

# Golden Gate University Law Review

---

Volume 24

Issue 1 *Women's Law Forum*

Article 8

---

January 1994

## Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve

Kristine L. Burks

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>

 Part of the [Family Law Commons](#)

---

### Recommended Citation

Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 Golden Gate U. L. Rev. (1994).

<http://digitalcommons.law.ggu.edu/ggulrev/vol24/iss1/8>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# REDEFINING PARENTHOOD: CHILD CUSTODY AND VISITATION WHEN NONTRADITIONAL FAMILIES DISSOLVE

Kristine L. Burks\*

## I. INTRODUCTION<sup>1</sup>

In California, the determination of child custody and visitation rights is governed by inflexible and outdated definitions and rules, rather than by the reality of the family unit. Biology,<sup>2</sup> le-

---

\* Golden Gate University School of Law, Class of 1996. Sincere thanks to my editors Rebecca Weisman, Monica McCrary, Gregg Zywicke, and Professor Roberta Simon for keeping this article focused and moving forward.

1. Throughout this article references are made to sections of the California Civil Code, specifically the Uniform Parentage Act and Family Law Act. Effective January 1, 1994 these sections were repealed and replaced with equivalent provisions in the Family Code. Stats. 1992 c. 162 (A.B. 2650), §§ 3-4, operative Jan. 1, 1994. Unless otherwise indicated, there is no change in the substantive law. To the extent there is no change in the substantive law, a provision under the Family Code is considered a restatement and continuation of the previously existing provision, not a new enactment. CAL. FAMILY CODE § 2 (West 1993). The author has chosen to refer to the repealed sections because these statutes are cited in the cases discussed in the article.

2. CAL. CIV. CODE § 7001 (West 1983) (defining "parent and child relationship" as "the legal relationship existing between a child and his [sic] natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations.") (recodified as CAL. FAMILY CODE § 7601 (West 1993)). In the rare instance where two women claim to be a child's natural mother, one based on a genetic relationship with the child and the other on the fact that she gave birth to the child, the court may look to the intentional acts of the parties in making its determination. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993). In a maternity dispute arising out of a surrogacy agreement, the California Supreme Court looked to the parties' intentions as manifested in the surrogacy agreement to determine who was the child's natural mother. The court held that "she who intended to bring about the birth of the child that she intended to raise as her own—is the child's natural mother." *Id.* The court found that presentation of blood test evidence and proof of having given birth to a child are but two means of establishing maternity. *Id.* at 779.

## 224 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:223

gal adoption,<sup>3</sup> and marriage to a woman who bears a child<sup>4</sup> are the only means currently available for attaining the legal status of parent.<sup>5</sup> Nevertheless, courts have had to determine custody, visitation, and child support rights for families who fall outside the traditional one mother and one father family model.<sup>6</sup> The California Legislature has limited the status of "legal parent"<sup>7</sup> to those with a biological, adoptive, or marital tie to a child. California courts consistently give a narrow interpretation of statutes conferring jurisdiction and standing to assert rights to custody and visitation. Together, the Legislature and the courts have effectively prohibited many nonlegal parents formerly involved in nontraditional relationships<sup>8</sup> from asserting or obtaining any rights to child custody or visitation.<sup>9</sup> Thus, individuals who function as children's parents,<sup>10</sup> but who lack the legal

3. CAL. CIV. CODE § 7001.

4. CAL. CIV. CODE § 7004(a) (West 1983) (presuming a man is the biological father if he meets conditions set forth in Evidence Code section 621, or if he and the mother are married, or if before the child is born, he and the mother attempt to marry, or if after the child is born, he and the mother marry or attempt to marry or the father engages in conduct holding the child out as his own) (recodified as CAL. FAMILY CODE § 7611 (West 1993)).

5. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 483 (1990).

6. *Id.* (defining traditional family as "one mother/one father").

7. Hereinafter, the author will use the term "legal parent" to refer to those whose parent-child relationships derive from biology, adoption, or marriage to a woman who bears a child. The author will use the term "nonlegal parent" to refer to those whose parent-child relationships derive from other means.

8. Hereinafter, the author uses the terms "nontraditional family" and "nontraditional relationship" to refer to family relationships extending beyond the traditional one mother/one father model. The relationship which is considered "nontraditional" is the relationship between the "parents." Nontraditional relationships include stepparents, same-sex partners, and unmarried heterosexuals.

9. *See, e.g.*, Nancy S. v. Michelle G., 279 Cal. Rptr. 212, 215 (Ct. App. 1991) (affirming lesbian partner was not a "parent" where she was not the biological or adoptive mother and she and the biological mother did not have a legally recognized marriage when the child was born); Curiale v. Reagan, 272 Cal. Rptr. 520, 522 (Ct. App. 1990) (affirming lesbian partner was without standing to seek custody or visitation); Perry v. Superior Court, 166 Cal. Rptr. 583, 585 (Ct. App. 1988) (affirming superior court lacked jurisdiction in a marriage dissolution proceeding to award visitation of wife's children to husband/stepparent; although, in response to the court's decision, Civil Code section 4351.5 was enacted in 1982 giving stepparents certain rights to visitation); *In re Marriage of Goetz & Lewis*, 250 Cal. Rptr. 30, 32 (Ct. App. 1988) (affirming superior court without jurisdiction in a marriage dissolution proceeding to consider stepfather's custody request).

10. Hereinafter, the author uses the term "functional parent" to refer to "anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in na-

status of parents, are often left with no parental rights should their relationships with the legal parents dissolve. In addition, children are deprived of ongoing relationships with individuals they look upon as their parents.

This article offers a method of providing custody and visitation rights to individuals formerly involved in nontraditional relationships who function as children's parents but who lack the legal status of parent. The article considers a broad range of nontraditional families, including stepparents, same-sex partners, and unmarried heterosexuals.<sup>11</sup>

The article begins with a summary of California statutory law. The author examines how "parent" is defined and the limitations imposed on those falling outside that definition when they seek to assert rights to child custody and visitation. Next, the article focuses on three types of nontraditional relationships to illustrate how California courts have applied the statutory law and how that application limits nonlegal parents'<sup>12</sup> ability to gain standing to assert claims for custody and visitation and limits courts' subject matter jurisdiction to consider such claims. In cases where nonlegal parents overcome the standing and jurisdictional issues and make it into court, the article shows how the law works to summarily deny their claims, without considering any functional parent-child relationship that may have existed.

Next, the article examines existing legal theories under which nonlegal parents attempt to use their functional relationships to establish parental rights. The article also explores the failure of these theories to provide for functional parents or to adequately protect the rights of legally recognized parents from outside parties. The article then considers three innovative ap-

---

ture." Polikoff, *supra* note 5, at 464.

11. Two recent notes focus specifically on the law's impact on lesbian-mother families. See Lisa M. Pooley, Note, *Heterosexism and Children's Best Interests: Conflicting Concepts in Nancy S. v. Michelle G.*, 27 U.S.F. L. REV. 477 (1993); Elizabeth A. Delaney, Note, *Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child*, 43 HASTINGS L.J. 177 (1991).

12. The author uses the term "nonlegal parent" when not referring specifically to the rights of functional parents, as opposed to "functional parent," because not every individual asserting custody and visitation rights based on their relationship meets the definition of functional parent. See *infra* part V.B. for the author's proposed definition of functional parent.

proaches to resolving child custody and visitation disputes arising out of nontraditional relationships which *do* establish rights for functional parents.

In conclusion, the author advises the California Legislature to redefine "legal parent" to include functional parents. The author recommends specific criteria for determining when a functional parent-child relationship exists, taking into account the extent of the relationship itself, the child's perceptions of the relationship and the legal parent's intent in creating the relationship. This approach allows functional parents to seek custody and visitation according to the same standards as other legal parents, while protecting legal parents from attempts by outside parties to establish parental rights.

## II. CALIFORNIA STATUTORY LAW

The Uniform Parentage Act<sup>13</sup> (hereinafter "UPA") defines a legal parent as the biological or adoptive parent of the child.<sup>14</sup> Under the UPA a mother may establish a parent-child relationship by proof of having given birth to the child.<sup>15</sup> The UPA provides a number of ways for a father to establish a parent-child relationship.<sup>16</sup> Mothers and fathers can also establish a parent-

---

13. CAL. CIV. CODE §§ 7000-7021 (West 1983). The UPA was part of a package of legislation introduced in 1975. It "deals substantively with the rights of children and procedurally with the determination of parentage." *Curiale v. Reagan*, 272 Cal Rptr. 520, 522 (Ct. App. 1990). The legislation's purpose was to eliminate the legal distinction between legitimate and illegitimate children. Under the UPA, parent and child rights are based on the existence of a parent-child relationship rather than on the marital status of the parents. *Johnson v. Calvert*, 851 P.2d 776, 778-79 (Cal. 1993).

14. CAL. CIV. CODE § 7001.

15. CAL. CIV. CODE § 7003(1) (West 1983) (recodified as CAL. FAMILY CODE § 7610(a) (West 1993)). In rare cases, maternity may be established by other means. *See supra* note 2 and accompanying text.

