfortunately, a second parent adoption is available only if the biological parent joins the petition, which is unlikely where the couple has separated and custody or visitation is contested.
agreement. If the arrangement becomes burdensome to the biological mother, she terminates visitation. Most frequently in same-sex families, when the biological parent unilaterally terminates visitation, the coparent seeks restored contact with the child. If the coparents cannot work out an acceptable arrangement, the nonbiological parent's only recourse is litigation.

The nonbiological parent then seeks redress in court. The IMDMA, and other statutes designed to address custody and visitation disputes, frequently provide no assistance to nontraditional family structures. For lesbian and gay families, using (and misusing) the legal system can be a self-destructive strategy. Biological parents who invoke existing laws that exclude nonbiological parents from their families tear their families apart and create bad law for other families.

II. ILLINOIS'S HISTORICAL TREATMENT OF CUSTODY AND VISITATION DISPUTES

Historically, courts have accorded special protection to the relationships between children and their biological parents. Parents must provide support and care for their offspring. Even if the relationship between the biological parents ends, this moral and legal obligation persists. The biological parent-child relationship is


79. One proposed alternative is to encourage former same-sex partners who create families to commit to the process of mediation to settle their disputes. See William Mason Emmett, Queer Conflicts: Mediating Parenting Disputes Within the Gay Community, 86 GEO. L.J. 433 (1997).

80. See GAY AND LESBIAN ADVOCATES & DEFENDERS ET AL., supra note 37.

81. See Lehr v. Robertson, 463 U.S. 248, 258 (1983) (“[T]he Court has found that the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection.”) (citations omitted); Santosky v. Cramer, 455 U.S. 745, 753 (1982) (a termination of parental rights case stating: “parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs”); Hock v. Hock, 365 N.E.2d 1025, 1027 (Ill. App. Ct. 1977) (holding that “[i]t is in the best interests of a child to have a healthy and close relationship with both parents”).


83. Id.
protected because of the fundamental belief that a child’s best interest is served by stable, continued relationships with his or her parents.\textsuperscript{84}

A. Statutes Governing Custody and Visitation

The IMDMA governs most child custody and visitation determinations.\textsuperscript{85} However, the Probate Act,\textsuperscript{86} The Juvenile Court Act of 1987,\textsuperscript{87} and the Adoption Act\textsuperscript{88} all give courts authority to adjudicate custody and visitation issues. These statutes codify the common law presumption that biological parents are entitled to the care, custody, and control of their children. The statutes also govern disputes between biological parents and unrelated third parties about visitation or custody issues.\textsuperscript{89} At the same time, courts continue to rely on common law principles to address custody and visitation disputes falling outside the ambit of these statutes.\textsuperscript{90}

Under the superior rights doctrine, biological parents’ rights are preferred over custody or visitation claims by unrelated third parties.\textsuperscript{91} However, biological parents’ rights to their children are not absolute.\textsuperscript{92} Proof that their parental claims do not serve the best interests of the children will overcome their presumed rights.\textsuperscript{93}

\textsuperscript{84} See Stanley v. Illinois, 405 U.S. 645 (1972) (holding that biological parents have a fundamental and constitutional right to raise their own children); Hock, 365 N.E.2d at 1027.

\textsuperscript{85} See 750 ILL. COMP. STAT. 5/601 (2000). Normally, the IMDMA is invoked when a heterosexual marriage is ending and there are children in the family. See id.

\textsuperscript{86} 755 ILL. COMP. STAT. 5/1-1 (2000) (governing legal guardianship proceedings initiated by “any interested person”).

\textsuperscript{87} 705 ILL. COMP. STAT. 405/1-1 (2000) (governing custody and visitation proceedings where the biological parent is allegedly unfit).

\textsuperscript{88} 750 ILL. COMP. STAT. 500/01 (2000) (for proceedings to terminate the parental rights of biological parents in favor of a third party).

\textsuperscript{89} See 750 ILL. COMP. STAT. 5/601-07 (2000); 755 ILL. COMP. STAT. 5/1-1; 705 ILL. COMP. STAT. 405/1-1; 750 ILL. COMP. STAT. 500/01.


\textsuperscript{92} See In re Peterson, 491 N.E.2d 1150, 1151 (Ill. 1986); In re Townsend, 427 N.E.2d 1231, 1234 (Ill. 1981).

