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Mothers and Significant Others: Parental Standing to Seek Visitation Rights in the Best Interest of the Child

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MOTHERS AND SIGNIFICANT OTHERS: PARENTAL STANDING TO SEEK VISITATION RIGHTS IN THE BEST INTEREST OF THE CHILD

Although not expressly provided for in the Constitution, the fundamental right to raise one's own children has been recognized through its penumbras.[1] Traditionally, parenthood has been an exclusive status under which the law has only recognized one set of parents.[2] As such, courts have closely scrutinized any at-

[1] *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (freedom of personal choice in family life protected by Due Process Clause of Fourteenth Amendment); Stanley v. Illinois, 405 U.S. 645, 651 (1972). Justice White, writing for the majority, explained: "The rights to conceive and to raise one's children have been deemed 'essential' " (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right of parent to raise children is fundamental one and beyond reach of any court)) "and 'basic rights of man' " (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate protected by Equal Protection Clause of Fourteenth Amendment)). *Id.*; Griswold v. Connecticut, 381 U.S. 479, 495-96 (1965) (Goldberg, J., concurring). *See generally* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* Acknowledging that the Ninth Amendment expressly recognizes a fundamental privacy right protected from abridgment by the government though not mentioned in the Constitution, Justice Goldberg stated: "The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." *Id.* at 495; *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion). "[T]he Constitution protects the family precisely because the institution of family is deeply rooted in this Nation's history and tradition." *Id.*; Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting). Justice Harlan declared that the "integrity of [family] life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right." *Id.*; Sorentino v. Family & Children's Soc. of Elizabeth, 378 A.2d 18, 20 (N.J. 1977) (constitutional right of natural parents to custody may be primary but is not absolute), *aff'd*, 391 A.2d 497 (N.J. 1978). *See generally* U.S. CONST. amend. IX. The Ninth Amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id. But cf.* Moore v. City of East Cleveland, 431 U.S. 494, 536-40 (1977) (Stewart, J., dissenting). A biological relationship alone is not sufficient to create a "family" to be afforded due process protection. *Id.* at 549 (White, J., dissenting). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.28 (4th ed. 1991) (discussing marriage and family rights as part of right to privacy).

[2] *See* UNIF. PARENTAGE ACT § 1, 9B U.L.A. 296 (1979). Section one defines the relationship between parent and child as "[t]he legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship." *Id. See generally* Katharine T. Bartlett, *Rethinking Parenthood as an Ex-*

tempt to terminate[3] or interfere with a fit parent's right to custody and control of a child.[4] Historically, visitation, as the alter-ego of custody,[5] has flowed from parenthood.[6] The primary pur-

clusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed, 70 VA. L. REV. 879 (1984). "A fundamental premise of the law of exclusive parenthood is that parents raise their own children in nuclear families." *Id.* at 880-81. Thus, the law generally recognizes only one mother and father for each child at one time. *Id.*

[3] *See, e.g.*, WIS. STAT. ANN. § 48.426 (West 1986) (termination statute requires parental unfitness in deciding best interest); *see* Santosky v. Kramer, 455 U.S. 745, 768-69 (1982) (due process requires clear and convincing evidence of parental unfitness before state may sever natural parent's rights); *Stanley*, 405 U.S. at 657-58 (due process requires fitness hearing before state may take children from unwed father in dependency proceeding following death of children's natural mother); *see also* Warren v. Warren, 386 So. 2d 1166, 1168 (Ala. Civ. App. 1980) (children removed from mother who had psychiatric history despite their young ages); *In re* Massey, 341 N.E.2d 405, 407 (Ill. App. Ct. 1976) (best interests of child can be considered only if court finds by clear and convincing evidence that parent is unfit or consents to severance); Burch v. Burch, 398 So. 2d 84, 87 (La. Ct. App. 1981) (unfitness displaces tender years doctrine); Mazurek v. Mazurek, 575 S.W.2d 227, 229 (Mo. Ct. App. 1978) (neglect and violent episodes warranted taking young child from mother); *cf.* Michael H. v. Gerald D., 491 U.S. 110, 120 (1989) (Brennan, J., dissenting). The majority of Justices agreed that a natural parent must be afforded adequate procedure before their parenthood may be taken away. *Id.*

[4] *See, e.g.*, Parham v. J. R., 442 U.S. 584, 603 (1979). Writing for the majority, Chief Justice Burger revealed: "The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* It is widely held that a state's power to impose reasonable regulations for the control and duration of basic education does not displace the fundamental rights and traditional interests of parents in religious upbringing. *Id.* at 603-04; *see also* Wisconsin v. Yoder, 406 U.S. 205, 205 (1972) (limited exception granted to mandatory school attendance law for religious reasons). Society places a high value on parental direction in religious and educational upbringing of children in their early formative years. *Id.* at 213-14; Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (state could not prohibit private schools but could set educational and safety standards); Bennett v. Jeffreys, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 280, 40 N.Y.S.2d 821, 825 (1976) (new hearing ordered to determine child's best interests when unwed natural mother's prolonged and voluntary separation from child constituted extraordinary circumstances); *cf.* UNIF. MARRIAGE & DIVORCE ACT § 401(d)(2), 9A U.L.A. 207 (1987) (non-parent may not institute custody action if child is in physical custody of parent). *But see, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (state has wide range of power to limit parental authority). The rights of parenthood are not beyond regulation. *Id.*

[5] *See* Jackson v. Fitzgerald, 185 A.2d 724, 726 (D.C. 1962) (awarding visitation to grandmother would impinge on father's vested right of custody). The court stated, "[t]he right of visitation derives from the right of custody." *Id.*; Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 142, 511 N.E.2d 75, 76, 517 N.Y.S.2d 932, 933 (1987) (former boyfriend could not petition for visitation rights against wishes of custodial parent). The court found that "[v]isitation is a sub-species of custody . . . ." *Id.* at 144, 511 N.E. 2d at 77, 517 N.Y.S.2d at 933; Pennsylvania *ex rel.* Williams v. Miller, 385 A.2d 992, 994 (Pa. Super. Ct. 1978) (maternal grandmother awarded visitation rights upon showing of best interests of child). The court reasoned that "visitation is correlative to custody." *Id.*

[6] *See* Deville v. LaGrange, 388 So. 2d 696, 698 (La. 1980) (right of custody flows from fact of parenthood); *see also* Maxwell v. LeBlanc, 434 So. 2d 375, 376 (La. 1983) "The right of visitation for a non-custodial parent is a natural right with respect to his children

pose of visitation was to protect the rights of the noncustodial parent[7] and to benefit the development of the child.[8] In determining custody and visitation rights between parents, the dominant concern has been the best interest of the child.[9]

. . . ." *Id.* Custody is a right of parenthood, and since visitation is a form of custody, the rights to visitation belong to all parents. *Id.* at 377.

[7] *In re* Marriage of Delf, 528 P.2d 96, 99 (Or. Ct. App. 1974). One basic policy to be achieved in granting visitation privileges to a parent who does not have custody is to protect the right of a parent to know and share the love of the child. *Id.; see* Conkel v. Conkel, 509 N.E.2d 983, 985 (Ohio Ct. App. 1987). Failure of the custodial parent to accord visitation rights to the non-custodial parent is an infringement on that parents right to visitation as well as the child's right to live with that parent. *Id.*; Spells v. Spells, 378 A.2d 879, 883 (Pa. Super. Ct. 1977) (visitation rights of non-custodial parent must be carefully guarded). *See generally* Michael J. Lewinski, Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L.J. 191, 194-95 (1984-85). A parent's right of custody of a child becomes theoretically impossible if a divorce has caused both parents to reside apart. *Id.* Thus, the law has assumed a right of visitation in the non-custodial parent. *Id.* Visitation may be granted for a specific period of time, or it may be granted liberally with the time frame to be determined by the parents. *Id.* Visitation privileges may be granted without supervision, but in some cases the presence of the custodial parent or some other guardian is required during the period of the visit. *Id.*

[8] *See Conkel,* 509 N.E.2d at 985. A child's need for visitation with a non-custodial parent is a "natural right of the child and is as worthy of protection as is the parent's rights of visitation with the child . . . ." *Id.* Interference with a non-custodial parent's visitation rights is an "infringement of the child's right to receive the love, affection, training and companionship of the parent." *Id.*; *Marriage of Delf,* 528 P.2d at 99. The court noted that one basic policy "to be achieved in granting visitation privileges to a parent who does not have custody is to protect the right of the of the child to the emotional, social and learning benefits of as stable a relationship as is possible with both parents." *Id.*; Patrick v. Patrick, 117 N.W.2d 256, 259 (Wis. 1962). The minor children of divorced parents "are entitled to the love and companionship of both parents . . . ." *Id.* (quoting Block v. Block, 112 N.W.2d 923 (Wis. 1961)).