16. *Id.* § 7003(2)(3) (providing father-child relationship exists where father is the biological or adoptive parent) (recodified as CAL. FAMILY CODE § 7610(b)(c) (West 1993)); CAL. CIV. CODE § 7004 (*see supra* note 4 and accompanying text) (recodified as CAL. FAMILY CODE § 7611 (West 1993)); CAL. CIV. CODE § 7005(a) (West 1983) (providing that where wife is impregnated through artificial insemination with consent of her husband, husband is considered biological father by law) (recodified as CAL. FAMILY CODE § 7613(a) (West 1993)); CAL. CIV. CODE § 7006 (West 1983) (providing by whom and under what circumstances an action to determine the existence or nonexistence of a father-child relationship may be brought) (recodified as CAL. FAMILY CODE §§ 7630-7634 (West 1993)).

child relationship through proof of adoption.<sup>17</sup>

#### A. CHILD CUSTODY

California Civil Code section 4600,<sup>18</sup> part of the Family Law Act<sup>19</sup> (hereinafter "FLA"), expressly recognizes that courts should award custody to legal parents in preference to nonlegal parents.<sup>20</sup> Section 4600 applies to "any proceeding where there is at issue the custody of a minor child."<sup>21</sup> This section alone does not create subject matter jurisdiction.<sup>22</sup> An underlying proceeding is required.<sup>23</sup>

In custody disputes between legal parents, section 4600 permits the court to award custody according to the "best interests" of the child.<sup>24</sup> Yet, in disputes between legal parents and nonlegal parents, individuals falling outside the narrow statutory definition of legal parent given above must show that custody with the legal parents would be detrimental to the children.<sup>25</sup> This

17. CAL. CIV. CODE § 7003(3).

18. CAL. CIV. CODE § 4600 (West Supp. 1993) (recodified as CAL. FAMILY CODE §§ 3020-3021, 3040-3043 (West 1993)).

19. CAL. CIV. CODE §§ 4000-5180 (West 1983 & Supp. 1993). The FLA was adopted in 1970 and made substantive and procedural changes in the law governing what had traditionally been termed "divorce" and "annulment." 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 22 (9th ed. 1990). With respect to child custody, a general objective of the FLA was to limit the power of the court to award custody to nonlegal parents. Prior to the FLA, a best interests standard was used in custody disputes between legal and nonlegal parents. Under the FLA, this standard was replaced with Civil Code section 4600(b) which provides an order of preference for courts to follow in awarding custody. 10 *id.* at §§ 116-17.

20. CAL. CIV. CODE § 4600(b)(1) (West 1983) (providing that custody should be awarded first to both parents jointly or to either parent) (recodified as CAL. FAMILY CODE § 3040(a) (West 1993)). See *In re B.G.*, 523 P.2d 244, 257 (Cal. 1974), the seminal case interpreting section 4600.

21. CAL. CIV. CODE § 4600(a) (West Supp. 1993) (recodified as CAL. FAMILY CODE § 3021 (West 1993)). The Legislature has excepted certain proceedings from section 4600. See, e.g., CAL. CIV. CODE § 232(d) (West 1983) (providing that section 4600 shall not apply in actions to declare minor free from parental custody and control) (recodified as CAL. FAMILY CODE § 7807 (West 1993)).

22. *In re Marriage of Goetz & Lewis* 250 Cal. Rptr. 30, 32 (Ct. App. 1988); *B.G.*, 523 P.2d at 255 n.24; *Marckwardt v. Superior Court*, 198 Cal. Rptr. 41, 47 (Ct. App. 1984); *Perry v. Superior Court*, 166 Cal. Rptr. 583, 585 (Ct. App. 1980).

23. *Goetz*, 250 Cal. Rptr. at 32.

24. CAL. CIV. CODE § 4600(b). See *B.G.*, 523 P.2d at 257; *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 215 (Ct. App. 1991).

25. CAL. CIV. CODE § 4600(c) (West 1983) (recodified as CAL. FAMILY CODE § 3041 (West 1993)). ("Before the court makes any order awarding custody to a person or per-

“detriment” standard is considerably more restrictive than the “best interests” standard which the courts apply in disputes between legal parents.<sup>26</sup> California courts have also applied this detriment standard where the nonlegal parent seeks not to exclude the legal parent but to share custody with the legal parent.<sup>27</sup> While legal parents may petition the court for joint custody of a child,<sup>28</sup> the law does not provide for joint custody between a legal and nonlegal parent when the legal parent objects.<sup>29</sup> In situations where the legal parent objects to joint custody with the nonlegal parent, the nonlegal parent must show that custody with the legal parent is detrimental to the child.<sup>30</sup> The law sets up a “Catch 22” situation for the nonlegal parent. By requiring the nonlegal parent to show that custody with the legal parent is detrimental to the child, the nonlegal parent is forced to choose between seeking sole custody or no custody. A nonlegal parent who seeks to establish joint custody, over the objections of the legal parent, is left without a legal remedy.<sup>31</sup>

Thus, the restriction for nonlegal parents is twofold. First, by limiting the definition of parent, the UPA initially limits which individuals can assert “parental” rights. Second, nonlegal parents who have standing, but who fall outside this definition of legal parent, must show that custody with the legal parents would be detrimental to the children before the court will award them custody.<sup>32</sup>

---

sons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.”)

26. *B.G.*, 523 P.2d at 257 (“As between parents, [section 4600] permits the court to award custody ‘according to the best interests of the child,’ but in a dispute between a parent and a nonparent, the section imposes the additional stipulation that an award to the nonparent requires a finding that ‘an award of custody to the parent would be detrimental to the child.’”) (quoting CAL. CIV. CODE § 4600(b), (c)).

27. *Nancy S.*, 279 Cal. Rptr. at 216.

28. CAL. CIV. CODE § 4600(b)(1); *supra* note 20 and accompanying text.

29. CAL. CIV. CODE § 4600.5(d)(3) (West 1983) (“‘Joint physical custody’ means that each of the *parents* shall have significant periods of physical custody.”) (emphasis added); *id.* § 4600.5(d)(5) (“‘Joint legal custody’ means that both *parents* shall share the right and the responsibility to make the decisions relating to the health, education and welfare of a child.”) (emphasis added).

30. CAL. CIV. CODE § 4600(c).

31. See *Nancy S.*, 279 Cal. Rptr. at 216; *Curiale v. Reagan*, 272 Cal. Rptr. 520, 521 (Ct. App. 1990); *In re Marriage of Goetz & Lewis*, 250 Cal. Rptr. 30, 30 (Ct. App. 1988).

32. CAL. CIV. CODE § 4600(c). See *Nancy S.*, 279 Cal. Rptr. at 216.

## B. VISITATION

California Civil Code section 4601 gives the court discretion to grant reasonable visitation rights "to any other person having an interest in the welfare of the child."<sup>33</sup> However, this section only applies where there is already some proceeding properly before the court in which custody is at issue.<sup>34</sup> Individuals who are without an underlying proceeding, such as one for marriage dissolution, are unable to bring actions for visitation. In marriage dissolution proceedings, any interested person may join the action and bring an action for visitation whether or not custody or visitation is at issue between the husband and wife.<sup>35</sup>

Section 4601 does not provide a standard for the court to use in determining whether to award visitation. However, the California Court of Appeal has held that in visitation disputes between legal and nonlegal parents, where legal parents are in joint-opposition to visitation, nonlegal parents must present clear and convincing evidence that the denial of such visitation would be detrimental to the children.<sup>36</sup>

Prior to 1982, courts had held that superior courts' jurisdiction to award visitation in marital dissolution proceedings was limited to "children of the marriage."<sup>37</sup> Thus, superior courts were without jurisdiction to award visitation rights to stepparents in marriage dissolution proceedings.<sup>38</sup> In response to what one court referred to as the "thorny problem of visitation by stepparents,"<sup>39</sup> the Legislature enacted California Civil Code section 4351.5 which, in marriage dissolution proceedings, confers jurisdiction on superior courts to award reasonable visitation rights to stepparents and grandparents when the courts determine that visitation by that person is in the best interests of

---

33. CAL. CIV. CODE § 4601 (West 1983) (recodified as CAL. FAMILY CODE § 3100 (West 1993)).

34. *Perry v. Superior Court*, 166 Cal. Rptr. 583, 584 (Ct. App 1980); *In re Marriage of Halpern*, 184 Cal. Rptr. 740, 745 (Ct. App. 1982).

35. *In re Marriage of Gayden*, 280 Cal. Rptr. 862, 863. See *infra* note 147 and accompanying text.

36. *Gayden*, 280 Cal. Rptr. at 867. See *infra* part III.C. for a discussion of how the standard was conceived.

37. *Perry*, 166 Cal. Rptr. at 584.

38. *Id.*

39. *Id.* at 586.



## 230 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:223]

the child.<sup>40</sup> Courts have consistently held section 4351.5 inapplicable to factual situations not specifically addressed by that section.<sup>41</sup> For example, courts have held the statute inapplicable to a nonbiological parent in a same-sex relationship.<sup>42</sup>

The Legislature and the courts have chosen to make the rights of biological and adoptive parents paramount.<sup>43</sup> Even discretionary visitation provided to some nonlegal parents “must give way to the paramount right to parent if the visitation creates conflicts and problems.”<sup>44</sup> Nonlegal parents who are unable to avail themselves of an underlying proceeding, a requisite to asserting rights to custody under section 4600 and visitation under section 4601, are unable to bring their claims and, therefore, go unheard. Under existing law, many individuals are denied any rights to custody or visitation because they lack biological, adoptive, or marital links to the children—regardless of the existence of functional parent-child relationships.