\textsuperscript{93} See Townsend, 427 N.E.2d at 1234. In some cases, even though the biological parent is fit, a court may decide that the children’s best interests are served by granting custody to a third party. See, e.g., In re Marriage of Brownfield, 670 N.E.2d 1198, 1200 (Ill. App. Ct. 1996) (court granted stepmother custody of children, over biological mother’s objections).
There are important distinctions between custody and visitation. Legal custody entitles a parent to greater control over a child's upbringing, and therefore, there are greater safeguards that accompany custody.\footnote{See Andersen, supra note 2, and accompanying text; see also Michael H. v. Gerard D., 491 U.S. 110, 118-19 (1989) (additional citation omitted) (discussing the rights attached to custody).} Visitation, on the other hand, is the legal right to maintain a continuing relationship with a child.\footnote{See Andersen, supra note 2; see also Michael H. v. Gerard D., 491 U.S. 110, 118-19 (1989) (additional citation omitted) (discussing the rights attached to custody).} Because of this distinction, legislatures and courts recognize that a broader array of individuals deserve to maintain significant relationships with children. With this understanding, Illinois courts have granted visitation rights to grandparents,\footnote{In Troxel v. Granville, 530 U.S. 57 (2000), the Supreme Court reviewed Washington State's broad visitation statute, and determined that a child's grandparents were not entitled to seek visitation where they had not demonstrated any unfitness on the part of the parent. The Court concluded that the visitation statute unconstitutionally infringed upon the parents' rights to make childrearing decisions. Shortly thereafter, the Illinois Supreme Court considered a challenge to section 607 of the IMDMA, which allows for visitation by grandparents. See Lulay v. Lulay, 739 N.E.2d 521 (Ill. 2000). In Lulay, over the objection of both of the parents, the grandparents sought visitation subsequent to the parents' divorce. Rather than address the facial challenge to the statute's constitutionality, the court issued an extremely narrow holding, finding that, as applied in this case, the provision unconstitutionally infringed upon the parents' fundamental right to make childrearing decisions.} nonbiological parents, putative parents,\footnote{A putative parent is the alleged father of an illegitimate child.} and stepparents.\footnote{See Brownfield, 670 N.E.2d at 1200 (finding that a biological mother had voluntarily relinquished custody and granting the stepmother custody of the children after their father died); In re Marriage of Carey, 544 N.E.2d 1293, 1299 (Ill. App. Ct. 1989); Cebrezynski v. Cebrezynski, 379 N.E.2d 716 (Ill. App. Ct. 1978).}

Before a person may petition for custody or visitation of a child, he or she must establish standing under the applicable statute. Under the IMDMA, a nonparent must meet the requirements of section 601(b)(2) to establish standing to seek custody.\footnote{750 ILL. COMP. STAT. 5/601(b)(2) (2000) (standing requirement for custody of a child).} In relevant part, section 601(b) provides that:

A child custody proceeding is commenced in the court: (1) by a parent, by filing a petition . . . (ii) for custody of the child, in the county in which he is permanently resident or found; or (2) by a person other than a parent, by filing a petition for custody of the child in the county in which he is permanently resident or found, but only if he is not in the physical custody of one of his parents.\footnote{Id.}

Several courts have considered the issue of what constitutes physical custody of a child. Physical custody requires more than
actual possession of the child at the time that the petition is filed.\textsuperscript{101} There is a clear distinction between legal custody and mere physical custody. Determining legal custody requires findings regarding who has actual possession of the child, how that custody was obtained, how long that individual has had the child, and the nature of the custodial relationship between the individual and the child.\textsuperscript{102}

A nonparent can usually establish standing under section 602(b)(2) under one of two circumstances.\textsuperscript{103} The first is when the parent has voluntarily given up control and custody of the child.\textsuperscript{104} The second is where the child has lived with the nonbiological parent for a "substantial period of time,"\textsuperscript{105} and a custody change would not serve the best interests of the child.\textsuperscript{106} These two situations have typically applied to stepparents\textsuperscript{107} or grandparents\textsuperscript{108} who become primary caregivers for the child.