[9] *See* Kohl v. Murphy, 767 F. Supp. 895, 903 n.8 (N.D. Ill. 1991) (paramount consideration in all child custody proceedings is best interest of child); McLaughlin v. Pernsley, 693 F. Supp. 318, 324 (E.D. Pa. 1988) (laws of most states mandate custody determinations be made in best interest of child); *Maxwell,* 434 So. 2d at 378. The Louisiana Supreme Court declared that when deciding what is in the best interest of the child and whether a parent should be awarded visitation rights, a court should take into account: (1) the "love, affection and other emotional ties" between the child and the parties involved; (2) the ability of the "parties involved to give the child love, affection, guidance, and continuation of the educating and raising of the child;" (3) the ability of the "parties involved to provide the child with material needs;" (4) "the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity" by keeping the child in this environment; (5) "the relationship of the child's mother and father;" (6) "the moral fitness of the parties involved;" (7) "the reasonable preference of the child;" (8) "the willingness and ability of the parents to facilitate and encourage a close and continuing parent-child relationship;" and (9) the effect of visitation upon [the] physical condition of [the] child." *Id.* at 377-78 (citations omitted). "The rights of any parent are always subservient to the best interests of the child." *Id.* at 377. A parent seeking to deny visitation has the burden of proving that "visitation would not be in the best interests of the child." *Id.* at 378; *see also In re* Marriage of Frey & Frey, 692 P.2d 615, 616 (Or. Ct. App. 1984) (pre-

The deterioration of the traditional two-parent nuclear family[10] has encouraged significant relationships between children and adults who are not their biological or legal parents.[11] These "significant others" have increasingly obtained standing to seek visitation rights.[12]

sumption that child of tender years is better off with its natural mother may be overcome by best interest of the child). *Compare* WASH. REV. CODE § 26.09.240 (1990) (court may order visitation to any person if in best interest of child) *with* LA. CIV. CODE ANN. art. 146.1 (West 1988) (any relative by blood or affinity not granted custody of child may be granted reasonable visitation rights if in best interest of child).

[10] *See* U.S. Bureau of the Census, *Statistical Abstract of the United States: 1990* 45 (110th ed. 1990). Assuming continuation of past trends (Series A classification), household projections reveal that by the year 2000, approximately one in four (17.8 million) families (as opposed to "nonfamily households") will be headed by a single parent rather than a married couple, up from 13 percent (5.4 million) in 1970 and 19 percent (6.7 million) in 1980. *Id.*; *Only One U.S. Family in Four is 'Traditional'*, N.Y. TIMES, Jan. 30, 1991, at A19. According to a survey of 57,400 housing units conducted in March, 1990, economic factors and the aging of the baby boomers may be contributing to the slowdown in the increase of new households from the "breakneck pace" of the 70's. *Id.* The number of single parents (9.7 million) increased 41 percent from 1980, half the 82 percent increase from 1970. *Id.*; Bartlett, *supra* note 2, at 880-81 (citing increasing number of parents who never marry, parents who divorce and stay single or remarry, parents who abandon their children and parents who are adjudged unfit).

[11] *See generally* Nancy D. Polikoff, Note, *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 (1990) (advocating extension of parental rights to non-traditional parents).

[12] *See* WIS. STAT. ANN. § 767.245 (1991) (court may grant visitation to any person who has maintained parent-child relationship); *In re* Guardianship of Martha M., 251 Cal. Rptr. 567, 570 (Cal. Ct. App. 1988) (court upheld jurisdiction to award visitation rights, after mother's suicide, to close friend of child's mother who had supported and developed loving relationship with child); Wishart v. Bates, 531 So. 2d 955, 956 (Fla. 1988) (grandparent entitled to visitation with child in custody of fit parent if in best interests of child), *cert. denied*, 490 U.S. 1001 (1989); Wills v. Wills, 399 So. 2d 1130, 1131 (Fla. Dist. Ct. App. 1981) (former wife of adoptive father entitled to visitation privileges); Collins v. Gilbreath, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980) (stepfather awarded visitation rights after mother's death to smooth transition to custody of natural father); Evans v. Evans, 488 A.2d 157, 161-62 (Md. Ct. App. 1985) (former wife statutorily entitled to visitation with nonadoptive minor stepson); Hamilton v. Hamilton, 622 S.W.2d 252, 254 (Mo. Ct. App. 1981) (paternal grandparents awarded visitation rights after parents divorced); L., K., C., B. & H. K. v. G. & H., 497 A.2d 215, 222 (N.J. Super. Ct. Ch. Div. 1985) (emancipated siblings granted visitation rights in best interest of child); State *ex rel.* A.H. v. Mr. & Mrs. H., 716 P.2d 284, 284 (Utah 1986) ("prospective adoptive parents had standing to petition for restoration of custody"); Gotz v. Gotz, 80 N.W.2d 359, 360 (Wis. 1957) (court upheld visitation rights of maternal aunts and their husbands after custody awarded to father when mother was too ill to exercise her custodial rights); *see, e.g.*, N.Y. DOM. REL. LAW § 71 (McKinney 1989). The section states, in pertinent part:

> [A] brother or sister. . . whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court . . . and . . . the court . . . may make such directions as the best interest of the child may require, for visitation rights for such

This Note will explore the meaning of parenthood for the purpose of obtaining visitation rights in the nontraditional family setting. Part One will examine various definitions of the term "parent" and contemplate two alternative theories of parenthood. Part Two will distinguish visitation rights from custody rights in light of today's alternative family arrangements. Part Three will address the need for equitable intervention to promote the best interest of the child in the context of visitation. Finally, this Note will advocate expansion of the orthodox definition of "parent" for visitation purposes to better fulfill the changing needs of society.

I. Acquisition of Parental Rights

A. *The Current Status of Parenthood*

Parenthood has attained an exclusive status under which the law generally recognized only one set of parents.[13] The term parent has historically referred to the lawful mother or father of a person.[14] Biological affiliation has always been a key factor in acquisition of parental rights,[15] although it is not necessary that the

brother or sister in respect to such child.
Id. See generally Miriam B. Chaloff, Note, *Grandparent's Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 Brook. L. Rev. 149, 149 (1982) (many states by statute allow grandparents to seek visitation with their grandchildren). *But see* Huffman v. Grob, 218 Cal. Rptr. 659, 661 (Cal. Ct. App. 1985) (court denied visitation petition to child's aunt and uncle after mother's death led to child's adoption by stranger); Temple v. Meyer, 544 A.2d 629, 632-33 (Conn. 1988) (trial court did not err in refusing to grant visitation rights to mother's boyfriend); *cf.* Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 142, 511 N.E.2d 75, 77, 517 N.Y.S.2d 932, 932 (1987) (former boyfriend, non-biological father, could not petition for custody absent legislative grant of standing).

[13] *See supra* note 2 (sources cited therein).

[14] *See, e.g.*, Black's Law Dictionary 1114 (6th ed. 1990). Parent is defined as "[t]he lawful mother or father of a person." *Id.; see also* Katharine T. Bartlett, *Re-expressing Parenthood*, 98 Yale L.J. 293, 337 (1988). Changing society's view about the status of parenthood is a "long term project." *Id.* "Current legal thinking . . . causes us to focus on . . . the achievements, biological contribution and 'rights' " of the parent, thereby giving us an "individualistic, possessory" image of parenthood. *Id. But see* Solberg v. Metropolitan Life Ins. Co., 185 N.W.2d 319, 322-23 (Wis. 1971). The word parent not only refers to the persons responsible for the child's conception and birth, but also to those who share "mutual love and affection with a child and who supply the child support and maintenance, instruction, discipline and guidance." *Id.*

[15] *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983). The "biological connection . . . offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring" and an interest entitled to constitutional protection. *Id.*; *In re* Ra-

mother and father be married to each other.[16]

The biological mother or father must be a fit parent in order to secure and sustain legal protection of their rights.[17] Adoption has always been the standard exception whereby a nonbiological parent has been legally protected.[18] Nevertheless, legal recognition

quel Marie X., 76 N.Y.2d 387, 402, 559 N.E.2d 418, 424, 559 N.Y.S.2d 855, 861 (1990) (unwed biological father's right to custody of adopted newborn constitutionally protected "so long as he promptly avails himself of all the possible mechanisms for forming a legal and emotional bond with his child"), *cert. denied*, 111 S.Ct. 517 (1990); Bennett v. Jeffreys, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 824 (1976) ("The parent has a 'right' to rear its child [absent] exceptions created by extraordinary circumstances such as surrender, abandonment, persistent neglect . . . .").

[16] *See* Stanley v. Illinois, 405 U.S. 645, 651-52 (1972). Marriage of the biological parents is not a prerequisite to legal rights. *Id.*; *see also* Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 373-74 (1988) (two-thirds of states have statutes that explicitly or through judicial interpretation allow putative father's right of action to rebut marital presumption by clear and convincing evidence in some states and by overwhelming evidence in others); *see also, e.g.*, COLO. REV. STAT. §§ 13-25-126(1)(e)(iv), 19-6-105(1)(f) (1986) (putative father can rebut marital presumption of legitimacy of child born in wedlock, if blood tests show 97% chance or better that either parent to marriage not actual parent of child). *See generally* Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of* Michael H. v. Gerald D., 65 TUL. L. REV. 585, 585-86 (1991) (rebutting marital presumption and providing alternative analysis of *Michael H.*); William Weston, *Putative Fathers' Rights to Custody—A Rocky Road at Best*, 10 WHITTIER L. REV. 683 (1989) (discussing establishment of custodial and visitation rights of out of wedlock fathers). *But see* UNIF. PARENTAGE ACT §§ 4(a), 6(a), 9B U.L.A. 302 (1987) (incorporated by five states, UPA permits rebuttal of presumption of paternity by clear and convincing evidence); Michael H. v. Gerald D., 491 U.S. 110, 124-30 (1989) (probable biological father denied parental rights in favor of presumption of husband's paternity); Vincent B. v. Joan R., 179 Cal. Rptr. 9, 10 (Cal. Ct. App. 1981) (state has legitimate interest in preserving integrity of family unit).