### III. RELATIONSHIPS EXISTING LAW FAILS TO ADDRESS

Existing law fails to adequately address the reality of families falling outside the traditional model. Courts consistently resolve custody and visitation disputes in favor of legal parents regardless of the functional relationships existing between nonlegal parents and children.<sup>45</sup> As discussed in the preceding section, the statutory law on its face severely limits the custody and visitation rights of nonlegal parents.<sup>46</sup> In turn, the courts have often given the statutes an even narrower interpretation. Using recent case law, this section examines how courts have interpreted current statutory law to find courts lack subject matter

---

40. CAL. CIV. CODE § 4351.5(a) (West 1983) (recodified as CAL. FAMILY CODE §3101(a) (West 1993)).

41. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 217 (Ct. App. 1991).

42. *Id.*

43. *Nancy S.*, 279 Cal. Rptr. at 216. *See also* CAL. CIV. CODE § 4600(b), (c); *In re B.G.*, 523 P.2d 244, 257 (Cal. 1974); *supra* note 26 and accompanying text.

44. *In re Marriage of Jenkins*, 172 Cal. Rptr. 331, 334 (Ct. App. 1991) (quoted in *Nancy S.*, 279 Cal. Rptr. at 216-17).

45. *See Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (Ct. App. 1991); *Curiale v. Reagan*, 272 Cal. Rptr. 520 (Ct. App. 1990); *In re Marriage of Goetz & Lewis* 250 Cal. Rptr. 30 (Ct. App. 1988).

46. *See discussion supra* part II.

jurisdiction to determine the parental rights of nonlegal parents and to deny nonlegal parents standing to assert parental rights. This section also illustrates the laws' impact on three different nontraditional families. The author does not suggest that every nonlegal parent involved in a nontraditional relationship should be entitled to custody and visitation. The author does suggest that courts should not exclude these individuals from asserting such rights merely because they lack biological, adoptive, or marital ties to the children.

#### A. STEPPARENTS<sup>47</sup>

Stepparent situations arise when two people marry and one or both partners have a child[ren] from a previous relationship. A stepparent is the nonbiological parent of his or her spouse's child[ren]. Should the marriage end in divorce, stepparents often bring actions for custody and visitation. The California Court of Appeal has found that trial courts lack subject matter jurisdiction to consider stepparents' claims for custody of stepchildren.<sup>48</sup> However, California Civil Code section 4351.5 confers subject matter jurisdiction on trial courts in marriage dissolution proceedings to award stepparents reasonable visitation rights.<sup>49</sup>

In *In re Marriage of Goetz & Lewis*,<sup>50</sup> the California Court of Appeal affirmed that existing statutory law did not provide the superior court with subject matter jurisdiction to award a stepparent joint custody of his stepchild.<sup>51</sup> In *Goetz*, the stepfather, Stephen, requested joint custody and reasonable visitation rights for both parties in his marriage dissolution proceeding.<sup>52</sup> The stepchild was born in 1980.<sup>53</sup> Stephen and the child's mother had lived together from 1980 to 1985.<sup>54</sup> During that time

---

47. Although stepparent relationships are arguably not "nontraditional," they are discussed here because as nonbiological, nonadoptive parents, stepparents are deprived of certain parental rights, despite evidence of functional parent-child relationships.

48. *Goetz*, 250 Cal. Rptr. at 32.

49. CAL. CIV. CODE § 4351.5(a).

50. *In re Marriage of Goetz & Lewis* 250 Cal. Rptr. 30 (Ct. App. 1988).

51. *Id.* at 32-33.

52. *Id.*

53. *Id.* at 30.

54. *Id.* at 31.

the couple was married for one year.<sup>55</sup> The mother's petition for dissolution alleged there were no minor children of the marriage.<sup>56</sup> Stephen's petition alleged there was a minor child of the marriage "based on his acknowledgment of [the child] as his son."<sup>57</sup> He based his request for custody on California Civil Code section 4600.<sup>58</sup> The requisite underlying proceeding in this case was for marriage dissolution.<sup>59</sup> The court, however, found that the jurisdiction conferred on a court by marriage dissolution proceedings to deal with the custody and visitation rights of stepparents is limited by California Civil Code sections 4351<sup>60</sup> and 4351.5.<sup>61</sup> Section 4351 gives the court jurisdiction in a marriage dissolution proceeding to make any orders, as appropriate, regarding child custody.<sup>62</sup> Section 4351.5, notwithstanding 4351, gives the court jurisdiction to award "reasonable visitation rights" to a stepparent when such an award is in the child's best interest.<sup>63</sup> The court construed the two sections to limit its jurisdiction to awarding only visitation. Absent express provisions for custody in section 4351.5, the court found it lacked subject matter jurisdiction to consider a stepparent's rights to custody.<sup>64</sup> Stephen was granted visitation rights under California Civil Code section 4351.5.<sup>65</sup>

While the extent of Stephen's relationship with the child was in dispute,<sup>66</sup> even if it were undisputed that he functioned as the child's parent in every way, the result would have been the same. Stephen was never afforded the opportunity to attempt to prove a parent-child relationship existed because the

---

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 31; CAL. CIV. CODE § 4600(a) ("In any proceeding where there is at issue the custody of a minor child, the court may . . . make such order for the custody of the child . . . as may seem necessary or proper.").

59. *Id.* at 33.

60. CAL. CIV. CODE § 4351 (West 1983) (recodified as CAL. FAMILY CODE §§ 2010, 2060) (West 1993)).

61. CAL. CIV. CODE § 4351.5; *Goetz*, 250 Cal. Rptr. at 31-32.

62. CAL. CIV. CODE § 4351 ("The superior court has jurisdiction to inquire into and render any judgment and make such orders as are appropriate concerning status of the marriage, custody and support of minor children of the marriage, and children for whom support is authorized under Section 206.")

63. CAL. CIV. CODE § 4351.5(a).

64. *Goetz*, 250 Cal. Rptr. at 32.

65. *Id.* at 31.

66. *Id.*

court found it lacked subject matter jurisdiction to consider the custody rights of a stepparent.<sup>67</sup>

Although a recent case affirmed an award of custody to a stepfather, it remained consistent with the holding in *Goetz*. In *In re Marriage of Hinman*,<sup>68</sup> the California Court of Appeal affirmed an award of joint custody of five children to the husband, Howard. Three of the children were his biological children and two his stepchildren.<sup>69</sup> The wife, and legal parent, designated all of the children as “children of the marriage” in her dissolution petition and stipulated to granting Howard joint custody.<sup>70</sup> After the court entered final judgment, the wife challenged the court’s jurisdiction to award Howard custody of the two stepchildren because he was not their biological father.<sup>71</sup> The Court of Appeal affirmed the custody award under principles of waiver and estoppel. The court held that the wife’s designation of the two stepchildren as “children of the marriage” in her petition and subsequent stipulation awarding the stepfather primary physical custody precluded her from later challenging the order on jurisdictional grounds.<sup>72</sup> The court held that jurisdiction does not “vanish” even if it is later shown that there were no children of the marriage.<sup>73</sup>

The Court of Appeal did *not* find the trial court had jurisdiction to award custody based on any statute. In fact, the court noted that the trial court’s award of joint custody may have exceeded its statutory authority because the children were stepchildren.<sup>74</sup> The court acknowledged that in previous cases where the mothers did not designate the children as “of the marriage” and objected to the stepparents’ attempts to gain custody, the courts correctly held that the stepparents had no statutory basis on which to predicate their custody requests.<sup>75</sup> How-

---

67. *Id.* at 32-33.

68. *In re Marriage of Hinman*, 8 Cal. Rptr. 2d 245 (Ct. App. 1992).

69. *Id.* at 248

70. *Id.* at 245-46.

71. *Id.* at 246.

72. *Id.* at 247 (“A party who participates in or consents to a judgment which otherwise would be beyond the court’s authority is precluded from attacking it, absent exceptional circumstances.”).

73. *Id.*

74. *Id.* at 248.

75. *Id.* at 247 (citing *Perry v. Superior Court*, 166 Cal. Rptr. 583 (Ct. App. 1980); *In re Marriage of Goetz & Lewis*, 250 Cal. Rptr. 30 (Ct. App. 1988)).

ever, the *Hinman* court reasoned that the mother herself invoked the court's jurisdiction by alleging in her petition that the children were of the marriage.<sup>76</sup> That allegation alone conferred subject matter jurisdiction on the trial court to decide custody of the children.<sup>77</sup> Thus, the Court of Appeal's decision remained consistent with previous decisions holding that stepparents have no statutory grounds on which to base custody requests.<sup>78</sup>

While superior courts lack subject matter jurisdiction to award custody to stepparents, California Civil Code section 4351.5 gives the courts jurisdiction to award them reasonable visitation. Although stepparents' rights are limited, they are not in danger of losing all rights with regard to their stepchildren.

#### B. SAME-SEX PARTNERS<sup>79</sup>

Same-sex partner custody and visitation disputes may arise where two people of the same sex decide to conceive and raise a child together either through adoption, artificial insemination, or other means. Such a dispute can also arise where one partner brings a child from a previous relationship to the same-sex relationship, much like a stepparent relationship. Except in the rare case of a second parent adoption,<sup>80</sup> only one of the "parents" will be the child's legal parent. Should the relationship dissolve, the nonlegal parent may attempt to bring an action for custody and visitation.

Same-sex partners are even more disadvantaged in their pursuit of custody and visitation than are stepparents. In addition to the jurisdictional problems faced by stepparents, same-sex partners also have difficulty gaining standing to assert their rights. Because stepparents are married to the legal parents, they gain standing to at least assert visitation rights through

---

76. *Hinman*, 8 Cal. Rptr. 2d at 246.

