Would've, Could've, Should've: Custodial Standing of Non-Biological Same-Sex Parents for Children Born Before Marriage Equality

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WOULD'VE, COULD'VE, SHOULD'VE: CUSTODIAL STANDING OF NON-BIOLOGICAL SAME-SEX PARENTS FOR CHILDREN BORN BEFORE MARRIAGE EQUALITY

FRANK AIELLO*

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I. INTRODUCTION

Same-sex couples have been raising children for decades.¹ Now that marriage is a fundamental right of same-sex couples, it seems likely – if not certain – that non-biological same-sex parents will enjoy the presumption of parentage to children born during a marriage or through adoption.² There are older children, however, who were born or adopted into same-sex

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families when marriage was unavailable or uncertain. The custodial rights of their non-biological parents are unclear.

While this issue will eventually sunset, courts will face the issue of how to determine the standing of an unmarried, non-biological same-sex parent seeking custody for children brought into a relationship before marriage equality for some time. Non-biological, non-adoptive, and unmarried same-sex parents have a relationship to these children unique to other third parties but still find themselves subject to standing rules developed for other individuals. These rules are all grounded in protecting the biological parent’s rights as fundamental and superior to any other non-biological parental figure. But this distinction does not merit the same weight when judged against the rights of a same-sex partner to that biological parent at the time of the birth, someone who did not have the option to biologically participate and that we now recognize was denied the fundamental right to marry or adopt a child.

The custodial or visitation standing of non-biological parental figures has been acknowledged by states to different degrees and in limited circumstances for grandparents, step-parents, or under doctrines such as equitable parenting,3 in loco parentis,4 or psychological parenthood.5 The application of these rules to a non-biological same-sex parent could be tragic. A child who has a significant relationship with the non-biological parent could be prevented the benefit of their parenting, and the child may experience the significant trauma of separation without any adjudication on the merits of whether visitation or custody for that non-biological parent could in fact be in the best interest of the child.

This article provides some background on the standing afforded to non-

3. The American Law Institute has defined “equitable parenthood,” also known as a “de facto parent,” as an individual other than a legal parent or parent by estoppel who, for a significant period of time not less than two years (i) lived with the child, and (ii) for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, (A) regularly performed a majority of the caretaking functions for the child, or (B) regularly performed a share of caretaking functions at least as great as that of the parent with whom the child primarily lived. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(G) (AM. LAW INST. 2003).

4. “In Loco Parentis” involves the unofficial or informal transfer of parental status and parental duties onto a person or entity who is not the child’s legal parent, but who intends to take on the parental role. See 67A C.J.S. Parent and Child § 367 (2016).

5. Psychological parenthood is a consensual status that can be created in a non-biological third party. Generally, the third party must be given consent by the legal parent to (1) perform a significant degree of parental functions, (2) live with the child, and (3) form a parent-child bond with the child. See V.C. v. M.J.B, 748 A.2d 539 (N.J. 2000).
biological, unmarried, non-adoptive, same-sex parents to children born before the Supreme Court found the fundamental right to marry for same-sex couples. It then examines the divergence that has developed in accepting the custodial standing of non-biological same-sex parents since the fundamental right to marry for same-sex couples was guaranteed. It also argues that non-biological same-sex partner standing is distinguishable from that of other third parties and should always be recognized under an appropriate test.

Going forward, this article uses the term “non-biological same-sex parent” to mean a same-sex partner that was in a relationship with a child’s biological parent at the time of birth. This term presumes that the same-sex couple was unmarried at the time of the child’s birth and that the non-biological parent did not adopt the child. This article also acknowledges that parenting rights can be granted to different degrees and using different terminologies. Here we will use the term “custodial standing” to represent the right of a non-biological same-sex parent to seek a parenting right to any degree later determined appropriate by a court.

II. NON-BIOLOGICAL SAME-SEX CUSTODIAL RIGHTS BEFORE MARRIAGE EQUALITY

Various schemes exist for granting non-biological third parties standing for visitation or liability for support of children. When marriage and second-party adoption were unavailable to same-sex couples, these rules were frequently used to define the custodial standing of non-biological same-sex parents. While this article argues that applying these rules generally to same-sex couples is problematic, some background on the concepts and prior application to same-sex couples is instructive.