\textsuperscript{101} See In re Custody of Peterson, 491 N.E.2d 1150, 1152 (Ill. App. Ct. 1986) (holding that grandparents whose daughter and granddaughter were living with them at the time of their daughter’s death did not have physical custody of the child under section 601(b)(2)); In re Custody of Cannon, 645 N.E.2d 348, 351 (Ill. App. Ct. 1994).

\textsuperscript{102} See In re Marriage of Houghton, 704 N.E.2d 409, 413 (Ill. App. Ct. 1998); Cannon, 645 N.E.2d at 351.

\textsuperscript{103} See Cannon, 645 N.E.2d at 352.

\textsuperscript{104} See id. at 352; In re Rudsell, 684 N.E.2d 421, 427 (Ill. App. Ct. 1997) (family friends had standing to gain custody because the mother had left her child with the family with only intermittent visitation over a course of several years); Look v. Look, 315 N.E.2d 623, 626 (Ill. App. Ct. 1974) (child remained in custody of maternal grandparents because the father did not seek custody for a number of years); see also In re Kirschn, 649 N.E.2d 324 (Ill. 1995) (the now infamous "Baby Richard" case, holding that voluntary relinquishment is required to establish nonparent standing under section 601(b)(2)).

\textsuperscript{105} See Cannon, 645 N.E.2d at 352.

\textsuperscript{106} The same standing requirement applies to petitions under the Probate Act. See In re Barnhart, 597 N.E.3d 1238, 1239 (Ill. App. Ct. 1992) (guardianship petition by grandmother did not satisfy standing requirements of section 601(b)(2)). If the nonparent cannot meet the requirements of section 601(b)(2), that individual may attempt to satisfy the more stringent standing requirements of the Adoption or Juvenile Court Acts. See Peterson, 491 N.E.2d at 1152; Cannon, 645 N.E.2d at 351; In re Marriage of Nicholas, 524 N.E.2d 728, 731 (Ill. App. Ct. 1988) (remanding for determination of who had physical custody of the child at the mother’s death). The courts have noted that the statutes require proof that the biological parents are "unfit" or that they have voluntarily relinquished custody of the child.

\textsuperscript{107} See Brownfield, 670 N.E.2d 1198, 1200 (Ill. App. Ct. 1996); In re Marriage of Carey, 544 N.E.2d 1293, 1299 (Ill. App. Ct. 1989); Cebrezynski v. Cebrezynski, 379 N.E.2d 713 (Ill. App. Ct. 1978) (intervener stepmother was granted custody of child, even though the biological mother was found to be a fit parent).

Individuals seeking visitation must also first establish standing. Section 607 of the IMDMA, which governs visitation petitions, provides that:

(a) a parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child's physical, mental, moral or emotional health. . . .

(b)(1) The court may grant reasonable visitation privileges to a grandparent, great-grandparent, or sibling of any minor child upon petition to the court by the grandparent, great-grandparent, or sibling, . . . if the court determines that it is in the best interests and welfare of the child . . . .

There is no standing requirements set out in this section. For purposes of visitation determinations, courts generally refer to the standing requirements of section 601 and 602. Even if reasonable visitation by nonbiological parents may be granted in more circumstances than custody, petitioners must still meet the more stringent standing requirements of section 601. Despite this threshold requirement, courts have found standing to seek visitation in cases where a continued, stable environment would serve the best interests of the child.

B. Equitable Principles Governing Custody and Visitation

Aside from statutory requirements, courts have general equity power to make custody and visitation decisions based on the best interests of children. This authority dates back to the state's common law duty to act as parens patriae for those who cannot care for themselves. Grandparents, stepparents, foster parents, and the

110. Id. The viability of section 607(b)(1) remains unclear in light of Lulay. The court's analysis focused primarily on the legislative history of the IMDMA and the exceptions set out in the statute. Taken together with the appellate court's decision in In re C.B.L., the strict construction of the statute does not bode well for nontraditional families appealing to the court's equity power.
114. The phrase parens patriae refers to the "role of state as sovereign and guardian of persons under legal disability, such as juveniles. . . . It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).
unmarried partners of either same-or opposite-sex biological parents may all be the practical, psychological, and actual parents of a child, though courts have not consistently recognized their relationships. Where a nonbiological parent does not meet the statutory requirements for standing to seek visitation or custody, courts may find other bases for standing.\textsuperscript{115} For example, courts have used various equitable doctrines to find that a nonbiological parent has standing based on their psychological parent,\textsuperscript{116} in loco parentis, or de facto parent status.\textsuperscript{117}