77. *Id.* at 247.

78. *Id.* See *Perry*, 166 Cal. Rptr. at 584; *Goetz*, 250 Cal. Rptr. at 31-32.

79. The author uses the term "same-sex partner" to refer to the nonbiological or nonadoptive parent in a same-sex relationship.

80. A second parent adoption is where two people of the same sex are permitted to adopt a single child.

their marriage dissolution proceedings.<sup>81</sup> However, because the law does not recognize same-sex marriages,<sup>82</sup> same-sex partners must find alternative ways to gain standing to assert their rights to custody and visitation.<sup>83</sup>

In *Curiale v. Reagan*,<sup>84</sup> the California Court of Appeal affirmed a nonbiological, same-sex parent was without standing to initiate a proceeding seeking custody and visitation.<sup>85</sup> Curiale, a partner in a lesbian relationship, sought custody of and visitation with a child born to her partner during their relationship. Curiale and the child's biological mother shared a home for five years during which time they decided to have a child through artificial insemination and raise the child together.<sup>86</sup> The child was born in 1985.<sup>87</sup> From the time of the child's birth until June 1988, Curiale provided the sole financial support for herself, the biological mother and the child.<sup>88</sup> Although the couple's relationship ended in December 1987, the couple entered into a written agreement<sup>89</sup> which provided for sharing physical custody of the child.<sup>90</sup> However, in June 1988, the biological mother informed Curiale she was no longer willing to share custody with Curiale or even allow Curiale to visit with the child.<sup>91</sup>

Curiale brought an action for custody and visitation. She based her claims on California Civil Code sections 7015, 7020, and 4600. Sections 7015 and 7020 are part of the UPA which

81. CAL. CIV. CODE § 4351.5. See *Goetz*, 250 Cal. Rptr. at 30.

82. California does not recognize same-sex marriages. CAL. CIV. CODE § 4100 (West 1983) (defining marriage as "a personal relation arising out of a civil contract between a man and a woman . . .") (recodified as CAL. FAMILY CODE § 300 (West 1993)).

83. An apparent solution to this dilemma would be for the same-sex partner to adopt his or her partner's child. However, traditionally, same-sex partners could not adopt a child without divesting their married partner of their parental rights. Only a few second parent adoptions have been allowed in California, as statutory law does not specifically provide for such. Delaney, *supra* note 11, at 215 (proposing statutory recognition of second parent adoptions); CAL. CIV. CODE § 221.76 (West Supp. 1993) (recodified as CAL. FAMILY CODE § 8617 (West 1993)).

84. *Curiale v. Reagan*, 272 Cal. Rptr. 521 (Ct. App. 1990).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Although Curiale attached a copy of the agreement to her complaint, the trial court declined to give it any effect. Curiale did not assert any contractual claims in the trial court nor on appeal. *Id.* at 522 n.1.

90. *Id.* at 521.

91. *Id.*

## 236 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:223

deals with the rights of children and the determination of parentage.<sup>92</sup> Section 7015 confers standing on any interested party to bring an action to determine the existence or nonexistence of a mother and child relationship.<sup>93</sup> Curiale asserted her claim as an interested party and sought to establish the existence of a mother-child relationship.<sup>94</sup>

Section 7015 does not specify the grounds for establishing a mother-child relationship.<sup>95</sup> However, the *Curiale* court found the grounds for establishing a parent-child relationship under section 7015 are limited to biology and adoption. Thus, because the identity of the biological mother was undisputed, the court found section 7015 inapplicable to a lesbian-partner because, in the eyes of the court, a child could not have two mothers.<sup>96</sup> The court reasoned, "While Civil Code section 7015 confers standing upon any interested person to bring an action to determine the existence or not of a parent-child relationship, it has no application where, as here, it is undisputed defendant is the natural mother of the child."<sup>97</sup> As in the stepparent situation presented in *Goetz*, the court declined to consider the functional relationship between Curiale and the child as a basis for establishing the existence of a mother-child relationship under section 7015.

Curiale also based her custody action on California Civil Code section 4600.<sup>98</sup> As explained previously, section 4600 alone does not confer subject matter jurisdiction.<sup>99</sup> Jurisdiction depends on a proceeding properly before the court in which custody is at issue.<sup>100</sup> The issue of custody and visitation may be raised in the following proceedings: determination of maternity<sup>101</sup> or paternity,<sup>102</sup> marriage dissolution,<sup>103</sup> guardian-

---

92. *Id.* at 522.

93. CAL. CIV. CODE § 7015 (West 1983) (recodified as CAL. FAMILY CODE § 7650 (West 1993)).

94. *Curiale*, 272 Cal. Rptr. at 522.

95. CAL. CIV. CODE § 7015.

96. *Curiale*, 272 Cal. Rptr. at 522. See also, Delaney, *supra* note 11, at 181.

97. *Curiale*, 272 Cal. Rptr. at 522.

98. *Id.*

99. See discussion *supra* part II.A.

100. *Curiale*, 272 Cal. Rptr. at 522.

101. CAL. CIV. CODE § 7015.

102. CAL. CIV. CODE § 7006.

103. CAL. CIV. CODE § 4350 (West 1983) (recodified as CAL. FAMILY CODE § 310 (West 1993)); CAL. CIV. CODE § 4351.

ship,<sup>104</sup> juvenile dependency,<sup>105</sup> habeus corpus,<sup>106</sup> adoption,<sup>107</sup> and termination of parental rights.<sup>108</sup>

For the reasons discussed above, Curiale could not bring an action to establish maternity.<sup>109</sup> As an unmarried, same-sex partner, Curiale could not bring a dissolution proceeding.<sup>110</sup> Because Curiale sought to share custody with the child's biological mother, not to exclude her, Curiale did not bring a guardianship action or one to terminate parental rights.<sup>111</sup> A juvenile dependency proceeding requires an allegation that the biological parent is unfit.<sup>112</sup> Curiale was seeking to establish joint-custody and was therefore not making that claim.<sup>113</sup> Traditionally under California law, a same-sex partner cannot adopt a child unless the biological parent of the same-sex consents and relinquishes his or her own parental rights.<sup>114</sup> Finally, a writ of habeus corpus can only be used by one who is entitled to custody of a child to regain custody of that child from another who is not legally entitled to custody.<sup>115</sup> Because Curiale lacked standing to avail herself of any of these proceedings, she could not bring her claims.<sup>116</sup> The court concluded, "The Legislature has not conferred upon one in plaintiff's position, a nonlegal parent in a same sex relationship, any right of custody or visitation upon the termination of the relationship."<sup>117</sup>

*Nancy S. v. Michelle G.*<sup>118</sup> also involved a custody and visi-

---

104. CAL. PROB. CODE § 1500 (West 1991).

105. CAL. WELF. & INST. CODE § 300 (West 1983 & Supp. 1994).

106. CAL. PENAL CODE § 1507 (West 1991).

107. CAL. CIV. CODE § 221.10 (West 1991) (recodified as CAL. FAMILY CODE § 8600 (West 1993)).

108. CAL. CIV. CODE §§ 232-233 (West 1991) (recodified as CAL. FAMILY CODE § 7820 (West 1993)).

109. *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Ct. App. 1990)

110. CAL. CIV. CODE § 4100; *supra* note 82 and accompanying text.

111. *Curiale*, 272 Cal. Rptr. at 521.

112. CAL. WELF. & INST. CODE § 300.

113. *Curiale*, 272 Cal. Rptr. at 521.

114. *Delaney*, *supra* note 11, at 184; CAL. CIV. CODE § 221.20 (recodified as CAL. FAMILY CODE § 8604-06 (West 1993)); CAL. CIV. CODE § 221.76. *See supra* note 83 for discussion of recent exceptions to the traditional rule.

115. CAL. PENAL CODE § 1507 (West 1991).

116. *Curiale*, 272 Cal. Rptr. at 522.

117. *Id.*

118. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212 (Ct. App. 1991).



tation dispute arising out of a lesbian relationship.<sup>119</sup> In this case, the couple lived together for eleven years prior to the birth of the first child in 1980.<sup>120</sup> A second child was born in 1984.<sup>121</sup> The couple planned to raise the children together and Michelle, the lesbian partner, participated in the artificial insemination of the biological mother.<sup>122</sup> The children's birth certificates listed Michelle as the children's "father" and both children took Michelle's last name.<sup>123</sup> The children referred to each of the women as "mom."<sup>124</sup> Although the couple separated in 1985, they reached a custody agreement and followed it for the next three years until the biological mother sought to alter the arrangement.<sup>125</sup> When Michelle objected, the biological mother initiated an action seeking a declaration that (1) Michelle was not a legal parent; (2) the biological mother was entitled to sole legal and physical custody; and (3) Michelle was entitled to visitation only upon consent of the biological mother.<sup>126</sup>

The court found it had jurisdiction under the UPA to decide whether Michelle was a parent of the children.<sup>127</sup> The court reasoned that because Michelle had at all times maintained she was a parent of the children, she had standing to seek custody and visitation.<sup>128</sup> However, the court determined that Michelle could not establish a parent-child relationship because she was not the biological mother, had not adopted the children, and she and the children's biological mother did not have a legally recognized marriage when the children were born.<sup>129</sup> In determining that Michelle was not a parent, the court ignored any functional parental relationship which may have existed. The court's holding was based solely on the narrow statutory definition of parent.

Because the court held Michelle was not a legal parent, sec-

---

119. *Id.* at 216.