A parental presumption is sometimes provided to non-biological parents under the Uniform Parentage Act (UPA). The National Conference of Commissioners on Uniform State Laws approved the UPA in 1973 to “establish a set of rules for presumptions of parentage” and “shun the term ‘illegitimate.’” A version of the UPA has been adopted in at least

6. The background provided here is limited to the scope of this article’s argument. Significant thought has been devoted to the survey and definition of same-sex parental rights. See Jeffrey A. Parness, Parentage Law (R)evolution: The Key Questions, 59 WAYNE L. REV. 743, 744-745 (2013).
11. UNIF. PARENTAGE ACT, Prefatory Note (UNIF. LAW COMM’N 2002).
nineteen states.\textsuperscript{12} The UPA presumes parentage, in the absence of biological verification, in certain cases. The UPA also provides that a man is presumed to be the natural father of a child when the child is born during marriage, when the man acknowledges his paternity in writing, or when “he receives the child into his home and openly holds out the child as his natural child.”\textsuperscript{13} Later, the UPA provides that for determining maternal paternity “[i]nsofar as practicable, the provisions of this Act applicable to the father and child relationship apply.”\textsuperscript{14} In its comments, the UPA states that:

[w]hile it is obvious that certain provisions in these Sections would not apply in an action to establish the mother and child relationship, the Committee decided not to burden these already complex provisions with references to the ascertainment of maternity. In any given case, a judge facing a claim for the determination of the mother and child relationship should have little difficulty deciding which portions [of the UPA should apply].\textsuperscript{15}

In states where the UPA has been adopted, interpretation of these provisions has been key to the custodial standing of non-biological same-sex partners.\textsuperscript{16} California\textsuperscript{17} and Kansas\textsuperscript{18} have interpreted the UPA broadly to provide standing to non-biological same-sex parents. Missouri has interpreted the UPA as denying standing to a non-biological same-sex parent.\textsuperscript{19}

In an early and groundbreaking case, \textit{Elias B. v. Superior Court}, the California Supreme Court found that a woman who agreed to raise children with her lesbian partner, supported her partner’s artificial insemination, and held the two children out as her own, was the children’s parent under the UPA and had the obligation to support them.\textsuperscript{20} Kansas has also read the UPA to allow standing by non-biological same-sex parents. In \textit{Frazier v. Goudschaal}, a biological parent argued that there was no subject matter

\begin{footnotesize}
\begin{enumerate}
\item \textit{UNIF. PARENTAGE ACT} § 4.
\item \textit{Id.} § 21 cmt. (1973).
\item \textit{Id.}
\item Frazier v. Goudschaal, 295 P.3d 542, 553 (Kan. 2013).
\item White v. White, 293 S.W.3d 1, 10 (Mo. Ct. App. 2009).
\item See \textit{Elisa B.}, 117 P.3d at 662; see also \textit{MOULDING supra note} 16.
\end{enumerate}
\end{footnotesize}
jurisdiction for a non-biological same-sex parent to decide the custody issues involving her child because the parties were not married. The court avoided this issue by invoking its equitable jurisdiction to specifically enforce the co-parenting agreement that had been entered into by the parties. The biological parent also suggested a reading of the Kansas Parenting Act, modeled after the UPA, which acknowledged standing only for one biological father and one biological mother. However, the court read the statute permissively to allow for the possibility of more than one mother to be an interested party under the act. Additionally, the biological parent argued that her previous co-parenting agreement was unenforceable as contrary to public policy. While the biological parent argued that the United States Supreme Court’s decision in Troxel v. Granville and Kansas’ parental preference doctrine trumped the co-parenting agreement, the court found that she actually exercised these rights and asserted these preferences when she entered into the co-parenting agreement. The court was unwilling to find the agreement void “merely because the biological mother agreed to share the custody of her children with another, so long as the intent, and effect, of the arrangement was to promote the welfare and best interests of the children.” The biological parent’s reference to prior precedent preventing “grandparent like” figures to limit standing was unpersuasive. The court found the standing of an unrelated third party distinguishable from “an agreement between two adults to utilize artificial insemination to bring children into the world to be raised and nurtured by the both of them.”