[17] *See* Ashford v. Hassan, 88 A.D.2d 977, 977-78, 452 N.Y.S.2d 322, 323 (2nd Dep't. 1982) (biological father denied custody pending determination of fitness); *see also supra* note 3 (fitness is prerequisite to maintenance of parental rights). *But cf. In re* S.L.H., 342 N.W.2d 672, 677 (S.D. 1983). "It is hazardous . . . to assume that removing child from an imperfect home invariably will benefit the child." *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 765 (1982)).

[18] *See* Caban v. Mohammed, 441 U.S. 380, 393 (1979) (suggesting that where unwed father has "substantial relationship" with child, his consent to adoption is necessary); *In re* Upjohn's Will, 304 N.Y. 366, 373, 107 N.E.2d 492, 494 (1952). Adoption recognizes "the fundamental social concept that the relationship of parent and child, with all the personal and property rights incident to it may be established, independently of blood ties, by operation of law . . . ." *Id.*; *Matter of Evan*, N.Y.L.J., Feb. 3, 1992, at 25, col. 6 (granting adoption petition to mother's homosexual partner in best interest of child); *see also, e.g.*, N.Y. DOM. REL. LAW § 110 (McKinney 1984). In affording equivalent parental rights, the adoption statute states in pertinent part: "Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person." *Id.*; *cf.* Judy E. Nathan, Note, *Visitation After Adoption: In the Best Interests of the Child*, 59 N.Y.U. L. REV. 633, 633-34 (1984) (courts attempt to preserve child's existing emotional relationships by granting custody to their "psychological parents"). "Psychological parent" has been defined as the

and enforceability of such rights have been co-extensive with some showing of assumption of parental responsibility for and establishment of a relationship with the child.[19] It is submitted that the best interest of the child, rather than biological affiliation, should be the most determinative factor in establishing parental rights.

B. Alternative Theories for Establishing Parenthood

With the decline of the traditional nuclear family, both custody and visitation rights have been extended beyond the mother and father of the child in order to meet changing familial and societal needs.[20] This is most common where one of the child's primary caretakers is someone other than the biological or adoptive parent.[21]

person who meets the child's emotional and physical needs. *Id.*; J. GOLDSTEIN, A. FREUND & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD, 17-19 (1979). *But cf. In re* Rhine, 456 A.2d 608, 614 (Pa. Super. Ct. 1983) (clear and convincing evidence that visitation would severely endanger child is required before natural parents' visitation of child in foster care can be terminated).

[19] *See, e.g.*, Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (unwed biological father denied right to object to adoption by stepfather for failure to shoulder responsibility or petition for legitimation); *see also* Bannister v. Bannister, 81 A.D.2d 913, 914, 439 N.Y.S.2d 194, 196 (2d Dep't 1981) (remanded for determination of child's best interest after finding that protracted acquiescence of physical custody of child with mother's sister showed lack of interest sufficient to constitute extraordinary circumstances); *In re* Board, 150 Misc.2d 743, 744, 570 N.Y.S.2d. 269, 271 (Family Ct. New York County 1991) (biological father estopped to assert paternity of emancipated child after failure to establish any personal or legal bond); *cf.* Stanley v. Illinois, 405 U.S. 645, 661 n.1 (1972) (unwed father did not ask for legal responsibility but only objected to someone else having legal control over his children) (citing Tr. of Oral Arg. 38, 39-40) (Burger, C.J., dissenting))). *But see* Lehr v. Robertson, 463 U.S. 248, 257 (1983) (New York statute requiring unwed father to openly live with child or mother for six continuous months in order to veto adoption was unconstitutional, neither legitimately furthering state's interest nor sufficiently protecting father's).

[20] *See generally* Lewinski, *supra* note 7, at 193 (advocating extension of visitation rights to third parties *in loco parentis*). The increased divorce rate and entrance of women into the work force has caused greater reliance on third parties who "often contribute significantly, sometimes more so than the mother or father, to the child's development." *Id.*; Mary Patricia Treuthart, *Adopting a More Realistic Definition of "Family"*, 26 GONZ. L. REV. 91, 96-99 (1991) (comparing legal premises and factual realities underlying modern family structure); *supra* note 10 (statistics reflecting societal changes in traditional families).

[21] *See supra* note 12 (non-parents receiving visitation rights).

1. Equitable Parenthood

The doctrine of equitable parenthood[22] which was set forth in *Atkinson v. Atkinson,*[23] has been employed as an alternative method of determining custody and visitation rights of nonbiological and nonadoptive parents. The Michigan court in *Atkinson* applied the doctrine of equitable estoppel[24] to award parental rights and privileges to a stepfather who acted as the child's father, against the wishes of the putative biological father.[25] The court reasoned that the applicable statute, known as the Child Custody Act,[26] was equitable in nature and thus should be liberally construed to advance the best interest of the child.[27]

The equitable estoppel principle as applied to parenthood has similarly prevailed in other jurisdictions as the courts wrestle with complex issues of support and visitation.[28] The doctrine has been

[22] Atkinson v. Atkinson, 408 N.W.2d 516, 519 (Mich. Ct. App. 1987). The doctrine of equitable parenthood states:

> [A] husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledged a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Id. But see In re Marriage of Goetz & Lewis, 250 Cal. Rptr. 30, 33 (Cal. Ct. App. 1988) (court refused to expand equitable parent doctrine to award custody rights to stepfather absent legislation).

[23] *Atkinson*, 408 N.W.2d at 516.

[24] *Id.* at 519-20. The doctrine of equitable estoppel precludes a person from asserting a right that he might otherwise have. *Id.*; *In re* Board, 150 Misc. 2d 743, 744, 570 N.Y.S.2d 269, 270 (Family Ct. New York County 1991) (equitable estoppel may prevent exercise of right to prevent inequity); *see also* American Bank & Trust Co. v. Trinity Universal Ins. Co., 205 So. 2d 35, 40 (La. 1967) (equitable estoppel is effect of voluntary conduct which prevents party from asserting an existing right against another). *Id.* For equitable estoppel to apply, this other person must have justifiably relied on the conduct and it must be apparent that he or she will suffer injury if the first party is allowed to enforce his or her right. *Id.*

[25] *Atkinson*, 408 N.W.2d at 519-20; *see also In re* Guardianship of Ethan S., 271 Cal. Rptr. 121, 130 (Cal. Ct. App. 1990) (equitable estoppel invoked against putative father by non-parent).

[26] MICH. STAT. ANN. §25.244(3) (1984).

[27] *Atkinson*, 408 N.W.2d at 519-20.

[28] *Cf.* Hartman v. Smith, 674 P.2d 176, 178-79 (Wash. 1984) (equitable estoppel barred custodial parent's past-due child support claim against biological father who consented to adoption by stepfather which was subsequently vacated). *But see* Albert v. Albert, 415 So. 2d 818, 820 (Fla. Dist. Ct. App. 1982) (former husband not equitably estopped from denying paternity merely because he signed birth certificate where no showing of reliance on

employed in New York to preclude a husband from denying support to children conceived by his wife through artificial insemination,[29] and in New Jersey to prohibit a husband from denying support to a child conceived by his wife during an extra-marital affair.[30] Similarly, a Pennsylvania court precluded a biological father from adopting his own son, since the natural mother was estopped from severing her former husband's relationship with her child.[31]

It is submitted that the equitable parenthood principle should be extended beyond husbands and stepfathers to grant standing to seek visitation to other equitable parents, particularly when the noncustodial, natural parent has relinquished his rights or has made no objection.

2. *In Loco Parentis*

A second viable alternative for the establishment of parental status is the doctrine of *in loco parentis*, which means literally "in the place of a parent."[32] A person standing *in loco parentis* to a child has assumed the status and daily obligations of a parent without formal, legal approval.[33]

misrepresentation by spouse or child). *See infra* notes 30-31. (sources cited therein).

[29] Gursky v. Gursky, 39 Misc. 2d 1083, 1089, 242 N.Y.S.2d 406, 412 (Sup. Ct. Kings County 1963); *see also* Wener v. Wener, 35 A.D.2d 50, 53, 312 N.Y.S.2d 815, 818 (2d Dep't 1970) (husband had duty to support child he neither fathered nor adopted on "dual foundation of an implied contract to support child and equitable estoppel" since wife would not have acquired child alone). *But see* K. B. v. N. B., 811 S.W.2d 634 (Tex. Ct. App. 1991) (husband not estopped where statute required written consent to artificial insemination and none was given).

[30] M.H.B. v. H.T.B., 498 A.2d 775, 775 (N.J. 1985)

[31] *In re* Adoption of Young, 364 A.2d 1307, 1311 (Pa. 1976); *see also* Johnson v. Johnson, 286 N.W.2d 886, 887 (Mich. Ct. App. 1979) (mother estopped from denying paternity of husband when child born in wedlock); *In re* Paternity of D.L.H., 419 N.W.2d 283, 287 (Wis. Ct. App. 1987) (mother estopped from claiming that husband was not biological father and thus was not entitled to parental rights); *cf.* Michael H. v. Gerald D., 491 U.S. 110, 124-30 (1989) (since mother's husband presumed to be father, probable biological father denied parental rights).