120. *Id.* at 214.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 215 n.2. Although the court did not specify, the court presumably found Michelle had jurisdiction under Civil Code section 7015.

128. *Id.* at 215 n.2.

129. *Id.* at 215.

tion 4600's detriment standard applied.<sup>130</sup> Before the court could award Michelle custody over the objections of the biological mother, the court would have to find that custody with the biological mother would be detrimental to the children. However, because Michelle sought to share custody, not to exclude the biological mother, she was not making this claim and therefore was denied custody.

In *Nancy S.* the court acknowledged that the record "strongly suggests" that the lesbian partner could prove that she had, from the children's point of view, performed the role of loving mother.<sup>131</sup> The court also agreed that the absence of any legal relationship to the children had resulted in a "tragic situation."<sup>132</sup> Nonetheless, the court held that Michelle was "entitled to seek custody and visitation over the objections of the children's biological mother, based on the 'best interests' of the children, only if she has alleged facts upon which the court could determine that she was a parent of the children."<sup>133</sup> Michelle's role as loving mother was an insufficient basis for establishing a parent-child relationship.

The court's findings in *Nancy S.* appear to conflict with the California Court of Appeal's holding in *Curiale*. In *Nancy S.* the court found it had jurisdiction under the UPA to decide whether Michelle was a parent.<sup>134</sup> In *Curiale* the court found the UPA inapplicable.<sup>135</sup> Because *Curiale* could not avail herself of an underlying proceeding, the court also found it lacked subject matter jurisdiction to consider her claims under section 4600.<sup>136</sup> One possible explanation for this conflict is that in *Nancy S.* the biological mother's action for a declaration that Michelle was not the children's parent provided the underlying proceeding necessary for Michelle to assert her own parental rights.<sup>137</sup> Because of the unpredictable nature by which same-sex partners are able to gain standing to assert their claims, it is difficult for them to be

---

130. See CAL. CIV. CODE § 4600(c).

131. *Nancy S.*, 279 Cal. Rptr. at 215 n.4.

132. *Id.* at 219.

133. *Id.* at 215; CAL. CIV. CODE §§ 4600(b), 7003(1).

134. *Nancy S.*, 279 Cal. Rptr. at 215.

135. *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Ct. App. 1990).

136. *Id.*

137. *Nancy S.*, 279 Cal. Rptr. at 214. See also, Delaney, *supra* note 11, at 186 (reconciling *Curiale* and *Nancy S.*).

## 240 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:223

apprised of their legal rights when making family planning decisions. Indeed, a same-sex partner's ability to assert any parental rights may depend on someone else first bringing an action.<sup>138</sup>

## C. UNMARRIED HETEROSEXUALS

Unmarried heterosexual custody and visitation disputes may arise where third parties develop relationships with other's children. The most common example is where a girlfriend or boyfriend of the legal parent attempts to bring an action for custody and visitation when their relationship with the biological parent dissolves and an ongoing relationship with the child is unlikely.<sup>139</sup>

As nonlegal parents, unmarried heterosexual partners cannot obtain custody without first showing that custody with the legal parents is detrimental to the children and that custody with the nonlegal parents is in the children's best interests.<sup>140</sup> The standard applied to actions for visitation is less clear. Only one case has addressed the nature of the findings necessary to award visitation.<sup>141</sup>

In *In re Marriage of Gayden*,<sup>142</sup> the California Court of Appeal held courts should not grant visitation under Civil Code section 4601 without clear and convincing evidence that denial of such would be detrimental to the child.<sup>143</sup> In *Gayden*, the court reversed a trial court's grant of visitation to a father's former girlfriend.<sup>144</sup> The father petitioned the court for the dissolu-

138. See also *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986). A biological mother's lesbian partner was able to gain standing and establish visitation rights in a sperm donor's paternity action. His action provided the underlying proceeding necessary for the lesbian partner to assert her rights to visitation. Unlike the biological mothers in *Curiale* and *Nancy S.*, the biological mother in *Jhordan C.* did not oppose visitation with the lesbian partner, as their relationship had not dissolved. *Id.* at 533, 537.

139. Unmarried heterosexual relationships might also include friends of legal parents.

140. CAL. CIV. CODE § 4600(c).

141. *In re Marriage of Gayden*, 280 Cal. Rptr. 862, 867 (Ct. App. 1991).

142. *In re Marriage of Gayden*, 280 Cal. Rptr. 862 (Ct. App. 1991).

143. *Id.* at 867; CAL. CIV. CODE § 4601 ("The court shall order reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.")

144. *Id.* at 869.

tion of his marriage in August of 1986.<sup>145</sup> Following the dissolution in February 1988, the court granted the father custody of the child and the mother visitation rights.<sup>146</sup> The court subsequently allowed the father's former girlfriend to be joined as a party to the proceeding.<sup>147</sup> The girlfriend based her claim for visitation rights on her status as the child's "de facto parent."<sup>148</sup> In her declaration, she stated that she had lived with the father and the child from the time the child was seven months old until she was one year and nine months old.<sup>149</sup> She also alleged that when the cohabitation ended, she continued to see the child frequently until she and the father ended their relationship. The child was three and a half years old at that time.<sup>150</sup> The girlfriend also charged that the child's mother had abdicated her parental rights by abandoning the child when the child was seven months old and that the girlfriend was the only mother the child had ever known.<sup>151</sup>

The father acknowledged that he and his former girlfriend had "an on-again, off-again" relationship for two years and lived together for six months.<sup>152</sup> Both the mother and father disputed the extent of the girlfriend's relationship with the child and believed that the girlfriend's continued involvement with the child would be detrimental to the child and the child's ongoing relationship with her parents.<sup>153</sup> The family counselor agreed that visitation in an atmosphere of hostility and bitterness would be harmful to the child, and a child psychologist declared that visitation would not be in the child's best interests.<sup>154</sup>

---

145. *Id.* at 863.

146. *Id.*

147. *Id.*; CAL. R. CT., rule 1252(b) (West Revised Ed. 1993) ("A person who has or claims custody or physical control of any of the minor children of the marriage or visitation rights with respect to such children may apply to the court for an order joining him [sic] as a party to the proceeding."). Because the girlfriend was making such a claim, the court allowed her to be joined. The issue of custody or visitation dispute is properly before the court regardless of whether there is an actual custody or visitation between the legal parents. See *Gayden*, 280 Cal. Rptr. at 863; *Perry v. Superior Court*, 166 Cal. Rptr. 583 (Ct. App. 1980).

148. *Gayden*, 280 Cal. Rptr. at 863. See *infra* part IV.A.2. for discussion of visitation rights based on *de facto* parent status.

149. *Gayden*, 280 Cal. Rptr. at 863.

150. *Id.*

151. *Id.*

152. *Id.* at 863.

153. *Id.*

154. *Id.* at 863-64.

## 242 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:223]

Over the objections of both parents and contrary to the recommendations of the family counselor and child psychologist, the trial court awarded the father's former girlfriend visitation under California Civil Code section 4601.<sup>155</sup> The trial court apparently based its decision upon a bare preponderance of the evidence that visitation was in the child's best interests.<sup>156</sup> The California Court of Appeal reversed.<sup>157</sup> Not only did the Court of Appeal doubt whether such visitation was in the child's best interests, the court held that such a determination was an insufficient basis for awarding visitation rights over the joint opposition of the child's parents.<sup>158</sup> The court found that, except where the Legislature has specifically provided, courts may not grant visitation to a nonlegal parent under section 4601 over the joint opposition of the child's legal parents merely on a finding that such a grant would be in the best interests of the child.<sup>159</sup> Where the legal parents are in joint opposition, the court held that visitation should not be granted without clear and convincing evidence that denial of such would be detrimental to the child.<sup>160</sup>

Although no previous cases addressed the nature of the findings necessary to award visitation, the *Gayden* court relied on "the strong legislative preference for the rights of parents over those of nonparents."<sup>161</sup> The court acknowledged that custody and visitation differ in important ways but found that the parental preference expressed in section 4600 was relevant to determinations involving visitation because visitation is a limited form of custody.<sup>162</sup> The court also reasoned that "judicially compelled visitation against the wishes of both parents can significantly affect parental authority and the strength of the family unit."<sup>163</sup> The court was persuaded by an earlier decision which held that visitation rights conferred by statute are "subordinate

---

155. *Id.* at 864; CAL. CIV. CODE § 4601; *supra* note 143 and accompanying text.

156. *Gayden*, 280 Cal. Rptr. at 868.

157. *Id.* at 869.

158. *Id.* at 868.

159. *Id.* at 867.

160. *Id.*

161. *Id.* at 865-66.

162. *Id.* The court looked to section 4600 which articulates the standard in custody cases. Under section 4600, the "best interests" standard is applied to disputes between legal parents, but a finding that custody with the parent would be detrimental is required in disputes between legal and nonlegal parents. CAL. CIV. CODE § 4600(c).