In contrast, Missouri denied a non-biological same-sex parent standing by reading its version of the UPA to limit parentage to only one mother and one father. In White v. White, a same-sex couple had two children. Each partner gestated one of the children. Upon dissolution of the relationship, one of the parties prevented visitation of the non-biological parent to that

22. Id. at 552.
23. Id.
24. Id. at 554.
25. Id.
27. Frazier, 295 P.3d at 554.
28. Id. at 556.
29. Id. at 555-56.
30. The court also notes that it is not required to adopt the concept of a psychological parent because the parties have already recognized the non-biological parent’s status here through the parenting agreement. Id. at 556.
adult's own biological child. The non-biological partner petitioned for custody and the biological parent argued that the non-biological parent did not have standing. The court first rejected the non-biological parent's contention that she can establish standing under Missouri law because the statute is designed to allow parties to bring a claim when there is no presumed biological father or mother, but that if a biological father or mother is identified, the right to bring such standing does not exist. The court found that standing under its adoption of the UPA "only allows claims for declaration of a parent-child relationship based on a biological tie or a presumption due to marriage or attempted marriage." The non-biological parent argued that she was the de facto or equitable parent, but the court found no authority for the doctrine in Missouri case law and declined to adopt the concept.

The court also declined to provide standing to the non-biological parent based on her acting in loco parentis, finding that to the extent Missouri had adopted this doctrine statutorily, it only applied to a stepparent's obligation to support a step child. The court determined that the doctrine shall not be construed to grant a stepparent any right to the care and custody of a stepchild, and care and custody terminates when the child is no longer living in the same home. Finding that there is no precedent for applying the concept of equitable estoppel to paternal relationships, the court also declined to find for the non-biological parent on this argument. In Missouri, a natural parent has a superior right to custody of a child, but "the parental presumption can be rebutted even though the parent or parents are found to be fit and competent, upon a showing 'that the welfare of the children, due to special or extraordinary circumstances, renders it in their best interests that their custody be granted to a third person.'" The court did not find any potential relationship on the part of the non-biological same-sex parent to the child as such an exceptional circumstance.

32. Id.
33. Id.
34. Id. at 11.
35. Id. at 16.
36. Id. at 15-16.
37. Id. at 18.
38. Id.
39. "Accordingly, at least since 1973, Missouri courts have recognized that a third party's foundational standing to litigate custody or visitation is dependent upon the third party being a named party in an action brought by someone else (parent, Juvenile Officer) or being permitted to intervene in a pending action (dissolution) or in cases
Other jurisdictions have defined a non-biological same-sex partner’s standing under rules that would apply generally to adult third parties, such as grandparents, stepparents or others acting in loco parentis.\(^40\)

The standing of third parties to petition for custody or visitation is limited by the Supreme Court’s decision in Troxel v. Granville.\(^41\) At the time, a Washington statute allowed anyone to petition at any time for visitation rights to a child and authorized a court to grant such right if it was in the child’s best interest.\(^42\) The children’s father in Troxel was deceased and the paternal grandparents petitioned for greater visitation than was being permitted by the children’s mother.\(^43\) The Supreme Court found that the Washington statute was unconstitutional because it did not presume that a fit parent will act in the best interest of the child and failed to provide any protection for the parent’s constitutional right to make decisions regarding her children.\(^44\) Importantly, the Court declined to address “whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation,”\(^45\) whether parental unfitness was a precondition to overriding a parent’s determination of the children’s best interests, and “the precise scope of the parental due process right in the visitation context.”\(^46\) The limits of the Troxel decision have formed the boundaries of enforceability of third party standing rules going forward.\(^47\)

In Egan v. Fridlund–Horne, the Arizona Court of Appeals denied standing to a non-biological same-sex parent for visitation using the limitations applicable to other third parties, such as grandparents, stepparents, and others who acted in loco parentis.\(^48\) The court of appeals found error in a lower court’s grant of standing for visitation rights to a

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where the third party already has something other than de facto custody (decretal custody).” Id. at 21.