[32] *See* BLACK'S LAW DICTIONARY 787 (6th ed. 1990). *In loco parentis* is defined as "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties and responsibilities." *Id.*

[33] *See* Griego v. Hogan, 377 P.2d 953, 955 (N.M. 1963). (*in loco parentis* exists when person undertakes care and control of another in absence of such supervision by natural parent and in absence of formal legal approval). It is temporary in character and is not to be likened to adoption which is permanent. *Id.; see also* Gursky v. Gursky, 39 Misc. 2d 1083, 1089, 242 N.Y.S.2d 406, 412 (Sup. Ct. Kings County 1963) (husband liable for sup-

In 1989, the Oregon legislature expressly conferred upon the courts the power to grant custody, guardianship, visitation and other generally recognized rights to persons who established emotional ties creating a child-parent relationship so long as it was in the best interest of the child.[34]

Although the *in loco parentis* doctrine has been applied to award visitation to stepparents,[35] some jurisdictions have blatantly disregarded the best interest of the child by denying standing to other third parties.[36] Notably, courts in Wisconsin,[37] New York,[38] and California[39] have recently declined to grant custody or visitation

port of child conceived by artificial insemination); Gribble v. Gribble, 583 P.2d 64, 66 (Utah 1978) (former husband *in loco parentis* entitled to reasonable visitation with stepson); Sparks v. Hinckley, 5 P.2d 570, 571-72 (Utah 1931) (rights and obligations of one *in loco parentis* exactly same as parent); *In re* Hudson, 126 P.2d 765, 775 (Wash. 1942) (*in loco parentis* parties have constitutional right to custody and control of minor children); *cf.* Rutkowski v. Wasko, 286 A.D.2d 327, 330, 143 N.Y.S.2d 1, 4 (3d Dep't 1955) (stepson precluded from suing *in loco parentis* stepfather for negligence).

[34] OR. REV. STAT. § 109.119 (1989). The statute defines the parent-child relationship as:

> A relationship that exists or did exist, in whole or in part, within the six months preceding the filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.

Id. The statute utilized a time threshold by providing that the relationship must have existed for at least six months prior to commencement of a proceeding to obtain such rights. *Id.*

[35] *See* Carter v. Brodrick, 644 P.2d 850, 854 (Alaska 1982) (stepparent who assumed *in loco parentis* status possessed parental status to seek visitation with stepchild). *But cf.* Rourke v. State of Ariz., 821 P.2d 273, 277 (Ariz. 1991) (foster parents do not have *in loco parentis* status); Franklin v. Franklin, 253 P.2d 337, 340 (Ariz. 1953) (*in loco parentis* status terminated by divorce).

[36] *See generally* Lewinski, *supra* note 7, at 194-95 (advocating extension of parental rights in best interest of child). A friend, neighbor, aunt, or lesbian lover of a biological mother may establish an *in loco parentis* relationship with a child just as a stepparent may. *Id.* To deny individuals visitation rights with children they have loved, cared for, and established a relationship with would generally discourage involvement with children as well as negatively affect the welfare of the child. *Id.* A person who has developed an *in loco parentis* relationship with a child should have visitation privileges regardless of his or her general relation to the child. *Id.*

[37] *See, e.g.*, Sporleder v. Hermes, 471 N.W.2d 202, 203 (Wis. 1991) (single woman denied custody and visitation of adopted son of former partner of eight years); *see also infra* notes 76-79 and accompanying text (underlying action affecting family unit is necessary before court may apply best interest test).

[38] Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

[39] Nancy S. v. Michele G., 279 Cal. Rptr. 212, 217 (Cal. Ct. App. 1991). "The concept of 'in loco parentis' . . . has never been applied in a custody dispute to give a non-parent

rights to other third parties. In *Sporleder v. Hermes*,[40] the Wisconsin Supreme Court denied custody and visitation rights to a single woman who had lived with the child and his adoptive father for eight years.[41] The New York Court of Appeals, in *Alison D. v. Virginia M.*, [42] denied parental standing to the former lesbian partner of the child's mother, who arguably stood *in loco parentis*[43] and sought visitation rights under section 70 of New York's Domestic Relations Law.[44] The court reached this result notwithstanding the parties' mutual decision to have the mother artificially inseminated and to raise the child together.[45] In vigorous dissent, Judge Kaye believed the decision would unreasonably preclude all but the biological parents from petitioning for visitation by "fixing biology as the key to visitation rights."[46] A California appellate court similarly declined to award custody to the mother's former lesbian partner in *Nancy S. v. Michele G.*,[47] specifically refusing to

the same rights as a parent, and we are unpersuaded that the concept should be so extended." *Id.*

[40] *Sporleder*, 471 N.W. 2d at 207-09.

[41] *Id.* The court stated its adherence to a "parental preference" standard which favored natural, biological parents and precluded non-parents from obtaining custody. *Id.* at 207. Furthermore, the court denied visitation rights on the ground that since there was no underlying divorce action affecting the family unit visitation by the non-parent was unnecessary for minor's well-being. *Id.* at 209.

[42] 77 N.Y.2d 651, 572 N.E. 2d 27, 569 N.Y.S.2d 586 (1991).

[43] *Id.* at 655-56, 572 N.E.2d at 28-29, 569 N.Y.S.2d at 587-88.

[44] *See* N.Y. DOM. REL. LAW § 70 (McKinney 1988). The relevant portion of the statute states:

> Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

Id.

[45] *Alison D.* 77 N.Y.2d at 655-56, 572 N.E.2d at 28-29, 569 N.Y.S.2d at 587-88. The court found that since the natural mother was a fit parent and no extraordinary circumstances were present the court should not interfere with the mother's right to decide to terminate the relationship with her former lover. *Id.* at 656-57, 572 N.E.2d at 29, 569 N.Y.S.2d at 588 (citing Bennett v. Jeffreys, 40 N.Y.2d 543, 544, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 823 (1976)).

[46] *Id.* at 657, 572 N.E.2d at 30, 569 N.Y.S.2d at 589 (Kaye, J., dissenting).

[47] 279 Cal. Rptr. 212, 217 (Cal. Ct. App. 1991).

extend parental rights to the nonparent, even if she had stood *in loco parentis* to the child.[48]

Admittedly, *in loco parentis* status or *de facto* parenthood, without formal assumption of legal obligations, neither displaces nor supersedes parental rights.[49] It is submitted, however, that extending visitation to "significant others," who realistically have taken the place of a second parent, would not supersede an absent parent's rights, nor would it severely impair the rights of the custodial parent any more than visitation by a stepparent could. Further, it is submitted that the refusal to recognize *in loco parentis* status beyond stepparents stems from outdated precedent and reluctance to promote the best interest of the child by providing a "second parent."

In *Gribble v. Gribble*,[50] the Supreme Court of Utah recognized *in loco parentis* status based on the intentions of both the natural parent and the third party involved.[51] A "significant other" who has maintained a relationship which was initiated and condoned by the parent, has established a "psychological parenthood."[52] It is submitted that a "significant other," who may be indistinguishable to a young child from a real parent, should be granted standing to seek visitation, since the parent should be estopped from disavowing a relationship he both encouraged and relied upon when it was convenient to do so.

[48] *Id.*

[49] *See* Teitler v. Haironson, 38 A.D.2d 949, 331 N.Y.S.2d 461 (2d Dep't 1972), *aff'd*, 31 N.Y.2d 712, 289 N.E.2d 557, 337 N.Y.S.2d 516 (1972) (*in loco parentis* status does not afford superior rights over third persons and court considers best interest of child). *But see* Spells v. Spells, 378 A.2d 879, 881-82 (Pa. Super. Ct. 1977) (*in loco parentis* stepparent's rights jealously guarded by courts).

[50] 583 P.2d 64 (Utah 1978).

[51] *Id.* at 66-67. Whether or not one assumes *in loco parentis* status "depends on whether that person *intends* to assume that obligation." *Id.* at 66.

[52] *See* Bartlett, *supra* note 2, at 944-51. Bartlett's proposal for an alternative to exclusive parenthood takes into account the child's need for continuation of a child's relationship with a non-parent. *Id.* at 944. The author states that a psychological parent should have custody rights if the legal parent is absent. *Id.* at 946. The requirements for psychological parenthood are that (1) the adult have had physical custody of the minor for at least six months, (2) the adult must demonstrate that his motive in seeking parental status is the genuine care and concern for the child, and (3) the adult must prove that the parent-child relationship began with the consent of the child's legal parent(s) or the court. *Id.* at 946-48.