1. Standing of Unmarried Biological Parent

Under Illinois statute\textsuperscript{118} and in equity, an unmarried biological parent has standing to seek visitation of his or her child.\textsuperscript{119} Standing is rooted in the parents' "substantial and cognizable interest in the custody and care" of their children.\textsuperscript{120} In Elmore, the court held that a habeas corpus proceeding was a proper avenue for an unmarried father to reach a best interests hearing.\textsuperscript{121} The equitable parent doctrine looks to the relationship between the presumed biological parent and the child, and whether it serves the best interests of children to establish standing for custody and visitation.\textsuperscript{122}

\textsuperscript{115} See, e.g., Koelle v. Zwiren, 672 N.E.2d 868, 873 (Ill. App. Ct. 1996) (court used equitable parent doctrine to grant visitation to petitioner who had developed a father-daughter relationship with child).

\textsuperscript{116} In Temple v. Meyer the court stated:

A psychological parent is one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs. The psychological parent may be a biological... adoptive, foster or common-law... parent, or any other person. There is no presumption in favor of any of these after the initial assignment at birth. . . . 

\textsuperscript{117} Some courts distinguish between de facto and in loco parentis standing. However, as applied, there is little practical distinction between the two doctrines. Thus, for purposes of this Note, the terms have been used interchangeably.

\textsuperscript{118} 750 ILL. COMP. STAT. 45/1-1 (2000).


\textsuperscript{120} Upmann, 558 N.E.2d at 572.

\textsuperscript{121} See Elmore, 361 N.E.2d at 617.

\textsuperscript{122} See In re Marriage of Roberts, 649 N.E.2d 1344, 1349 (Ill. App. Ct. 1995). In Atkinson v. Atkinson, 408 N.W.2d 516 (Mich. Ct. App. 1987), the court used the equitable parent doctrine to extend paternity rights and obligations to the petitioner where the child had been born during the parties' marriage, the petitioner had developed a parental relationship with the child, and where he had assumed the status of parent. This doctrine was refined in In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995), a case involving a lesbian coparent, and followed by other courts. See, e.g., S.F. v. M.D., 751 A.2d 9 (Md. 2000); V.C. v. M.J.B., 748 A.2d 539 (N.J.}
2. Equitable Standing of Nonbiological Parents

There are four, sometimes overlapping, equitable principles that courts have used to find standing: psychological parent, in loco parentis, de facto\textsuperscript{123} parent, and equitable parent status. A psychological parent who has taken on all of the responsibilities of parenthood may be in the best position to care for a child who is not biologically related to him or her.\textsuperscript{124} It is also well established in Illinois that a person standing in loco parentis may claim rights to a relationship with a child.\textsuperscript{125} This is an equitable common law doctrine that recognizes the parental status of individuals who assume the care and responsibility for a child, without ever formally adopting the child.\textsuperscript{126} Illinois courts have also recognized that individuals can be de facto parents.\textsuperscript{127}

When evaluating whether or not an individual is an equitable parent, courts look to whether the individual intended to assume a parental role and whether that individual actually carried out parental duties.\textsuperscript{128} The Zazove court noted that "[o]ne standing in the place of a parent may give more than material things to that relationship. . . . Some of the most worth-while, precious and cherished things in one's life may come therefrom wholly separate and apart from the rights of support and maintenance."\textsuperscript{129} Therefore, courts look to the financial and disciplinary role that the putative parent has assumed in the

\textsuperscript{123} See S.F., 751 A.2d at 9 (permitting visitation by de facto mother).

\textsuperscript{124} See Rodriguez v. Koschny, 373 N.E.2d 47, 53 (Ill. App. Ct. 1978) (laches precluded vacation of adoption order, where adoptive parents had become "psychological parents" to the child); In re Ross, 329 N.E.2d 333, 342 (Ill. App. Ct. 1975) (recognizing that foster parents who had cared for the two girls for six and a half years were "psychological parents"); see also Watkins v. Nelson, 748 A.2d 558 (N.J. Super. Ct. App. Div. 1999) (affirming grant of custody to grandparents who were psychological parents and stood in loco parentis to the child).