42. Id. at 58.

43. Id. at 69.

44. Id. at 63-64.

45. Id. at 66.

46. Id.

47. See In re E.L.M.C., 100 P.3d 546, 552 (Colo. App. 2004), where Colorado noted these limitations in allowing a same-sex parent standing to seek visitation.

non-biological same-sex parent because evidence was not introduced to rebut the presumption that the biological parent was acting in the best interest of the child.\(^\text{49}\) The non-biological same-sex parent argued that her rights were distinguishable from those provided under the third-party visitation statute\(^\text{50}\) but the court disagreed.\(^\text{51}\) Important to the court in this case was the fact that the biological parent was not contesting visitation generally, but rather only the amount of visitation awarded to the former same-sex partner.\(^\text{52}\) Arizona declined to recognize any common law \textit{de facto} parenting doctrine that would afford "a fundamental liberty interest in the care, custody, and control of the child, to the same extent as the legal parent."\(^\text{53}\) Key to the court's decision was the distinction between the fundamental rights of a biological parent as distinct to those of a non-parent.\(^\text{54}\)

In contrast, Colorado determined that a non-biological same-sex parent had standing to seek custody under its statutory framework for third parties.\(^\text{55}\) Non-biological third parties are permitted standing to seek custody in Colorado as psychological parents.\(^\text{56}\) In \textit{In re E.L.M.C.}, the adoptive parent of a child argued that her former same-sex partner was barred from standing because she did not have a legal relationship to the child, the petition for custody was not incidental to a marriage dissolution proceeding, and that as the legal parent she had not relinquished custody of the child.\(^\text{57}\) The court rejected all of these arguments based on its

\(^{49}\) \textit{Id.} at 1225.

\(^{50}\) "She argues that each of those cases involved grandparents who were third parties to the basic family unit. She contends that she stands in a much different position than a typical grandparent because: (1) Egan invited Hochmuth into a parent-like relationship with the child; (2) Egan had Hochmuth artificially inseminate her; (3) Egan used Hochmuth's name for the child's middle name; (4) Egan allowed Hochmuth's name to be on the child's birth certificate; and (5) Egan treated Hochmuth as a co-parent for seven years. Thus, according to Hochmuth, Egan should be estopped from denying substantial visitation rights based on Egan's invitation to join the family unit and participate in all aspects of the child's life." \textit{Id.} at 1220.

\(^{51}\) \textit{Id.}

\(^{52}\) \textit{Id.} at 1220.

\(^{53}\) \textit{Id.} at 1221 (contrasting \textit{In re Parentage of L.B.\textquoteright}, 122 P.3d 161, 178 (Wash. 2005)).

\(^{54}\) This is illustrated by the court's extensive discussion of \textit{Troxel}, determining the rights of a biological parent as adverse to the rights of third parties, as a framework for their decision. \textit{Id.} at 1218-29.


\(^{56}\) \textit{Id.} at 554.

\(^{57}\) \textit{Id.}
interpretation of the standing statute.\textsuperscript{58} The court also found that the award of custody was compelling even in light of the adoptive parent’s constitutional rights as the “sole, and fit, legal parent.”\textsuperscript{59} Taking note of *Troxel* and its own state precedent, the court rejected a requirement that a parent be unfit for interference with the parent’s parenting plan.\textsuperscript{60} The court explicitly stated that for purposes of applying the psychological parent doctrine, the fact that the adoptive mother and psychological parent are the same sex is not relevant.\textsuperscript{61}

In Indiana, a non-biological same-sex partner was also found to have standing to seek visitation under a third party standing doctrine.\textsuperscript{62} In Indiana, the rights of third parties for standing to seek visitation is governed by case law.\textsuperscript{63} Acknowledging that the Indiana Supreme Court had vacated a prior decision finding parentage in a non-biological same-sex parent, the Indiana Court of Appeals still found that “a partner who did not give birth to the child has standing to seek visitation with the child. This is not to say that a former domestic partner is automatically entitled to visitation in these circumstances—it must still be established that visitation is in the child’s best interests.”\textsuperscript{64}

**III. NON-BILOGICAL SAME-SEX CUSTODIAL STANDING AFTER MARRIAGE EQUALITY**

After marriage equality, Florida, Illinois, and New York have continued to prohibit or greatly limit non-biological same-sex parent custodial standing. Oklahoma and Oregon, however, have created tests that acknowledge the unique role of non-biological same-sex parents and have granted them custodial standing.

Florida recently denied a non-biological same-sex parent standing using its traditional third party parenting standing doctrine. Florida does not recognize the concepts of a *de facto* or psychological parent and does not grant rights to a non-biological, non-legal parent unless there is proof that the biological parent has deserted or abandoned the child.\textsuperscript{65} In *Russel v. Pasik*, a non-biological same-sex parent petitioned a court for timesharing of two children that she jointly raised with the biological parent. The

\textsuperscript{58} *Id.*

\textsuperscript{59} *Id.* at 558.