II. VISITATION

A. *Distinction Between Custody and Visitation*

Custody generally refers to the care, control and maintenance of a person,[53] and parents have enjoyed a natural and legal right to the custody of their children.[54] Custody disputes concern a parent's right to raise a child,[55] and courts generally do not disturb the biological or adoptive parent's custody of the child absent some clear indication of gross misconduct, unfitness, or some other extraordinary circumstance negatively affecting the welfare of the child.[56]

[53] *See, e.g.,* Trompeter v. Trompeter, 545 P.2d 297, 301 (Kan. 1976). Custody also includes the right to the child's service and earnings and the right to make decisions about his or her care, control, education, health and religion. *Id.; see also In re* Marriage of Ginsberg, 425 N.E.2d 656, 657 (Ind. Ct. App. 1981) (discussing various forms of custody); BLACK'S LAW DICTIONARY 384 (6th ed. 1990). Custody encompasses the right of a parent with respect to rearing and caring for a child. *Id.* Basically, two forms of custody have been acknowledged by our legal system. *Id.* Divided custody means that each parent gets complete control and custody over the child for part of the year, and the other gets visitation rights during that period. *Id.* Joint custody of children means the physical sharing of a child by both parents who jointly make decisions affecting the child's life. *Id.; cf.* Doucet v. Doucet, 465 So. 2d 175, 177 (La. Ct. App. 1985) (joint custody does not mean "a fifty-fifty" sharing of time).

[54] Leroy v. Odgers, 503 P.2d 975, 977 (Ariz. Ct. App. 1972). "[T]he right of parents to the custody of minor children is both a natural and a legal right." *Id.; see also* Acomb v. Billeiter, 175 So. 2d 25, 28 (La. Ct. App. 1965). As between parents and non-parents, only the parents have a legal and natural right to the custody of their children, and absent parental unfitness, the parents' rights must prevail. *Id.*; *In re* Devone, 356 S.E.2d 389, 391 (N.C. Ct. App. 1987). "The natural and legal right of parents to the custody, companionship, . . . and control of their children is not an absolute right and it may be limited or denied in the best interest of the child." *Id. See generally* Peggy Blotner, Comment, *Third Party Custody and Visitation: How Many Ways Should We Slice the Pie?* DET. C.L. REV. 163 (1989). A majority of states today presume that it is in the best interest of the child to be raised by his or her biological parent. *Id.* However, this is a rebuttable presumption. *Id.* The burden of proof is on the non-parent to show unfitness and this burden is rarely overcome. *Id.*

[55] *See In re* Adoption of Mays, 507 N.E.2d 453, 457 (Ohio Ct. App. 1986). "[I]n a custody dispute between a parent and a non-parent, the fundamental right of a parent to raise his own child is brought into play." *Id.*; *see also* Bennett v. Jeffreys, 40 N.Y.2d 543, 546, 356 N.E.2d 277, 281, 387 N.Y.S.2d 821, 824 (1976). Custody cases challenge the right of a parent to raise a child, and the right of a child to be raised by his/her parents. *Id.*

[56] *See* Anderson v. Woods, 179 S.E.2d 569, 572 (W. Va. 1971) "Although a parent has a natural right to the custody of his or her infant child such custody will be denied where the parent is unfit because of misconduct, neglect, immorality, or where the custody has been relinquished or surrendered." *Id.*; *see also In re* Steckman, 620 P.2d 319, 321 (Kan. 1980). "Custody or severance of parental rights is dependent upon fitness." *Id.; see also Bennett,* 40 N.Y.2d at 546, 356 N.E. 2d at 281, 387 N.Y.S.2d at 824. The *Bennett* court stated:

Examples of cause or necessity permitting displacement of or intrusion on parental

Traditionally, visitation has referred to the noncustodial parent's right of access to his or her child.[57] As between two parents, visitation has been awarded to protect the rights of the noncustodial parent as well as to promote the welfare of the child.[58] Visitation has proven to be meaningful to the child's mental, physical and spiritual growth.[59] Studies have shown that discontinuing a parent-child relationship may have a destructive effect on the

> control would be fault or omission by the parent seriously affecting the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like.

Id. See generally supra notes 3, 4, & 16 (discussing effect of unfitness and misconduct on right of parental custody).

[57] *See In re* Tate, 797 S.W.2d 618, 622 (Tenn. Ct. App. 1990). The generally accepted meaning of the term visitation implies a brief period of custody of a minor or child by a visiting relative. *Id.*; Patrick v. Patrick, 117 N.W.2d 256, 258 (Wis. 1962). "In the most-restricted sense, a parent's right to visit his child while in the custody of another, means a right of access to the child." *Id.*; *see also* Shee v. Holewski, 463 A.2d 480, 483 n.2 (Pa. Super. Ct. 1983). In *Shee*, when faced with the undefined term "visitation," as used in the state's Custody and Grandparents Visitation Act, the Superior Court assumed that the legislature intended the common meaning of the term. *Id.* Thus, the court assumed visitation to mean the privilege to see a child wherever he or she may be located, but not the right to take possession of the child. *Id.*

The law allows a parent to assume that he or she has a basic right to visitation if he or she does not possess custody of his or her child. *See* Lewinski, *supra* note 7, at 194-95. The author noted that a parent has the right of custody of a child, but this becomes theoretically impossible if a divorce has caused both parents to reside apart. *Id.* Thus, the law has assumed a right of visitation in the non-custodial parent. *Id.* Visitation may be granted in a number of different ways. *Id.* It may be granted for a specific period of time, or it may be granted liberally with the time frame to be determined by the parents. *Id.* Visitation privileges may be granted without supervision, but in some cases the presence of the custodial parent or some other guardian is required during the period of the visit. *Id.*

[58] *See In re* Marriage of Delf, 528 P.2d 96, 99 (Or. Ct. App. 1974). In *Marriage of Delf*, the court noted that:

> There are two basic policies to be achieved in granting visitation privileges to a parent who does not have custody: The right of the child to the emotional, social and learning benefits of as stable a relationship as is possible with both of the parents and the right of a parent to know and share the love of the child.

Id.; *see also supra* notes 7 & 8 (discussing dual purpose of visitation).

[59] *See* Maxwell v. LeBlanc, 434 So. 2d 375, 379 (La. 1983). "The child's experience of family continuity and connection is a basic and fundamental ingredient of his sense of self, of his sense of personal significance and his sense of identity." *Id.*; Pierce v. Yerkovich, 80 Misc. 2d 613, 621, 363 N.Y.S.2d 403, 410 (Family Ct. Ulster County 1974) (visitation important for whole growth of child); *see also* T.S. Elliot, Note, *Medical Technology and the Law, II. Reproductive Technologies*, 103 HARV. L. REV. 1519, 1535 n.56 (1990). "Sociologists have found that the primary factors contributing to a child's healthy development are the quality and continuity of parental relationships that a child forms, rather than the influences of traditional lifestyles or of a parent of either gender."*Id.* (citing MICHAEL RUTTER, MATERNAL DEPRIVATION REASSESSED 120-21 (1981).

child.[60]

A decision to grant visitation has merely implicated the custodial parent's right to choose with whom the child associates.[61] Customarily, visitation has been awarded when it has been in the best interest of the child to maintain a particular relationship with the noncustodial party.[62]

Although visitation has been called a form of custody,[63] the two terms are legally distinguishable.[64] Regrettably, some courts have obscured this distinction by applying the same criteria to visitation issues as they have for custody determinations.[65] Recently, in *Alison D. v. Virginia M.*,[66] the New York Court of Appeals based its decision to deny visitation on the premise that custody and visitation disputes are similar and therefore should be treated alike.[67] However, such reasoning fails to recognize that a grant of visitation rights has a relatively minuscule effect on a parent's custody

[60] *See* Elliot, *supra* note 59, at 1535. Severing an important relationship with a child by denial of visitation may leave the child feeling confused and rejected. *Id.; see also Maxwell,* 434 So. 2d at 379. The *Maxwell* court stated:

> While a child is cut off from one of his parents . . . there is, for the child and the parent . . . a mutual sense of deep personal loss. Denying a child the ability to visit with and know the non-custodial parent does deep and profound violence to the child's opportunity to know himself in a whole way.

Id.

[61] *See* Ronald FF. v. Cindy GG., 70 N.Y.2d 141, 144, 511 N.E.2d 75, 77, 517 N.Y.S.2d 932, 934 (1987). The state may not interfere with the fundamental right of the custodial parent to choose whom their child associates with. *Id. But see Yerkovich,* 80 Misc. 2d at 625, 363 N.Y.S.2d at 413 (custodial parent does not have exclusive right to determine, in best interest of child, that non-custodial parent should not be permitted to associate with child).

[62] *See, e.g.,* Looper v. McManus, 581 P.2d 487, 489 (Okla. Ct. App. 1978) (court awarded visitation rights to stepmother, stating that relationship would contribute in positive way to child's mental health and well being); *see also* Leininger v. Leininger, 355 N.E.2d 508, 515 (Ohio Ct. App. 1975) (friend of child's natural father was awarded visitation rights after establishing five year relationship that was beneficial to maintain).

[63] *See supra* note 5 (discussing visitation as a form of custody).

[64] *See* Westrate v. Westrate, 369 N.W.2d 165, 168 (Wis. 1985). "Custody and visitation are distinct legal terms with different meanings." *Id.;* J.M.S. v. H.A., 242 S.E.2d 696, 697 (W. Va. 1978). "Custody" relates to care and keeping while "visitation" indicates an act or instance of visiting, and one with custody has more authority and power than one with visitation privileges. *Id.*

[65] *See infra* notes 69-78 and accompanying text (courts that have used an inappropriate test in determining custody or visitation disputes).