163. *Gayden*, 280 Cal. Rptr. at 865-66.

to the preservation of the parent/child family unit."<sup>164</sup>

The *Gayden* court also looked to the limited rights afforded grandparents under section 4351.5.<sup>165</sup> While a best interests standard is used in determining whether to grant visitation to a grandparent, there is a rebuttable presumption that visitation is not in the child's best interests where the parties to the marriage are in joint opposition to the grandparent receiving any visitation rights.<sup>166</sup> The *Gayden* court reasoned that section 4351.5 would be meaningless if visitation rights could be granted to a nonlegal parent under section 4601 merely upon a finding that it is in the child's best interests.<sup>167</sup> Moreover, where there is a rebuttable presumption that visitation with a grandparent is not in the child's best interests where the parents are in joint-opposition, the court reasoned that "the opposition of both parents ought to be given even greater weight when visitation is sought by unrelated persons not favored under [the current statutory law]."<sup>168</sup>

Given the preferred status afforded to legal parents expressed in section 4600 and the deference given to parental wishes under section 4351.5 and in the case law, the Court of Appeal held that where the legal parents are in unified opposition to awarding visitation to a third party, the applicable standard for determining whether to grant visitation is a clear and convincing showing that denying visitation would be detrimental to the child.<sup>169</sup> A finding that such a grant would be in the best interests of the child is insufficient.<sup>170</sup>

The court, however, cautioned that its holding did not mean that trial courts could never award visitation to nonlegal parents over the objections of legal parents:

. We do not mean to suggest by this opinion that a court must always submit to the objection of bio-

---

164. *Id.* at 866 (quoting *In re Marriage of Jenkins*, 172 Cal. Rptr. 331, 334 (Ct. App. 1981)).

165. *Gayden*, 280 Cal. Rptr. at 867; CAL. CIV. CODE § 4351.5 (b) (West Supp. 1993) (recodified as CAL. FAMILY CODE § 3103(a) (West 1993)).

166. *Gayden*, 280 Cal. Rptr. at 867; CAL. CIV. CODE § 4351.5 (k) (West Supp. 1993).

167. *Gayden*, 280 Cal. Rptr. at 867; CAL. CIV. CODE § 4351.5 (b).

168. *Gayden*, 280 Cal. Rptr. at 867 (favoring stepparents and grandparents).

169. *Id.* at 867.

170. *Id.*

logic or adoptive parents to a visitation award to another person with whom their minor child has developed a close attachment. As strong as the rights of such parents must be, there may be instances in which a child would be significantly harmed by completely terminating his or her relationship with a de facto parent.<sup>171</sup>

The *Gayden* court suggested the following test for granting visitation to a de facto parent:

[Where an individual has] (1) lived with the child for a substantial portion of the child's life; (2) been regularly involved in providing day-to-day care, nurturance [sic] and guidance for the child appropriate to the child's stage of development; and, (3) been permitted by a biologic parent to assume a parental role.<sup>172</sup>

The *Gayden* court's apparent willingness, in certain circumstances, to grant nonlegal parents visitation over the objections of legal parents is promising. However, the test has yet to be applied in an action under the UPA or FLA to support granting visitation to a nonlegal parent.<sup>173</sup>

As courts struggle to apply the statutory law to nontraditional families, the decisions become more removed from children's interests; for example, children's interest in maintaining relationships with those they perceive to be their parents. In an attempt to avoid the harsh results of the statutory law, nonlegal parents attempt to use existing legal theories as a basis for establishing parental rights. These theories are discussed in the following section.

#### IV. EXISTING LEGAL THEORIES UNDER WHICH NON-LEGAL PARENTS ATTEMPT TO ESTABLISH PARENT-CHILD RELATIONSHIPS

As previously discussed, California law limits a nonlegal parent's ability to gain standing and restricts lower courts' juris-

---

171. *Id.* at 868.

172. *Id.*

173. *See infra* note 184 for juvenile court cases citing the *Gayden* test.

diction to determine a nonlegal parents' parental rights. Individuals who consider themselves children's parents but lack biological, adoptive, or marital ties to the children have used existing legal theories such as *de facto* parenthood, *in loco parentis*, and equitable estoppel in attempts to gain standing or give courts jurisdiction to decide their claims. This section discusses the use of these existing legal theories and their respective shortcomings.

#### A. *DE FACTO* PARENTHOOD

The California Supreme Court has described a *de facto* parent as "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical and psychological needs for affection and care."<sup>174</sup> *De facto* parenthood is alleged in actions for custody and visitation by parties who fall outside the statutory definition of legal parent, but who consider themselves to be the children's parents.

##### 1. *Child Custody*

In *In re B.G.*,<sup>175</sup> the California Supreme court held that *de facto* parents, such as foster parents, have standing to "assert and protect their own interests in the companionship, care, custody and management of the child."<sup>176</sup> However, in determinations of custody, the court held that section 4600 applies.<sup>177</sup>

While *de facto* parents may have standing to bring their claims, they will not be awarded custody according the same standards applied in disputes between legal parents.<sup>178</sup> The court in *B.G.* expressly stated that, "We do not hold that a *de facto* parent is a "parent" or "guardian" as those terms are used

---

174. *In re B.G.*, 523 P.2d 244, 253 n.18 (Cal. 1974). See also CAL R. Ct., rule 1401(a)(4) ("[A *de facto* parent is] a person who has been found by the court to have assumed, on a day to day basis, the role of parent, fulfilling both the child's physical and psychological needs for care and affection and who has assumed that role for a substantial period.").

175. *In re B.G.*, 523 P.2d 244 (Cal. 1974).

176. *Id.* at 254.

177. *Id.* at 255.

178. *Id.* at 257-58. See also *Nancy S. v. Michelle G.*, 272 Cal. Rptr., 212, 216 (Ct. App. 1991).



in Juvenile Court Law."<sup>179</sup> Like other nonlegal parents, courts may award *de facto* parents custody only if they establish that custody with the legal parents would be detrimental to the children.<sup>180</sup>

## 2. Visitation

The California Court of Appeal indicated that there may be certain circumstances that warrant an award of visitation to a *de facto* parent over the objections of the child's legal parents.<sup>181</sup> In *Gayden*, the court held that the applicable standard for determining visitation rights where the parents are in joint opposition is whether the denial of visitation would be detrimental to the child.<sup>182</sup> Although in that particular case the court denied visitation with the child's alleged *de facto* mother, the court went on to suggest that under certain circumstances, visitation with a *de facto* parent should be awarded.<sup>183</sup>

The *Gayden* court's willingness to consider the functional role of a *de facto* parent in determining visitation rights while protecting parental autonomy by requiring the permission of the biological parent is encouraging. However, the implications of this case on functional parents seeking visitation is still unclear. To date, no court has used the *Gayden* test to support an award of visitation in an action brought under the UPA or FLA.<sup>184</sup>

---

179. *B.G.*, 523 P.2d at 254 n.21.

180. *Id.* at 257-58. See also *Nancy S. v. Michelle G.*, 272 Cal. Rptr. 212 (Ct. App. 1991); *Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Ct. App. 1983); *In re Lynna B.*, 155 Cal. Rptr. 256 (Ct. App. 1979); *In re Volkland*, 141 Cal. Rptr. 625 (Ct. App. 1977).

181. *In re Marriage of Gayden*, 280 Cal. Rptr. 862, 868 (Ct. App. 1991). See *supra* part III.C. for discussion of the facts.

182. This standard is considerably easier to meet than the test applied in custody disputes between legal and nonlegal parents. See *supra* note 26 and accompanying text.

183. *Gayden*, 280 Cal. Rptr. at 868. See *supra* part III.C. for discussion of the circumstances which may warrant such an award.

184. Two cases involving juvenile dependency proceedings have cited the *Gayden* test in awarding visitation to a *de facto* parent. See *In re Robin N.*, 9 Cal. Rptr. 512, 515-16 (Ct. App. 1992) (using *Gayden* test to support award of three-way visitation to child's mother, father, and *de facto* father); *In re Hirenia C.*, 22 Cal. Rptr. 2d 443, 452 (Ct. App. 1993) (using *Gayden* test to support award of visitation to child's *de facto* mother who had previously been the lesbian partner of child's adoptive mother).

### B. *IN LOCO PARENTIS*<sup>185</sup>

The California Court of Appeal has described a person standing *in loco parentis* as:

[A] person who has put himself [sic] in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to legal adoption, . . . stand[s] *in loco parentis*, and the rights, duties and liabilities of such person are the same as those of the lawful parent.<sup>186</sup>

California courts have used the common law doctrine of *in loco parentis* in the context of tort law to impose upon persons standing *in loco parentis* the same rights and obligations imposed by statutory and common law upon parents<sup>187</sup> and to confer certain benefits upon children such as more favorable inheritance tax treatment<sup>188</sup> and worker's compensation benefits.<sup>189</sup> However, California courts have never applied the doctrine of *in loco parentis* to give a nonlegal parent the same rights as a legal parent in a custody dispute.<sup>190</sup>

### C. *EQUITABLE ESTOPPEL*

The doctrine of estoppel is:

[I]mposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into action upon the be-

---

185. This doctrine is similar to the doctrine of *de facto* parenthood, and at least one court has used the terms interchangeably. *In re Marriage of Halpern* 184 Cal. Rptr. 740, 747 (Ct. App. 1982).

186. *Loomis v. State*, 39 Cal. Rptr. 820, 822 (Ct. App. 1964).

187. *See, e.g., Costello v. Hart*, 100 Cal. Rptr. 554, 556 (Ct. App. 1972).

188. *See, e.g., Loomis*, 39 Cal. Rptr. at 823-24.

189. *See, e.g., Moore Shipbuilding Corp. v. Industrial Accident Comm'n.*, 196 P. 257, 260 (Cal. 1921).

190. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 217 (Ct. App. 1991). A same-sex partner advanced this theory arguing that the court could apply this doctrine to give her the same custody and visitation rights as a legal parent. The court declined.

lief that such enforcement would not be sought.<sup>191</sup>

Under some circumstances, California courts have used the doctrine of equitable estoppel to prevent husbands from denying paternity to avoid paying child support where the husbands have previously represented to their wives' children that they were their biological fathers.<sup>192</sup> The California Court of Appeal has held that where: (1) a husband represented to the child that he was his or her father; (2) the child relied upon the representation; (3) the child was unaware of the true facts; and (4) the representation was of such a duration as to frustrate the opportunity for the child to establish a parent-child relationship with the true biological father, the husband is estopped from denying his paternity for the purpose of avoiding paying child support.<sup>193</sup> However, California courts have never used the doctrine of equitable estoppel against a biological parent to award custody or visitation to a nonlegal parent.<sup>194</sup>

## V. RECOMMENDATION

The aforementioned theories and existing statutory law do

191. *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 436 N.E.2d 1265, (N.Y. 1982) (quoted in Brenda J. Runner, *Protecting a Husband's Parental Rights When his Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. LAW 115 (1989-90)).

192. See *In re Marriage of Johnson*, 152 Cal. Rptr. 121, 122 (Ct. App. 1979); *Clevenger v. Clevenger*, 11 Cal. Rptr. 707, 708 (Ct. App. 1961). See also Polikoff, *supra* note 5, at 491.

193. *In re Marriage of Valle*, 126 Cal Rptr. 38, 41 (Ct. App. 1975); *Clevenger*, 11 Cal Rptr. at 716-17. See also, *In re Guardianship of Ethan S.* 271 Cal. Rptr. 121, 130 (Ct. App. 1990) (holding that a husband is estopped from asserting paternity based on a presumption of fatherhood where he represents to a child that he is not the child's father and the child relies on that representation).

194. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 218 (Ct. App. 1991). A same-sex partner argued that the court should apply the doctrine to prevent the biological mother from denying the existence of a parent-child relationship that she encouraged and supported for many years where the purpose of her denial was to obtain sole custody of the children. The court declined to do so. Although the court acknowledged that other states have used the doctrine to prevent a wife from denying the paternity of her husband, the court explained that its use in the out-of-state cases is based on "[o]ne of the strongest presumptions in law . . . that a child born to a married woman is the legitimate child of her husband." Runner, *supra* note 191, at 116 (quoted in *Nancy S.*, 279 Cal. Rptr. at 218). Because *Nancy S.* involved a dispute between two unmarried, same-sex partners, the court reasoned that the out-of-state cases were inapplicable because, here, no such presumption existed. For a discussion of these out-of-state cases, see Runner, *supra* note 191, at 115. See also *Ethan S.*, 271 Cal. Rptr. at 130; *supra* note 193 and accompanying text.

not recognize the reality of children's lives. Courts cannot make the family life of all children uniform. As one legal scholar notes, "[w]hen parents create a nontraditional family, that family becomes the reality of the child's life."<sup>195</sup> Children's interests should be protected within the context of their nontraditional families.<sup>196</sup>

Current doctrines establishing parental rights must strain to encompass the area of child custody and visitation. These doctrines were either not intended to deal with child custody and visitation or were not intended to deal with nontraditional families. Even if nonlegal parents were able to establish custody and visitation rights under these doctrines, the doctrines would still be inadequate. Taken literally, none of these doctrines specifically requires the legal parent's cooperation in the creation of the parent-child relationship. The doctrines focus exclusively on the acts of the nonlegal parent, and the intent of the legal parent in establishing a parent-child relationship between the child and nonlegal parent is irrelevant. Thus, parental autonomy remains unprotected, exposing legal parents to the possibility of litigation brought by outsiders such as long standing child-care providers, relatives, friends, or others whom the legal parents never intended to function as their children's parents and whom children do not perceive to be their parents.<sup>197</sup>

#### A. POSSIBLE ALTERNATIVES

Two states have developed innovative approaches to child custody and visitation disputes involving nonlegal parents, one by statute and one by case law. A third approach is a scholarly reassessment of parental status which no court or legislature has yet adopted.<sup>198</sup> This section will discuss and analyze these three approaches. Each approach is significant in that each acknowledges the reality of the children's lives in nontraditional family environments and attempts to fashion rules to serve the children's interests within the context of those families should they

---

195. Polikoff, *supra* note 5, at 482.

196. *Id.*

197. The *Gayden* test, enunciated under the doctrine of *de facto* parenthood, does provide for the protection of parental autonomy. See discussion *supra* part III.C.

198. Polikoff, *supra* note 5, at 483.

dissolve.<sup>199</sup>

### 1. *Child-parent Relationship*

An Oregon statute permits anyone who “has established emotional ties creating a child-parent relationship with a child” to intervene or petition for custody or visitation.<sup>200</sup> The statute also permits any person who “has maintained an ongoing personal relationship with substantial continuity for at least one year, through interaction, companionship, interplay and mutuality” to petition the court for visitation.<sup>201</sup> The court will grant visitation “[i]f the court determines from clear and convincing evidence that visitation is in the best interests of the child and is otherwise appropriate in the case.”<sup>202</sup> In addition to conferring standing to persons with parent-child relationships, the statute also gives the court broad discretion to grant “custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis” where the court determines such a grant is appropriate and in the best interests of the children.<sup>203</sup>

This statute is in sharp contrast to California statutory law. Under California law, courts have found that individuals basing their custody and visitation rights on parent-child relationships lack standing to assert such rights.<sup>204</sup> Under California statutory law, individuals basing their custody rights on parent-child rela-

---

199. *Id.*

200. OR. REV. STAT. § 109.119(1) (1989).

201. *Id.* § 109.119(5).

202. *Id.*

203. *Id.* § 109.119(1). Child-parent relationship is defined as:

[A] relationship that exists or did exist, in whole or in part, within 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 necessities and provided the child with necessary care, education and discipline, and such 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.* § 109.119(4) (excluding foster parents unless the relationship continued for more than three years).

204. *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Ct. App. 1990).

tionships must first show that custody with the legal parents would be detrimental to the children.<sup>205</sup> Traditionally, California courts have held that visitation rights of nonlegal parents must give way if legal parents oppose the visitation.<sup>206</sup> The Oregon statute allows the court to grant custody or visitation to a person in a parent-child relationship where such a grant is in the best interests of the child.<sup>207</sup>

Unlike California statutory law, the Oregon statute allows for joint-custody between a legal parent and nonlegal parent over the objections of the legal parent.<sup>208</sup> The Oregon Supreme Court stated that "it would never be proper to give custody to someone other than the natural parent unless custody in the other person best served the child's interests."<sup>209</sup> While awarding joint custody would require a "best interests" standard, "compelling reasons" are required before a court will deprive a legal parent of custody in favor of a nonlegal parent.<sup>210</sup>

One legal scholar described the Oregon statute as "the most well-developed understanding of parental relationships absent biological or adoptive ties."<sup>211</sup> However, the same scholar also criticized the statute for not sufficiently protecting parental rights.<sup>212</sup> The statute does not require any showing of the legal parent's intent to create a parental relationship between his or her child and the third party. Under the statute, a live-in babysitter, boyfriend, girlfriend, or a relative who had lived in the parent's home could seek custody or visitation.<sup>213</sup>

The statute is also unnecessarily restrictive in its requirement that the petitioner have custody of or have lived with the child within six months of bringing the action.<sup>214</sup> This require-

205. CAL. CIV. CODE § 4600(c).

206. *Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 216-17 (Ct. App. 1991); *Curiale*, 272 Cal. Rptr. at 522. See *supra* part IV.A.2. for discussion of recent trends in conflict with traditional holdings.

207. OR. REV. STAT. § 109.119(1).

208. Intact lesbian-mother couples have been awarded joint-custody under the statute. *In re L.O. & E.W.*, No. 15-89-0096 (Or. Cir. Ct., Lane Cty., Feb. 7, 1989).

209. *In re Hrubby*, 748 P.2d 57, 66 n.9. (1987).

210. *Id.* at 60-63.

211. Polikoff, *supra* note 5, at 486.

212. *Id.* at 488.

213. *Id.*

214. *Id.*; OR. REV. STAT. § 109.119(4).

ment may exclude an individual who functions as a parent with the legal parent's consent but who does not petition the court within six months of the dissolution of his or her relationship with the legal parent.<sup>215</sup> If the individual remains a functional parent, it is inappropriate to limit that person's relief to visitation and require proof that visitation is in the best interests of the child.<sup>216</sup>

## 2. *Equitable Parenthood*

An equitable parent is one who is not the biological parent of the child but who desires such recognition and is willing to accept the obligations of supporting the child, in return for "reciprocal rights" of custody and visitation.<sup>217</sup> The Michigan Court of Appeals created the doctrine of equitable parent in *Atkinson v. Atkinson*.<sup>218</sup> In that case, the mother of a four-year-old son argued that the court should deny her ex-husband custody and visitation because he was not the biological father of the child conceived and born during the marriage. The Court of Appeals granted the ex-husband custody, finding:

[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 acknowledge 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.<sup>219</sup>

Equitable parenthood is grounded in the theories of equitable estoppel and equitable adoption.<sup>220</sup> A significant aspect of the doctrine is its recognition of the husband's rights based upon

---

215. Polikoff, *supra* note 5, at 488-89.

216. *Id.*

217. *Atkinson v. Atkinson*, 408 N.W.2d 516, 520 (Mich. App. 1987).

218. *Atkinson v. Atkinson*, 408 N.W.2d 516 (Mich. App. 1987).

219. *Id.* at 519.