\textsuperscript{60} *Id.*

\textsuperscript{61} *Id.* at 551.


\textsuperscript{63} *Id.* at 696-97.

\textsuperscript{64} *Id.* at 697.

children were born to the biological mother via artificial insemination when she and the biological parent were in a relationship.\textsuperscript{66} After the relationship ended, the non-biological parent was allowed visitation by the biological parent, provided financial support to the children, and listed them as dependents on her health insurance policy.\textsuperscript{67} However, the biological parent later refused the non-biological parent visitation.\textsuperscript{68} The non-biological parent then petitioned the district court for timesharing on the basis that she was the \textit{de facto} or psychological parent to the children.\textsuperscript{69} The biological parent brought a motion to dismiss the non-biological parent’s petition because the non-biological parent did not have standing.\textsuperscript{70} The trial court declined to dismiss the case, but the District Court of Appeals reversed, finding that the motion to dismiss should have been granted because the non-biological parent did not have standing under Florida law.\textsuperscript{71}

In considering the issue, the Florida Court of Appeals noted the requirements in Florida for visitation and timesharing and the explicit limitation to parents.\textsuperscript{72} As the non-biological parent’s petition acknowledged that she was not the legal parent of the child but instead a \textit{de facto} or psychological parent, the court found that she did not have standing for timesharing in Florida.\textsuperscript{73} The non-biological parent argued that the biological parent had waived any right to her privacy by inviting the non-biological parent to jointly raise the children.\textsuperscript{74} The court stated that this argument was improperly plead for appeal and warned that it would unlikely be persuasive because of numerous cases in Florida where the court found that the biological parent did not waive his or her due process rights through involvement of a nonparent.\textsuperscript{75} When the non-biological parent brought up her own due process rights, the court stated that the due process rights of a parent are only triggered by the “biological

\textsuperscript{66} Russell v. Pasik, 178 So. 3d 55, 57 (Fla. Dist. Ct. App. 2015). Interesting to note, but not material to the court’s analysis, the non-biological parent in the case involving these children was the biological parent to two other children born during the relationship via artificial insemination. \textit{Id. at 57.}

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.}

\textsuperscript{69} \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} FLA. STAT. ANN. § 61.13. (West 2014).

\textsuperscript{74} Russell, 178 So. 3d at 60.

\textsuperscript{75} See \textit{id.}
connection between parent and child." Among others, the court cited a precedential case where a same-sex egg-donor partner was granted parental rights to a child born by her same-sex partner to explain the biological connection requirement. The court stated that it is sympathetic to the non-biological parent’s desire to visit with the children and the potential importance to the children, but that the legislature would have to change the standing rules. The court declined to comment on whether awarding visitation would have been appropriate had the parties been married when the children were born but referenced a case regarding the right to visitation by an opposite-sex stepparent. The court also noted that the non-biological parent could have adopted the children, which would have given her the rights that she sought.

Illinois also recently denied standing to a non-biological same-sex parent using its third party custodial standing rule. Illinois has an equitable adoption doctrine that provides inheritance rights to a person treated as an adopted child. Illinois also grants standing to grandparents, great-grandparents, siblings or stepparents of a minor child seeking visitation. In this case, the biological parent and non-biological parent were in a relationship for at least six years. During a six-month period when the parties were separated, the biological parent became pregnant. Afterward the parties reconciled and the non-biological parent was present at the child’s birth. According to the non-biological parent, the parties publicly represented themselves as a family. After the parties’ romantic relationship dissolved, the non-biological parent continued to visit the child, spend a few hours with him daily, and spent every other weekend with him. The parties discussed adoption of the child by the non-

76. Id.
77. Id. at 60-61.
78. Id. at 61.
79. Id. (citing O’Dell v. O’Dell, 629 So. 2d 891 (Fla. Dist. Ct. App. 2015)).
80. Id. at 61.
81. See In re Parentage of Scarlett Z.-D, 28 N.E.3d 776, 790-91 (Ill. 2015).
84. Id.
85. Id.
86. Id.
87. Id. at ¶ 4.
biological parent, but agreed to wait until they secured sufficient funds.\textsuperscript{88} Later the biological parent informed the non-biological parent that she no longer wanted the non-biological parent to have contact with the child.\textsuperscript{89}