[66] 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

[67] *Id.* at 654-55, 572 N.E.2d at 28, 569 N.Y.S.2d at 587. The court held that one petitioner was not a parent within the meaning of New York Domestic Relations Law § 70 and therefore, could not apply for a writ of habeas corpus to determine the issue of visitation rights. *Id.*

and control as contrasted with an actual award of custody.[68]

In *Gorman v. Gorman*,[69] a Florida appellate court awarded custody to a stepparent over the child's natural father.[70] Although the *Gorman* court specifically acknowledged that the biological parents' right to custody and control of their children should not be taken lightly, it denied custody to the biological parent of the child.[71] The court stated that when the rights of the parent conflict with the best interest of the child, the best interest standard should be utilized.[72] Thus, the court used the standard visitation test to determine a custody dispute.[73]

In *Sporleder v. Hermes*,[74] the Supreme Court of Wisconsin denied custody and visitation to the female companion of an adoptive mother.[75] In denying custody, the court reasoned that since the legal parent was neither unfit nor unable to care for the child, custody should not be disturbed.[76] However, in determining whether visitation privileges should be granted, the court declined to apply the best interest standard, concluding that there must be an "underlying action affecting the family unit" before visitation can be awarded.[77]

By adjudicating a claim for visitation using the same standards employed in custody claims, some courts have ignored the purpose of visitation and have precluded any consideration of the best interest of the child.[78] It has been suggested that the custody-determination standard should not be employed.[79] It is submitted

[68] *See* LeBouef v. LeBouef, 325 So. 2d 290, 292 (La. Ct. App. 1975) (visitation privileges do not substantially affect custodial parent's right to custody and control); Anonymous v. Anonymous, 50 Misc. 2d 43, 46, 269 N.Y.S.2d 500, 504 (Family Ct. Queens County 1966) (granting visitation right to grandparent would not diminish parent's custody or control rights).

[69] 400 So. 2d 75 (Fla. Dist. Ct. App. 1981).

[70] *Id.* at 77.

[71] *Id.*

[72] *Id.* at 77-78.

[73] *Id.* at 77 (court applied best interest test to determine custody even though parent was fit).

[74] 471 N.W.2d 202 (Wis. 1991).

[75] *Id.* at 204.

[76] *Id.*

[77] *Id.* at 209-10.

[78] *See* Alison D. v. Virginia M., 77 N.Y.2d at 658-59, 572 N.E.2d at 30-31, 569 N.Y.S.2d at 589-90 (Kaye, J., dissenting).

[79] *See generally* Eric P. Salthe, Note, *Would Abolishing the Natural Parent Preference in Cus-*

that until a determination is made as to what standard should be employed, standing should be granted to "significant others" to seek visitation and the best interest of the child standard should be maintained.

B. Contemporary Family Relationships

In the past, children were generally raised by their natural mothers and fathers in what has come to be known as a "traditional" or "nuclear" family.[80] However, in contemporary society, the decline in the marriage rate and the increase in the number of unmarried couples has caused this family structure to crumble.[81] As a result, today, an ever increasing number of children are raised in "alternative family" settings.[82] Such alternative families include heterosexual or homosexual couples, stepparent families, and single parents.[83]

The demise of the traditional family unit has caused concern for the welfare of innocent children, who have formed strong emotional and physical bonds with, and have come to depend on, outsiders such as babysitters, day-care workers, teachers, relatives, friends, and others who have often spent more time with the children than their own parents.[84] Increasing numbers of nonparents have sought to maintain these relationships by acquiring visitation rights.[85] Most states have extended visitation to grandparents,[86]

tody Disputes be in Everyone's Best Interest?, 29 J. FAM. L. 539, 539-50 (1990-91) (advocating universal use of best interest test in custody determinations).

[80] *See* Rebecca L. Melton, Note, *Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of Family*, 29 J. FAM. L. 497, 497-500 (1990-91) (decline of traditional nuclear family has led to alternate family arrangements).

[81] *Id.*; *see also supra* note 10 (sources cited therein).

[82] *Id.*

[83] *Id.*

[84] *See generally* Lewinski, *supra* note 7, at 192-93. Given the increased number of single parent households combined with the increased proportion of women in the work force, a child is more likely to develop strong emotional bonds with substitute caretakers than ever before. *Id.* at 193.

[85] *See* Bartlett, *supra* note 2, at 880-81. The commentator states that:

> [A]n increasing number of children do not live in traditional nuclear families. In 1982, twenty-five percent of children under the age of eighteen in the United States — over fifteen and a half million children — did not live with both natural parents . . . . The reasons for this phenomenon are familiar. More and more parents obtain divorces, resulting in single parent families or, as divorced parents remarry, step-families. An increasing number of parents never marry. Some parents abandon their

and other states have granted such rights to blood relatives,[87] stepparents,[88] and various other interested third parties.[89]

Although nonparents are increasingly becoming involved in child rearing, such alternative family arrangements still retain the valuable qualities of the traditional family, including love, support,

children; others give their children to temporary caretakers; and still others are judged unfit to raise their children, who are then placed in foster homes.

Id.

[86] *See* N.Y. DOM. REL. LAW § 72 (McKinney 1988) (grandparents granted standing to obtain visitation where either or both parents deceased or where equity would see fit to intervene). Section 72 states, in pertinent part:

> [A] grandparent or . . . grandparents . . . may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court . . . and . . . the court . . . may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

Id.; Cockrell v. Sittason, 500 So. 2d 1119, 1121 (Ala. Civ. App. 1986) (trial court's award of visitation privileges to maternal grandparents after death of child's mother upheld); Brown v. Meekins, 666 S.W.2d 710, 710 (Ark. 1984) (maternal grandparents given visitation rights by court after child was adopted subsequent to his mother's death); Hamilton v. Hamilton, 622 S.W.2d 252, 254 (Mo. Ct. App. 1981) (court awarded paternal grandparents visitation rights after child's parents divorced).

Prior to enactment of section 72, grandparents had no standing to sue for visitation unless the question of custody was already before the court. *See, e.g.*, Geri v. Fanto, 79 Misc. 2d 947, 949, 361 N.Y.S.2d 984, 986 (Family Ct. Kings County 1974). *See generally* Miriam B. Chaloff, Note, *Grandparent's Statutory Visitation Rights and the Rights of Adoptive Parents*, 49 BROOK L. REV. 149, 149 (1989) (many states allow grandparents to seek visitation with their grandchildren). *But see* LoPresti v. LoPresti, 40 N.Y.2d 522, 526, 355 N.E.2d 372, 375, 387 N.Y.S.2d 412, 415 (1976) (grandparent statute does not grant automatic or absolute right to visitation when parents are deceased).

[87] *See* L. v. G., 497 A.2d 215, 223 (N.J. Super. Ct. Ch. Div. 1985) (court granted visitation right to adult, emancipated siblings); Gotz v. Gotz, 80 N.W.2d 359, 362 (Wis. 1957) (court upheld visitation rights of maternal aunts and their prospective husbands after custody was awarded to father when mother was too ill to exercise custodial right); *see also supra* note 12 (text of N.Y. DOM. REL. LAW § 71 regarding sibling visitation). *But see* Huffman v. Grob, 218 Cal. Rptr. 659, 664 (Cal. Ct. App. 1985) (court denied petition for child visitation by aunt and uncle of child after mother's death and child's adoption by stranger).

[88] *See* Collins v. Gilbreath, 403 N.E.2d 921, 921 (Ind. Ct. App. 1980) (stepfather awarded visitation rights after death of mother to smooth transition to custody of natural father); Evans v. Evans, 488 A.2d 157, 166 (Md. 1985) (granted former wife visitation with stepson after divorce). *But see* Shoemaker v. Shoemaker, 563 So. 2d 1032, 1034 (Ala. Civ. App. 1990) (stepparent has no right to visitation with stepchild, since legal relationship severed by divorce). *See generally supra* notes 28-31, 35 (visitation awarded to stepparents standing *in loco parentis*).

[89] *See In re* Guardianship of Martha M., 914, 251 Cal. Rptr. 567, 570 (Cal. Ct. App. 1988) (court had authority to award visitation rights after mother's death to close friend of child's mother who had supported and developed loving relationship with child); Wills v. Wills, 399 So. 2d 1130, 1131 (Fla. Dist Ct. App. 1981) (woman who was married to adoptive father of child received visitation privileges). *But see* Temple v. Meyer, 544 A.2d 629, 632 (Conn. 1988) (refused to grant visitation rights to boyfriend of child's mother).

loyalty and affection.[90] It is suggested that decisions by courts to extinguish all ties between a child and a "significant other" parent[91] deprive a child of those qualities that are essential for the child's growth and development, and therefore do not serve the best interest of the child.

III. Equitable Intervention in the Best Interest of the Child

A. *Visitation in the Best Interest of the Child*

The ultimate goal of the court in a visitation dispute is to render a decision in the best interest of the child.[92] There is a long-standing presumption that granting visitation rights to a natural parent is in the best interest of the child.[93] Nevertheless, other parties are not precluded from seeking and obtaining visitation rights.[94] These other parties, however, first must gain standing and then must demonstrate that "extraordinary circumstances"[95] exist before the state will interfere with parental

[90] *See* Melton, *supra* note 80, at 497-500 (decline of traditional nuclear family has led to alternate family arrangements).