\textsuperscript{125} See Alber v. Ill. Dep't of Mental Health, 786 F. Supp. 1340 (N.D. Ill. 1992) (guardians who did not formally adopt children had standing to assert parental rights); Faber v. Indus. Comm'n, 185 N.E.255 (Ill. 1933) (couple who did not formally adopt children that they cared for over thirteen years stood in loco parentis); Fetrow v. Krause, 61 Ill. App. 238 (Ill. App. Ct. 1895); see also Gribble v. Gribble, 583 P.2d 64 (Utah 1978) (individual acting in loco parentis was entitled to show the relationship with child in a hearing on visitation petition).

\textsuperscript{126} See Zazove v. United States, 156 F.2d 24, 27 (7th Cir. 1946) (finding that a deceased soldier could have assigned National Service Insurance Act benefits to woman who stood in loco parentis); Hawkey v. United States, 108 F. Supp. 941, 944 (E.D. Ill. 1952) (affection and generosity not enough to establish in loco parentis).


\textsuperscript{128} See Hawkey, 108 F. Supp. at 944.

\textsuperscript{129} Zazove, 156 F.2d at 27.
child’s life, as well as the more intangible aspects of the relationship between them.

III. PROPOSED STANDARDS FOR ILLINOIS COURTS

While these equitable doctrines are grounded in common law and Illinois precedent, they have not been extended to lesbian and gay nonbiological parents seeking custody or visitation. To the contrary, an Illinois court’s recent decision in In re Visitation with C.B.L. specifically prevents a lesbian or gay nonbiological parent from establishing standing in equity. This holding departs from equitable standing precedent, from as recently as three years earlier, in which the court allowed a nonbiological parent to petition for visitation of the daughter he helped raise. The court’s reasoning in C.B.L. was disingenuous, and failed to explain why common law did not apply in this case, where a lesbian coparent was involved.

Nevertheless, the decision does not close the door to successful visitation petitions by nonbiological coparents. The appellate court in C.B.L. did not consider whether or not a lesbian or gay nonbiological parent could establish standing under the plain language of section 607(a) of the IMDMA. Further, the court’s duty and power to resolve a family situation not explicitly contemplated by the statute is well established in equitable standing cases. Considering these issues together, courts can fashion a consistent approach to standing issues that protects parents’ rights to their children and reflects the actual families before the court.

A. In re Visitation with C.B.L.

In this case, A.B., the petitioner, and H.L. had been in a committed relationship for nine years when they had a child together. The women agreed that H.L. would bear the child through artificial insemination and that A.B. would financially support the family. As the court noted, “[p]etitioner was dutifully involved in all of the preparations prior to the birth. She was also equally involved in the care of C.B.L. for the next year-and-a-half.” A.B. and H.L. separated when their daughter was nearly two, and agreed to a visitation schedule, with H.L. retaining physical custody of the child.

131. See Koelle, 672 N.E.2d at 868.
132. C.B.L., 723 N.E.2d at 317.
Within a year of the separation, H.L. moved to Illinois with the baby and refused to allow A.B. any further contact.\textsuperscript{133}

A.B. sought visitation of the child, but her petition was denied for lack of standing.\textsuperscript{134} She brought the petition under section 607 and also requested any other equitable relief available.\textsuperscript{135} The circuit court specifically held that common law did not apply. The appellate court affirmed dismissal, finding that A.B. had conceded that she lacked standing under section 607.\textsuperscript{136} It also held that the provisions of IMDMA had eliminated the common law and, therefore, precluded A.B. from establishing common law standing as a de facto parent or a person standing \textit{in loco parentis}.\textsuperscript{137}

\textbf{B. Standing Based in Equity}

The \textit{C.B.L.} court allied itself with courts that have explicitly refused to recognize the equitable standing of lesbian or gay nonbiological parents to seek visitation.\textsuperscript{138} Courts rejecting equitable visitation standing claim that they may not broadly interpret existing statutes to include nonbiological lesbian or gay parents, and instead must defer to the legislature.\textsuperscript{139} In addition, they argue that it is the legislature’s prerogative to broaden the description of people who are “parents,” and it is not within the judge’s discretion to make those determinations.\textsuperscript{140}