The non-biological parent filed a petition for visitation, alleging that based on her intent to adopt the child and her parent-child relationship with him, she had standing to seek visitation with the child under the equitable adoption doctrine.\textsuperscript{90} The biological parent filed a motion to dismiss arguing that the non-biological parent lacked standing for visitation rights.\textsuperscript{91} The circuit court dismissed the non-biological parent's petition for lack of standing.\textsuperscript{92} The court of appeals upheld the lower court's determination because the doctrine of equitable adoption in Illinois is solely a probate matter and not a basis for seeking custody.\textsuperscript{93}

The non-biological parent also argued that the long-standing parenting schedule that the parties maintained should be recognized and upheld by the court. The court distinguished an Illinois case where the court had enforced a prior visitation agreement because it was part of a court's consent decree.\textsuperscript{94} In so holding, we are not unsympathetic to the position of the [non-biological parent], or even that of [the child], having developed a loving relationship with each other that was encouraged by [the biological parent] during the first seven years of the child's life. However, we are unable to conclude that [the non-biological parent] has standing to petition for visitation under the Illinois laws as they currently exist; thus, we are unable to grant her the relief that she seeks.\textsuperscript{95}

Further, New York recently denied standing for visitation to a non-biological same-sex parent when a fit biological parent opposed it.\textsuperscript{96} Equitable estoppel does not prevent the biological parent from such opposition where the non-biological parent has enjoyed a close relationship with the child and exercised some control over the child without the parent's consent.\textsuperscript{97} Without much discussion, the Appellate Division of

\textsuperscript{88} Id. at ¶ 6.
\textsuperscript{89} Id. at ¶ 7.
\textsuperscript{90} Id. at ¶ 8.
\textsuperscript{91} Id. at ¶ 9.
\textsuperscript{92} Id. at ¶ 10.
\textsuperscript{93} Id. at ¶ 24.
\textsuperscript{94} See id. at ¶ 25.
\textsuperscript{95} Id. at ¶ 28.
\textsuperscript{97} See id. at 380.
New York’s Supreme Court found that these limitations on standing also applied to former same-sex partners. 98

While the issue has yet to be addressed in a published opinion by courts in Michigan, parties have also used an equitable parenting rule to deny standing to non-biological same-sex parents. In Michigan, a third party only has standing to petition for custody or visitation under an equitable parenting theory if the couple was in fact married.99 Before marriage equality, this explicit marriage requirement was used to bar non-biological same-sex parents standing to obtain custody or visitation. After marriage equality, the Michigan Supreme Court vacated a lower court’s decision to deny standing to a non-biological same-sex parent married in a foreign jurisdiction at a time when same-sex marriage was illegal in Michigan.100 The Michigan Supreme Court’s direction to the lower court to reconsider its decision in light of Obergefell appears to signal that Michigan courts must recognize out-of-state marriages for purposes of Michigan’s limited standing requirements; however, it remains to be seen whether Michigan will adjust its standing requirement to grant standing to those non-biological same-sex parents who were unable to take advantage of the opportunity to be married somewhere else.

While Florida, Illinois, and New York have continued to strictly limit non-biological same-sex parent standing after marriage equality, Oregon and Oklahoma have created tests to allow standing for non-biological same-sex parents distinct from other adult third parties.

In re Madrone was decided in Oregon before Obergefell, but after federal district courts had found same-sex marriage bans illegal in Oregon.101 Oregon has a presumption of parentage for a husband who is married to a woman when the woman bears a child by artificial insemination and the husband has consented to the insemination.102 Previously, when same-sex couples were not permitted to marry in Oregon, the court extended this presumption to a same-sex partner to prevent such a privilege to opposite-sex couples from being a violation of the Oregon state constitution.103 As same-sex marriage was permitted at the time of In re

98. Id. Leave to appeal this case has been granted Court of Appeals of New York (that state’s highest court), but there has been no disposition of this appeal as of yet. See Barone v. Chapman-Cleland, 38 N.E.3d 827, 827 (N.Y. 2015).
103. Madrone, 350 P.3d at 496 (citing In re Shineovich and Kemp, 214 P.3d 29 (Or. Ct. App. 2009)).
Madrone, the court faced whether the same-sex parental presumption should extend to only married couples.104