220. *Id.* at 519-20.

his relationship to the child, not based upon his marriage to the child's mother.<sup>221</sup> Under the equitable parent doctrine, a person who is indisputably not the biological parent of the child may acquire parental rights.<sup>222</sup>

California courts have expressly declined to adopt the doctrine of equitable parenthood. In *Goetz*, the California Court of Appeal refused to apply the doctrine to a stepfather's request for joint-custody of his stepson.<sup>223</sup> The court acknowledged that it is arguable that the Legislature gave limited recognition to the equitable parent doctrine by giving stepparents limited visitation rights.<sup>224</sup> Yet, ultimately the court declined to recognize the doctrine, again deferring to the Legislature because given the "complex practical, social and constitutional ramifications" the court believed that the Legislature is better able to consider the expansion of the law in this area.<sup>225</sup>

Of the three approaches discussed in this section, equitable parenthood is the only one that explicitly requires the legal parent's cooperation in creating a relationship which is *parental* in nature. The author believes the major shortcoming of this doctrine is that it was conceived in the narrow context of marriage dissolution proceedings, applying only to children born or conceived during the marriage. Thus, a court could distinguish this case if faced with a dispute arising from the dissolution of a same-sex or unmarried heterosexual relationship.<sup>226</sup> A court, however, should not do so. The test articulated in *Atkinson* could easily be adapted from a marital situation to a nonmarital one.<sup>227</sup> If a nonlegal parent satisfies the three elements of the *Atkinson* test, he or she is no less a parent than was the husband in *Atkinson*.<sup>228</sup>

---

221. Polikoff, *supra* note 5, at 484.

222. *In re Marriage of Goetz & Lewis*, 250 Cal. Rptr. 30, 33 (Ct. App. 1988).

223. *Id.* See *supra* part III.A. for discussion of the facts.

224. *Goetz*, 250 Cal. Rptr. at 33; CAL. CIV. CODE § 4351.5.

225. *Goetz*, 250 Cal. Rptr. at 33.

226. Polikoff, *supra* note 5, at 485.

227. *Id.* (discussing the test's application to lesbian-mother relationships).

228. *Id.*



### 3. *Nonexclusive Parenthood*

Nonexclusive parenthood is a hybrid of the child-parent relationship and equitable parenthood approaches.<sup>229</sup> Legal scholar Katharine Bartlett<sup>230</sup> proposed this approach but no court or legislature has adopted it.<sup>231</sup> Her approach redefines parenthood into a nonexclusive status and permits awards of custody and visitation based on the child's best interests.<sup>232</sup> Under this approach, courts should grant party status to legal, biological, and *psychological parents* in custody and visitation disputes. Bartlett defines three criteria for identifying a psychological parent: (1) "physical custody of the child for at least six months;" (2) "mutuality" where the adult's motivation is "genuine care and concern for the child and the child perceives the adult's role to be that of [a] parent;" and (3) "the relationship with the child began with the consent of the child's legal parent or under court order."<sup>233</sup>

Like the Oregon statute, this approach requires that the parent-child relationship be one of "mutuality." However, Bartlett's definition of mutuality provides that the child must perceive the adult's role to be that of a parent.<sup>234</sup> Bartlett notes that if the child perceives the relationship to be subject to the discretion of the legal parent, "a true psychological parenting relationship does not exist."<sup>235</sup>

Unlike the Oregon statute and the existing legal theories asserted in California, this approach requires the relationship begin with "the consent of the child's legal parent or under court order."<sup>236</sup> While this is an important requirement, one legal scholar has criticized it for not defining what specifically the legal parent must consent to.<sup>237</sup> To the extent that this approach

---

229. *Id.*

230. Associate Clinical Professor of Law, Duke University.

231. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Promise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984). See also Polikoff, *supra* note 5, at 489.

232. Polikoff, *supra* note 5, at 489.

233. Bartlett, *supra* note 231, at 946-47.

234. Polikoff, *supra* note 5, at 489-90.

235. Bartlett, *supra* note 231, at 947.

236. Polikoff, *supra* note 5, at 489-90.

237. *Id.* at 490 ("Because parental autonomy would be eviscerated unless the stan-

makes it clear that the child must consider the adult to be a parent, the legal parent should also consider the other adult to be a parent.<sup>238</sup>

## B. REDEFINING PARENTHOOD

California courts have overwhelmingly declined to address the problems relating to child custody and visitation specific to nontraditional families by mechanically adhering to and narrowly interpreting existing statutory law. The courts, restricted by existing statutory law, have often deferred to the Legislature when forced to apply these statutes to nontraditional relationships.<sup>239</sup>

The Legislature must respond. The Legislature should redefine parenthood to include functional parents. In addition to defining a legal parent as someone with a biological or adoptive tie to the child, the definition should include an individual who functions as a child's parent and whose relationship with that child developed with the consent and cooperation of a legally recognized parent.<sup>240</sup> Such a definition would fit the reality of today's nontraditional families, allowing biological, adoptive, and *functional* parents to compete for child custody and visitation on equal grounds.

By defining legal parents to include those in functional parent-child relationships, functional parents would gain standing

---

dard were rigid, parenthood should not be conferred unless the legal parent consents to or cooperates in the formation of an explicit parent-child relationship between the adult and the child.”).

238. *Id.*

239. In *Nancy S.* the court reasoned:

By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue.

*Nancy S. v. Michelle G.*, 279 Cal. Rptr. 212, 219 (Ct. App. 1991). See also *Curiale v. Reagan*, 272 Cal. Rptr. 520, 522 (Ct. App. 1990); *In re Marriage of Goetz & Lewis*, 250 Cal. Rptr. 30, 33 (Ct. App. 1988); *Perry v. Superior Court*, 166 Cal. Rptr. 583, 586 (Ct. App. 1980).

240. Polikoff, *supra* note 5, at 573.

to bring their claims and compete on equal footing with biological and adoptive parents for custody and visitation. Because functional parents would be considered legal parents, courts would no longer require them to show that custody with the legal parents is detrimental before asserting custody rights of their own.

The UPA defines the "parent and child relationship" as "the legal relationship existing between a child and his [sic] 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."<sup>241</sup> The author proposes that the statute be amended to read "the legal relationship existing between a child and his or her natural, adoptive, or *functional* parents . . . ." Under this approach a functional parent is one who, though not a biological or adoptive parent of a child, may be considered a parent where:

- (a) the individual and the child mutually acknowledge the relationship as parent and child; and
- (b) the individual has made available to the child food, clothing, shelter, and incidental necessities and provided the child with the necessary care, education, and discipline; and
- (c) the individual has resided with or had physical custody of the child for at least one year; and
- (d) the parent-child relationship has developed with the support and cooperation of the legally recognized parent, with the intent that the relationship be parental in nature, or under court order.<sup>242</sup>

---

241. CAL. CIV. CODE § 7001.

242. A similar amendment was proposed in an earlier note. See Delaney, *supra* note 11, at 210. The proposed statutory amendment included *de facto* parents, and the statutory definition of *de facto* parent included the following criteria:

- (1) The biological mother and the nonmarital partner must have mutually decided to start a family prior to the child's conception;
- (2) the nonmarital partner and the child must mutually acknowledge a relationship as parent and child;
- (3) the relationship must have been in existence for at least one year prior to the time of filing the action to determine parentage, during which time the nonmarital partner must have had physical custody of the child or resided in the same household as the child; and

As legal parents, functional parents will be able to intervene or petition for custody or visitation. The proposed definition will eliminate standing and jurisdictional problems by elevating functional parents to the status of legal parents.<sup>243</sup>

Both the Legislature and the courts have expressed concern for the protection of parental autonomy. The proposed approach protects parental autonomy by requiring that the parent-child relationship develop with the support and cooperation of the legally recognized parent, with the intent that the relationship be parental in nature. This approach also protects children's best interests by preventing legal parents from cutting off, for any reason, parent-child relationships which the legal parents initially supported and helped develop.

## VI. CONCLUSION

Broadening the definition of legal parent and focusing on the parent-child relationship will clarify existing uncertainties related to parental rights and nontraditional families. Contrary to existing approaches, the author's proposed approach will accommodate functional parents involved in a variety of nontraditional families should these families dissolve. In addition, by recognizing nontraditional family relationships, the law will no longer condone disparaging community attitudes. This change in the law may lead society to reevaluate many current positions.

---

(4) the nonmarital partner must have supplied or otherwise made available food, clothing, shelter, and incidental necessities and provided the child the necessary care, education, and discipline, 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.

*Delaney*, *supra* note 11, at 212. While the proposed criteria focus on the relationship and seek to protect the biological parents, they are unnecessarily restrictive. The criteria certainly solve the problems faced by the lesbian-mothers in *Nancy S* and *Curiale*, the two cases the note addressed. However, they exclude stepparents and any other individuals with whom the biological mothers did not agree to start families with prior to the children's conception. This would include individuals who develop relationships with the children subsequent to the children's conception and birth or to men and women who unintentionally conceive a child. Functional parent-child relationships may develop with the consent and cooperation of the legal parents following the children's conception. Any proposed legislative amendment must address such relationships.

243. The author derived the proposed criteria from the three previously discussed approaches and from the *Gayden* test articulated by the California Court of Appeal.

258 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 24:223

For example, as more men are legally recognized as functional parents and are awarded custody and visitation, attitudes towards areas like child care and family leave may change, making them more attractive to a broader range of people. These areas are more likely to be addressed to the benefit of all parents, men and women alike, should the Legislature include functional parents in its definition of parent.