The \textit{C.B.L.} court did not attempt to distinguish, or even address, any of the Illinois cases extending standing to nonbiological parents seeking visitation or custody.\textsuperscript{141} Instead, the court focused on the transformation of grandparent standing from a common law doctrine

\textsuperscript{133} \textit{See id.}
\textsuperscript{134} \textit{See id.}
\textsuperscript{135} \textit{See id.}
\textsuperscript{136} A.B. focused her appeal on common law standing and did not argue standing under section 607. \textit{Id.} at 321. (“That concession is dispositive of this appeal.”).
\textsuperscript{137} \textit{See id.; see also} 750 ILL. COMP. STAT. 5/607 (1999).
\textsuperscript{139} \textit{See, e.g.,} Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (recognizing that the legislature had not explicitly granted visitation rights to lesbian coparent who had not adopted children, but declining to adopt equitable standing principles).
\textsuperscript{140} \textit{See, e.g.,} Curiale v. Reagan, 222 Cal. App. 3d 1597, 1600 (Cal. 1990); \textit{Thompson}, 11 S.W.3d at 918.
\textsuperscript{141} \textit{See C.B.L.,} 723 N.E.2d at 318; \textit{see also supra} Part III.B.
to its incorporation in section 607(b). Based on this development, the court concluded that the Illinois legislature intended to abolish common law standing as applied to section 607. Section 607 has evolved significantly during its twenty-year history, as the court noted. Yet, the court did not declare the abolition of common law standing until a lesbian coparent sought visitation of her child.

This position is untenable because it leaves absolutely no recourse for nonbiological parents to maintain relationships with their children. If the legislature refuses to explicitly extend parental rights to a class of parents based on their sexual orientation, the court cannot avoid its duty to resolve the issue in light of the best interests of the child.

We have recognized that when social mores change, governing statutes must be interpreted to allow for those changes in a manner that does not frustrate the purposes behind their enactment. To deny the children of same-sex partners, as a class, the security of a legally recognized relationship with their second parent serves no legitimate state interest.

It is inappropriate and shortsighted for the judiciary to defer to legislative authority where the legislature has failed to address a dire situation affecting children in the state. The purpose of a court's equitable power is to fashion common sense remedies that will fairly and adequately address the issues before the court. Further, as parens patriae, the state is obligated to protect the interests of its children. Regardless of whether there is sufficient public approval of families created by lesbian and gay Americans to generate specific legislation addressing their family relationships, the courts must not abandon their duties.

The rapid expansion in this area of family

143. See C.B.L., 723 N.E.2d at 320.
144. See id.
146. At least two other courts have exercised jurisdiction over custody and visitation disputes between lesbians who have separated after coparenting a child. See Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. Spec. App. 2000); Barnae v. Barnae, 943 P.2d 1036, 1041 (N.M. Ct. App.), cert. denied, 942 P.2d 189 (N.M. 1997). In each case, after the petition was brought, the biological mother moved from a state that recognized some form of equitable standing back to her former resident state, which did not afford custody or visitation to nonbiological parents. The courts exercised jurisdiction, finding that the courts in Tennessee and California, respectively, did not provide adequate protection to the nonbiological parents' constitutional rights.
147. See, for example, In re Guardianship of Olivia J., 84 Cal. App. 4th 1146, 1162 (Cal. Ct. App. 2000), where the court stated:
indicates that these issues will continue to be brought before the Illinois courts and others. Developing a consistent approach to standing that critically examines the family structure before the court will ensure that all children may maintain relationships with their actual parents, so long as it is in their best interests.

Courts in other states have extended equitable standing to nonbiological parents seeking visitation. Standing is determined by focusing on the nature and the extent of the actual relationship between the individual and the child. Courts recognizing the standing of nonbiological parents to seek visitation have referred to the variety of forms taken by modern families. What then, is the difference between a lesbian or gay coparent and a stepparent? If both the biological and nonbiological parent planned, created, and fostered the family together, the lesbian or gay coparent presents a stronger basis to establish equitable standing for visitation.

Perhaps the repetition of this unfortunate scenario, in case after case, in which the appellant unsuccessfully avails herself of legal remedies not designed to suit the factual circumstances, will eventually lead to a legislative solution, if for no other reason than to protect the children involved from becoming pawns in the conflict of the adults who care for them.