The parties gave birth to a child by the biological parent.105 Afterward, the state provided the parties the opportunity to register as domestic partners and they did.106 The couple then dissolved their domestic partnership.107 The child’s non-biological mother sought a declaration that she was the child’s legal parent because she was the same-sex partner of the biological mother and consented to the insemination, which had previously been outlined by Oregon as a requirement.108 The trial court granted summary judgment to the non-biological mother on the issue. The Oregon Court of Appeals reversed, applying a parentage presumption to the non-biological same-sex parent “if the partner of the biological parent consented to the insemination and the couple would have chosen to marry had that choice been available to them.”109

The biological mother argued that the facts were distinguishable from Oregon’s prior extension of legal parentage to a non-biological same-sex parent because she and her partner were not registered as domestic partners at the time of the child’s birth (but rather afterwards).110 The court disagreed. “Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite-sex couple . . . cannot be whether the same-sex couple chose to be married or not. Rather, the salient question is whether the same-sex partners would have chosen to marry before the child’s birth had they been permitted to.”111

The court then stated that the determination of whether a couple would have chosen to marry is a question of fact, to be determined by considering various factors.112

A couple’s decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each other out as spouses; considered themselves to be

104. Id.
105. Id.
106. Id.
107. Id.
108. See id. (citing In re Shineovich and Kemp, 214 P.3d 29 (Or. Ct. App. 2009)); see also Shineovich, 214 P.3d at 40.
109. Id.
110. Id. at 499.
111. Id. at 501.
112. Id.
spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married. We hasten to emphasize that the above list is not exhaustive. Nor is any particular factor dispositive (aside from unsuccessfully attempting to get married before same-sex marriages were legally recognized in Oregon...), given that couples who choose not to marry still may do many of those things.\textsuperscript{113}

After articulating these factors, the court found that material issues of fact remained, and denied the non-biological parent’s motion for summary judgment.\textsuperscript{114}

The biological parent also argued that the requirement of the biological parent’s consent under the Oregon law required that the biological parent have explicitly sought the approval of the non-biological parent in order to receive such consent, which in the eyes of the biological parent she did not do.\textsuperscript{115} The court clarified that the statute simply requires the assent or approval of the non-biological parent.\textsuperscript{116}

Oklahoma also created a standing rule for non-biological same-sex couples, recognizing the unique circumstances existing before marriage equality in \textit{Ramey v. Sutton}.\textsuperscript{117} The lower court in this case granted a motion to dismiss on the basis that a non-biological parent did not have standing for custody or visitation because the couple had not married and did not have a parenting agreement.\textsuperscript{118} The Oklahoma Supreme Court previously upheld the rights of a non-biological parent and partner in a civil union to the biological mother under a written parenting agreement.\textsuperscript{119}

However, in this case the non-biological same-sex partner sought standing even though the couple was not married and there was no parenting agreement.\textsuperscript{120} The court acknowledged the standing rights of a non-biological parent who has acted \textit{in loco parentis} when prior to the right to marry being available in Oklahoma, the couple “(1) [was] unable to marry legally; (2) engaged in intentional family planning to have a child

\textsuperscript{113} \textit{Id.} at 501-02.
\textsuperscript{114} \textit{Id.} at 502.
\textsuperscript{115} \textit{See id.}
\textsuperscript{116} \textit{Id.} at 503.
\textsuperscript{118} \textit{Id.} at 218.
\textsuperscript{119} \textit{See id.} at 217; \textit{see also} \textit{Eldredge v. Taylor}, 339 P.3d 888, 891 (Okla. 2014).
\textsuperscript{120} \textit{Ramey}, 362 P.3d at 217.
and to co-parent; and (3) the biological parent acquiesced and encouraged the same sex partner’s parental role following the birth of the child.”

Appreciating the precarious position of same-sex couples before marriage equality, the court stated that “[t]he couple’s failure to marry cannot now be used as a means to further deprive the non-biological parent, who has acted in loco parentis, of a best interests of the child hearing.” After listing numerous facts about the non-biological and biological parents’ relationship to each other and the child, the court found that the non-biological parent had “been intimately involved in the conception, birth and parenting of their child, at the request and invitation” of the biological parent. The uncertainty that the non-biological parent could have faced in this case, in the view of the court, is the “exact peril identified in Obergefell.” The court notes that the non-biological parent was not attempting to obtain custody in substitution of the biological parent, but was rather only looking to be recognized as a parent and to have that considered as it relates to the best interests of the child.