[91] *See, e.g.*, Alison D. v. Virginia M., 77 N.Y.2d 651, 655-56, 572 N.E.2d 27, 28-29, 569 N.Y.S.2d 586, 587-88 (1991) (former live-in lesbian lover of mother denied visitation); Sporleder v. Hermes, 471 N.W.2d 202, 204 (Wis. 1991) (female "companion" of adoptive mother denied visitation with child).

[92] *See, e.g., Matter of* Marriage of Kiister, 777 P.2d 272, 275-76 (Kan. 1989). "In determining child custody matters and visitation rights, the court's paramount concern is the welfare of the child." *Id.; see also supra* note 9 (discussing courts' concern with best interest of child in visitation disputes).

[93] *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979). Writing for the majority, Chief Justice Burger explained:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id. (citing, 1 W. Blackstone, Commentaries 447; 2 James Kent, Commentaries on American Law 190). *But see, e.g.*, Mark V. v. Gale P., 143 Misc. 2d 487, 540 N.Y.S.2d 966, 968 (Family Ct. Schenectady County 1989) (father's wishes overridden by extraordinary circumstances whereby court awarded subordinate custody to deceased wife's former live-in lover); *cf.*, Pierce v. Yerkovich, 80 Misc. 2d 613, 614, 363 N.Y.S.2d 403, 404 (Family Ct. Ulster County 1974) (consent to visit should not be left to sole discretion of custodial parent).

[94] *See supra* note 12 (discussing non-parents who have requested and been awarded visitation privileges).

[95] Bennett v. Jeffreys, 40 N.Y.2d 543, 545, 356 N.E.2d 277, 280, 387 N.Y.S.2d 821, 824 (1976). Chief Judge Breitel, writing for the majority stated:

custody.[96] It is submitted that when the issue in dispute is solely one of visitation, a showing of extraordinary circumstances should not be necessary before a court can consider what is in the best interest of the child.

In *Maxwell v. LeBlanc*,[97] the Louisiana Supreme Court indicated factors that the court should take into account when deciding what is in the best interest of the child and whether a parent should be awarded visitation rights.[98] The court's list included the love, affection and other emotional ties between the child and the parties involved, the ability of the parties to give the child love, affection, guidance, and a continuing education, the ability of the parties involved to provide for the child's necessary material needs, and the relationship between the child's parents.[99] The *Maxwell* court also added that the court should take into account the moral fitness of the parties involved, the willingness and ability of the parents to assist and encourage a close and continuing parent-child relationship, and the effect of visitation on the physical well-being of the child.[100]

In determining the best interest of the child, the child's preference should be considered by the court if the child has reached a certain level of maturity.[101] Moreover, the parent's biased view-

> The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the sole theory of an absolute legal right. Instead, *in the extraordinary circumstance*, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody.

Id. at 546, 356 N.E.2d at 280, 387 N.Y.S.2d 824-25 (emphasis added).

Chief Judge Breitel concluded that "[a]lthough the extraordinary circumstances trigger the 'best interests of the child' test, this [does] not mean that parental rights or responsibilities may be relegated to a parity with all the other surrounding circumstances . . . ." *Id.* at 548, 356 N.E.2d at 282, 387 N.Y.S.2d at 826; *see* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (courts and law are powerless to supplant parents except for grievous cause or necessity).

[96] *See* Roland F. v. Brezenoff, 108 Misc. 2d 133, 436 N.Y.S.2d 934, 935 (Family Ct. N.Y. County 1981) (former boyfriend and neighbor lacked standing to petition custody or visitation or guardianship). *See generally* ELLIOT L. BISKIND BOARDMAN'S N.Y. FAMILY LAW § 45(1) n.27 (1987) (standing must be gained before best interests are determined).

[97] 434 So. 2d 375 (La. 1983).

[98] *Id.* at 378.

[99] *Id.*

[100] *Id.* at 378-79.

[101] *See* Simmons v. Simmons, 554 So. 2d 238, 243 (La. Ct. App. 1989) (court able to consider child's custodial preference if child is of sufficient age); *see also* Schouten v. Schou-

point should not supersede the best interest of the child.[102] In the wake of a parental divorce or separation, it is essential to maintain as stable an environment as possible for the child which would include the continuation of existing relationships.[103]

B. Legislative Intent and the Court's Proper Role

In order to determine the best interest of the child, courts have enforced the *parens patriae* power of the state.[104] As "parent of the country,"[105] the state may equitably intervene in child custody cases in order to balance competing interests and thereby protect those persons under legal disability.[106] This equitable power is well established,[107] but it has called into question whether the

ten, 155 A.D.2d 461, 463, 547 N.Y.S.2d 126, 128 (2d Dep't 1989). The child's preference is an indication of what is in the child's best interest, but it is not conclusive. *Id.* To determine the proper weight given to such preference, the court should consider the child's age and maturity, and the possibility that the preference may have been influenced by an interested party. *Id.*

[102] *See* Collins v. Gilbreath, 403 N.E.2d 921, 923 (Ind. Ct. App. 1980). The court should not deny visitation privileges in all cases merely because a parent claims that such privileges will harm the child. *Id.* This is especially true where a third party has acted as the child's parent, because in such disputes the well being of the child must be paramount. *Id.; see also* Spells v. Spells, 378 A.2d 879, 882 (Pa. Super. Ct. 1977) The personal preferences or prejudices of the parent should not control the decision in a visitation case. *Id.*

[103] *See* Rogers v. Rogers, 577 So. 2d 761, 763 (La. Ct. App. 1991) The stability of the environment should be a concern in determining the best interest of a child. *Id.* Such an environment should not be disturbed absent compelling circumstances. *Id.*; Linam v. King, 804 P.2d 1235, 1239 (Utah Ct. App. 1991) (to determine best interest of the child court should consider need for stability in child's environment); *see also* Caso v. Department of Health and Rehabilitative Servs. 569 So. 2d 466 (Fla. Dist. Ct. App. 1990) (stable environment needed to achieve child's emotional security).

[104] *See* Thompson v. Gorman, 502 N.E.2d 916, 921 (Ind. Ct. App. 1986). *Parens patriae* power is limited to three factors: (1) dependent children; (2) where clear and convincing evidence of parental unfitness has been shown; and (3) to further best interest of the child. *Id.;* Hunter v. Duncan, 288 P.2d 388, 391 (Okla. 1955) (*parens patriae* concerned with "welfare of the child"). *But cf.* Davis v. Davis, 708 P.2d 1102, 1115-16 (Okla. 1985) (*parens patriae* doctrine traditionally invoked only where necessary for protection of child). It is unnecessary for the state to act as surrogate parent "where the child's own custodial parent's interest is not at issue with the interest of the child." *Id.*

[105] West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1089 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). *Parens patriae* literally means 'parent of the country.' *Id.*; *accord In re* Richard P., 451 A.2d 274, 278 (R.I. 1982) (*parens patriae* concept gives state responsibility to act as "superparent"); BLACK'S LAW DICTIONARY, 1114 (6th ed. 1990). (" '*Parens patriae,*' literally 'parent of the country'. . . .").

[106] *Pfizer*, 440 F.2d at 1089; BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). (" '*Parens patriae,*' . . . refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane.").

[107] *See* Finlay v. Finlay, 240 N.Y. 429, 434, 148 N.E. 624, 626 (1925) (court of equity

state is competent to "raise children".[108] In recognizing that the best interest of the child is paramount, the New York Court of Appeals, in *Bennett v. Jeffreys*,[109] adopted the "modern principle that a child is a person and not a subperson over whom the parent has an absolute possessory interest."[110] It is submitted that, in visitation disputes, until the state legislatures conform to society's changing needs, it is proper for the courts to equitably intervene under the state's *parens patriae* power to safeguard the best interest of the child.

When confronted with a habeas corpus petition for visitation in *Alison D. v. Virginia M.*,[111] the New York Court of Appeals declined to countermand the natural mother's wishes to sever the child's relationship with her lesbian partner,[112] and the court refused to grant standing to seek visitation without a showing of biological or legal ties.[113] The court reasoned that the applicable statute, New York Domestic Relations Law section 70,[114] only

may act at instance of anyone where habeas corpus petition is denied); *see also* Bachman v. Mejias, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956); *cf.* People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953) (*parens patriae* power to determine best interest must be qualified in contest between parent and non-parent; since parent is superior in right to all others unless parent abandons that right or is proven unfit); People *ex rel.* Portnoy v. Strasser, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952) (discretion of Supreme Court is not absolute or uncontrolled).

[108] *See* Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion) (raising child is beyond the competence of impersonal political institutions). *See generally* Bartlett, *supra* note 2, at 881. In giving decisional rights to parents, the state recognizes that it cannot effectively raise children. *Id.*

[109] 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976) (new hearing ordered to determine child's best interest when unwed natural mother's prolonged and voluntary separation from child constituted extraordinary circumstances).

[110] *Id.* at 546, 356 N.E.2d at 280, 40 N.Y.S.2d at 825. Although a child's rights are superior, the *Bennett* court found that it is in the child's best interest to be raised by its parent, unless that parent is disqualified by gross misconduct. *Id.* at 547, 356 N.E.2d at 282, 40 N.Y.S.2d at 825 (citing Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 204, 274 N.E.2d 431, 436, 324 N.Y.S.2d 937, 944 (1971)); *accord* Kridel v. Kridel, 205 A.2d 316 (N.J. Super. Ct. App. Div. 1964).