150. See id.

151. Indeed, the C.B.L. court acknowledged this, even as it deferred to the legislature: “This court is not unmindful of the fact that our evolving social structures have created non-traditional relationships.” 723 N.E.2d at 321. Similarly, in Troxel v. Granville, Justice Stevens stated:

The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel 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. It is indisputably the business of the States, rather than a federal court employing a national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.


C. Section 607(a) of the IMDMA

As set forth earlier, section 607(a) of the IMDMA states that "a parent is entitled to reasonable visitation rights." The statute does not define who qualifies as a parent. Courts that have narrowly construed the term require a biological link between the parent and child. They are reluctant to stray from a strict biological link because of the fear that any number of individuals, from the babysitter, to "a cult group," could claim to be parents entitled to custody or visitation. In the second-parent adoption context, an Illinois appellate court responded to this implausible argument by reminding the circuit court that it remains empowered to determine whether or not granting the petition serves the best interests of the child.

Moreover, Illinois courts have already recognized that a parent can be someone other than a biological parent. On at least two occasions, individuals were found to be parents for standing purposes under section 601 and 607(a). In each case, a putative father whose paternity was not rebutted when he first sought custody was considered a parent for standing purposes, even though he was later proven not to be the biological father.

The C.B.L. court's decision leaves open the possibility of extending standing to a lesbian or gay nonbiological parent under section 607. In affirming, the court emphasized A.B.'s decision not to pursue her 607 claim on appeal. The court's position on equitable standing was clear in this case. On the other hand, its position on A.B.'s standing under section 607 was far from clear. Same-sex marriages are not recognized in Illinois, so nonbiological parents have no recourse under the traditional IMDMA dissolution rules. Without an adoptive link, lesbian or gay nonbiological parents in Illinois have no legal protection of their relationships with their children. Recognizing lesbian or gay coparents as "parents" for standing purposes of either section 601 or 607 would remedy a serious problem for this class of nonbiological parents.

155. See id.
156. See supra Part II.
158. See id.
159. See supra note 132 and accompanying text.
160. See 750 ILL. COMP. STAT. 5/212.
Inclusion of lesbian or gay coparents under section 607(a) would also provide guidance to courts and families created by same-sex couples. Common law equitable doctrines such as de facto parent and *in loco parentis* provide solid rationale for recognizing coparents' standing to seek visitation. However, relying on equity leaves too much room for inconsistency and subjectivity of standing determinations. Moreover, since *C.B.L.* specifically eliminated the option of standing based in equity, lesbian or gay nonbiological parents are left with no other basis for standing.

Extending "parental" standing under the IMDMA to lesbian and gay coparents recognizes the reality of millions of parents and children. It will also give notice to lesbian or gay biological parents that they must honor their families, even when they divorce. Coparenting agreements may remain unenforceable, but they can be used to demonstrate that a nonbiological parent has standing to seek visitation.

D. Proposed Guidelines

A United States Supreme Court Justice has said that "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Yet courts return to biology because they do not know how to limit the number of people claiming to be parents. These fears can be allayed. Families deliberately created by same-sex couples are identifiable and distinct from unrelated third parties. If the constitutional protection accorded to nuclear families remains a fundamental right for all families, then courts must look to the actual family before them.

Courts recognizing the standing of nonbiological parents to seek visitation have referred to the variety of forms taken by modern families. They have engaged in a fact specific inquiry into the relationship between the child and the nonbiological parent.

With the best interests of children in mind, courts can follow a consistent approach to standing issues in visitation disputes between

same-sex coparents. A two-part test may be used to determine whether the person seeking visitation is a "parent" for standing purposes. First, courts should look to the facts reflected by testimony, parenting agreements, and the history of the relationship between the biological parent and the person seeking visitation. If the facts show that there is both a significant relationship between the child and the nonbiological parent, and prior biological parental knowledge of and fostering of that relationship, then the nonbiological parent will have met the threshold requirement of parenthood. Courts have adopted this approach when examining the standing of other nonbiological parents. It allows the court to adhere to the statutory requirement of standing and reflects a critical inquiry into the family structure before the court. This approach can be used with either lesbians or gay men seeking visitation with their children.

Proving a significant relationship may be difficult. This will be especially true where, as in C.B.L., the couple separated when the child was an infant. How will the court determine if a relationship is significant? One approach would be to look at the extent of the nonbiological parent's interactions with the child. If he or she shared all primary responsibilities for the child, i.e., feeding, clothing, bathing, playing, doctor visits, investing in the child's education, then those facts should weigh in favor of a significant relationship, regardless of the child's age when the parents separate. Considering these issues, along with the second part of the threshold test, will ensure that only legitimate parents have standing under 607(a) and 601.

After the threshold visitation standing requirements have been met, courts may apply the traditional best interests standard. In its analysis, the court should consider the interests of the child, the nonbiological parent's interests, and the social interest in protecting and maintaining stable relationships between parents and their

164. See In re Marriage of Slayton, 685 N.E.2d 1038, 1042 (Ill. App. Ct. 1977) (affirming a nonbiological father's visitation rights, even though he did not appear to be a parent within the language of section 607); Boyles v. Boyles, 466 N.Y.S.2d 762, 765 (N.Y. App. Div. 1983) (ruling that a biological mother was estopped from denying paternity of a nonbiological father when she had fostered and encouraged a relationship between child and father); In re Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995) (lesbian coparent allowed visitation because the biological mother had fostered a relationship with the child).

children. One author has suggested that these three classes of interests converge to form the standards that create a legal relationship between a child and an adult. These distinct interests frame the author’s evaluation of the legal standards used by courts in custody and visitation determinations. Because “[v]isitation is a considerably less weighty matter than outright custody of a child, and does not demand the enhanced protections . . . that attend custody awards,” Illinois courts should equally protect all three interests in disputes over the visitation rights of lesbian or gay nonbiological parents. Therefore, a court presented with a custody or visitation dispute between Elijah and Alicia’s mothers must consider the benefits of returning the children to the home and community they have lived in for their entire lives; the children’s interests in regular contact and visitation with both of the parents who raised them; and the interests of each parent—regardless of biology—in preserving the family they have created.

CONCLUSION

Contemporary American families are, more often than not, created outside of traditional heterosexual marital relationships. When the relationships between the parents change, whether through divorce, legal separation, or mutual decision, courts have a responsibility to maintain and protect the relationships between children and their parents. Families created by lesbian and gay parents should not be accorded less protection than those created in a traditional heterosexual marriage.

Therefore, Illinois courts should include lesbian and gay nonbiological parents under section 607(a) and section 601 of the

166. See H.S.H.-K., 533 N.W.2d at 419; GAY AND LESBIAN ADVOCATES & DEFENDERS ET AL., supra note 37.
167. See Andersen, supra note 2, at 935.
168. Although his conceptual framework is useful, I disagree with the author’s conclusions about same-sex partners of biological parents, and their rights to children. Andersen believes that marriage—which is an exclusively heterosexual institution—must be an essential part of the social interest. See id. at 997. To bolster his theory, he minimizes studies revealing high divorce rates among heterosexual couples and instead emphasizes a frequently debunked report about the sexual relationships of gay men. See id. at 988, 994. While I would agree that heterosexual marriage is one element of the social interest, it is by no means the only actual and legitimate form of family structure in modern America.
170. In his dissent in Troxel v. Granville, Justice Stevens explicitly recognized children’s interests in maintaining their familial relationships with individuals who are not their biological parents. See 530 U.S. 57, 81 (Stevens, J., dissenting).
IMDMA. Courts can engage in a fact-specific inquiry to determine whether a lesbian or gay person petitioning for visitation qualifies as a parent for standing purposes. The most relevant considerations are the nature and quality of the relationship between the petitioner and the child, and whether the biological parent fostered and developed that relationship. By engaging in this inquiry, courts may adhere to the statutory requirement for standing.

Regardless of whether the legislature decides to redraft the statutory standing requirements of the IMDMA, the Adoption Act, or the Juvenile Court Act, courts have an inherent authority to act in the best interests of the child. The two part threshold test allows courts to make a genuine best interests determination. By adopting this standard, courts will serve the convergence of interests: the interests of the parent petitioning for visitation, the interests of the child in maintaining a relationship with his or her parent, and the social interests in fostering and preserving family relationships. With this approach, neither equity nor the best interests of children will be abandoned.