[111] 74 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

[112] *Id.* at 654-55, 572 N.E.2d at 28, 569 N.Y.S.2d at 587.

[113] *Id.* at 656, 572 N.E.2d at 29, 569 N.Y.S.2d at 588.

[114] N.Y. DOM. REL. LAW § 70 (McKinney 1988). The text of this section was amended in 1988 to incorporate a new subsection (b) pertaining to visitation rights of those children in custody by virtue of Family Court Act and Social Services Law. *Id.* Subsection (a) remains unchanged since 1964 when the legislature deleted the words, "A husband or wife, being an inhabitant of this state, living in a state of separation, without being divorced, who has a minor child . . . ." and added, in place thereof, "Where a minor child is residing within this state, either parent . . . ." 1964 SESSION LAWS OF NEW YORK, sec.1, ch. 564, p. 858.

provided that "either parent" could petition for visitation with a child.[115] As Judge Kaye pointed out in dissent, the term "parent" remained undefined in the statute.[116] When a court is not bound by a statutory definition, it should look beyond the plain meaning of the word and construe the term to effectuate the statutory objectives.[117] In section 70, the stated legislative purpose is the best interest of the child.[118] The *Alison* court's refusal to grant

[115] *Id.*

[116] Alison D. v. Virginia M., 74 N.Y.2d 651, 658, 572 N.E.2d 27, 30, 569 N.Y.S.2d 586, 589 (1991) (Kaye, J., dissenting). Judge Kaye argued that since the Legislature chose not to define the term "parent" in the Domestic Relations Law, the court was not bound to a specific statutory definition. *Id.* at 659, 572 N.E.2d at 31, 569 N.Y.S.2d at 590; *see also In re* Roman, 94 Misc. 2d 796, 405 N.Y.S.2d 899 (Family Ct. Onondaga County 1978); *cf.* N.Y. EDUC. LAW § 3212 (McKinney 1974). For purposes of this statute, a "person in parental relation" includes the birth or adoptive father and mother, step-father, step-mother, legally appointed guardian or custodian. *Id.* A "custodian" is defined as one who "has assumed the charge and care of such individual because the parents . . . have died, are imprisoned, are mentally ill . . . have been committed to an institution . . . have . . . abandoned or deserted, . . . or are living outside the state or their whereabouts are unknown." *Id*; N.Y. FAM. CT. ACT § 1012(a), (g) (McKinney 1984). Section 1012(a) defines a respondent in child protective proceeding as any parent or other "person legally responsible for a child's care." *Id.* Section 1012(g) defines a person legally responsible for child's care to include a "custodian (which) may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child." *Id.*

As noted in the commentary to section 1012, "The primary effect of this supplemental definition of the word 'custodian' is to authorize child protective petitions against paramours." N.Y. FAM. CT. ACT § 1012 commentary at 235 (McKinney 1988).

[117] *See* Cahen v. Boyland, 1 N.Y.2d 8, 14, 132 N.E.2d 890, 892, 150 N.Y.S.2d 5, 9 (1956) (effect must be given to all language employed); Palmer v. Van Santvoord, 153 N.Y. 612, 616, 47 N.E. 915, 916 (1897) (courts are bound to assume that words in statute are inserted for purpose); *see also* MCKINNEY'S STATUTES §73. "While the courts may sometimes depart from the literal wording of an enactment when such departure is necessary to further the legislative intent, when the intent of the lawmakers is not in doubt, the courts cannot revise the legislation or do otherwise than to carry out its plain command." *Id.*; Meltzer v. Koenigsberg, 302 N.Y. 523, 525, 99 N.E.2d 679, 680 (1951) (resort is to be had first to words and language and "when the words have a definite and precise meaning," it is not allowable "to go elsewhere in search of conjecture in order to restrict or extend the meaning"); Bacon v. Miller, 247 N.Y. 311, 317-18, 160 N.E. 381, 383-84 (1928) (court's duty is to construe statutes and not to legislate). *But see* Spillane v. Katz, 25 N.Y.2d 34, 37, 250 N.E.2d 44, 46, 302 N.Y.S.2d 546, 548 (1969) ("[T]he court may not substitute itself for the Legislature merely because the Legislature has failed to act").

[118] *See* N.Y. DOM. REL. LAW § 70 (McKinney 1988). The relevant portion of the statute states: "In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly." *Id.; Alison D.*, 74 N.Y.2d at 660, 572 N.E.2d at 31, 569 N.Y.S.2d at 590 (Kaye, J., dissenting). It is accurately noted that the legislature has expressed a clear mandate to consider the best interest of the child in awarding custody and visitation. *Id.* (quoting Bennett v. Jeffreys, 40 N.Y.2d at 543, 356 N.E.2d at 277, 387 N.Y.S.2d at 821); *see also supra* note 45 (discussing

visitation to the nonbiological parent was labeled a "retreat from the court's proper role" by dissenting Judge Kaye,[119] who primarily relied on the recent decision in *Braschi v. Stahl Associates*.[120]

In *Braschi*, the New York Court of Appeals expanded the previously undefined term "family" to grant standing to a homosexual lover so that he could remain in his deceased lover's rent-controlled apartment.[121] Although the decision was expressly limited to the facts of the case,[122] it is submitted that the holding in *Braschi* clearly illustrates the court's power to construe an undefined statutory term and accordingly, the court should allow an expanded definition of the word "parent" in visitation proceedings. In New York, standing as a parent has been a prerequisite to petitioning for visitation.[123] However, it is vital not to lose sight of the court's legitimate role in the procedural quagmire of our legal system.[124]

relevant text of section 70).

[119] *Alison D.*, 77 N.Y.2d at 657-58, 572 N.E.2d at 30, 569 N.Y.S.2d at 589 (Kaye, J., dissenting). While conceding that "there must be some limitation on who can petition for visitation," the dissent urged fashioning a judicial definition of the word "parent," which would encompass relevant factors such as prior consent to the relationship by the biological or legal parent and prior joint custody for a significant period of time, as other states have in defining visitation rights of stepparents. *Id.* at 662, 572 N.E.2d 27, 35, 569 N.Y.S.2d at 591 (citing Gribble v. Gribble, 583 P.2d 64 (Utah 1988)).

[120] Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 543 N.E.2d 49, 544 N.Y.S.2d 784 (1989); *see Alison D.*, 74 N.Y.2d at 661, 572 N.E.2d at 32, 569 N.Y.S.2d at 591 (Kaye, J., dissenting). Judge Kaye noted that courts had previously defined terms in other statutes. *Id.* (citing, *e.g.*, People v. Eulo, 63 N.Y.2d 341, 354, 472 N.E.2d 286, 294, 482 N.Y.S.2d 436, 444 (1984) (defining "death" for purposes of homicide prosecutions)).

[121] *Braschi*, 74 N.Y.2d at 211-13, 543 N.E.2d at 54, 544 N.Y.S.2d at 789.

[122] *Id.* at 216, 543 N.E.2d at 56-57, 544 N.Y.S.2d at 791.

[123] *See, e.g.*, Roland F. v. Brezenoff, 108 Misc. 2d 133, 436 N.Y.S.2d 934 (Family Ct. N.Y. County 1981) (former boyfriend could not petition for custody absent legislative grant of standing); *see also* N.Y. DOM. REL. LAW § 70 commentary at 247 (McKinney 1988). *See generally* BOARDMAN, N.Y. FAMILY LAW § 45(1) n.27, (1987) (standing must be gained before best interests are determined.)

[124] *See* Alison D. v. Virginia M., 77 N.Y.2d 651, 659-60, 572 N.E.2d 27, 31, 569 N.Y.S.2d at 586, 590 (1991) (Kaye, J., dissenting). Judge Kaye asserted that the absence of a statutory definition does not necessarily limit the court solely to a biological definition of parent. *Id.* Rather, the court should have comported with the legislative expansion of custody and visitation to all children domiciled in the state, whereby the legislature brought "section 70 into conformity with what the courts were already doing," (citing MEM. OF JOINT LEGIS. COMM. ON MATRIMONIAL AND FAMILY LAWS, *reprinted in* 1964 SESSION LAWS OF NEW YORK 1880); Finlay v. Finlay, 240 N.Y. 429, 434, 148 N.E. 624, 626 (1925) (court of equity may act at instance of anyone where habeas corpus petition is denied); Lewinski, *supra* note 7, at 194-95. Some courts have failed to use the best interest of the child standard in deciding the visitation rights of third parties. *Id.* These courts have claimed that

Conclusion

As society evolves, so should the legal system that serves society's needs. The failure of the courts to keep pace with changes in the traditional family structure by limiting parental standing establishes dangerous precedent. In order to preserve important relationships between children in nontraditional families and their equitable parents, standing to seek visitation rights should be equitably extended to these "significant others" to appropriately determine the best interest of the child.

Susan Gross Goldstein & Christopher J. Soltys

they lacked the power to grant visitation in such a situation, or the third party did not have standing to seek such visitation. *Id. But see* Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion) (raising child is beyond competence of impersonal political institutions).