IV. THE NEED TO ACKNOWLEDGE NON-BIOLOGICAL SAME-SEX PARENT CUSTODIAL STANDING

Non-biological same-sex parents who did not have the benefit of legal marriage should not be denied standing to seek custody of the children born during their relationships. By discriminating based on biological limitations, rules denying non-biological same-sex parents standing conflict with Obergefell and fail to equally protect non-biological same-sex parents and their children. The custodial standing of non-biological same-sex parents is distinguishable from that of other third parties and may be granted within current constitutional constraints without infringing on the rights of a biological parent.

Denial of standing for non-biological same-sex parents is discrimination based on a biological limitation beyond their control. Limitations on non-biological parental standing were designed to protect the parental prerogatives of a biological parent against third parties. This is a valid and important consideration. However, denying a non-biological same-sex parent standing for custody based solely on biology is troublesome. The law has now recognized the constitutional validity of a same-sex marriage

121. Id. at 218.
122. Id. at 220-21.
123. See id. at 219.
124. Id. at 221.
125. Id.
126. Id.
and we must also recognize that there will always be a non-biological parent in same-sex parent families. This is simply a reality of same-sex couples that does not exist for opposite-sex couples. Failing to acknowledge this difference in the rules of standing outside of marriage perpetuates discriminates against same-sex couples.

Providing non-biological same-sex parents custodial standing will not “open the floodgates” to challenges to the biological parent’s parental prerogatives, and continuing to rely on this rationale places the biological parent’s prerogative over the child’s best interest. Limitations on third party standing are sometimes criticized as putting misplaced weight on formulaic rules over the best interest of a child without considering the best interest of the child in each particular case. Advocates for such strict rules argue that they serve as a protection to parents from the risk of unlimited attack to their fundamental right to make choices in the best interest of their child. This protection is important, but its significance fades in the context of a same-sex parent family. States must instead design rules that accommodate the unique position of the children in these families. It would be more appropriate to first acknowledge the non-biological same-sex parent’s standing to custody and then make a determination on the merits as to what would be in the best interest of the child, as would be done between two biological parents.

Denying standing to non-biological same-sex parents also ignores the equal protection rights of the child at issue. Failing to acknowledge parentage by the non-biological same-sex parent denies the benefits of inheritance, access to employee health insurance benefits, right to be in the custody of the non-biological parent if the biological parent dies, ability to maintain a relationship with both parents, and ability to receive child support if the parents separate. The denial of standing may also influence probate outcomes, further denying benefits to the children of these couples.

Denial of standing to non-biological same-sex parents places an unfair expectation that the non-biological parent would have pursued legal remedies that were uncertain at the time. Non-biological same-sex parents and their children should not be judged for the failure to obtain custodial rights through alternative legal methods.127 Some may argue that the standing of non-biological same-sex partners should be denied when there was a failure to obtain available alternative legal rights to custody, such as marriage, domestic partnership, a co-parenting agreement, or second-parent adoption. This argument fails to appreciate the tremendous legal uncertainty that faced these same-sex couples in pursuing these options at

127. See id. at 220-21 (acknowledging the precarious position of same sex couples before marriage equality and the unfairness of using their failure to take action as a bar to non-biological parental custody).
the time. Great emotional and financial trouble would have been required to undertake these solutions in the limited circumstances when they were available with the ultimate legal validity still in question. The Supreme Court acknowledged that same-sex couples were "consigned to an instability many opposite-sex couples would deem intolerable in their own lives" and "[t]he marriage laws at issue thus harm and humiliate the children of same-sex couples." Even if a court is unsympathetic to such a quandary on the part of a same-sex couple, a child should not be prejudiced by the failure of their same-sex parents to take such steps.

Denying standing to non-biological same-sex parents is contrary to the call from Obergefell to avoid humiliation of same-sex parent families. The Supreme Court has clearly found value in families created by same-sex couples. The Court noted when granting a fundamental right to same-sex marriage, that it safeguards children and families and thus draws meaning from the related rights of child-rearing, procreation, and education... Marriage also affords the permanency and stability important to children's best interests... Without recognition, stability and predictability that marriage offers, their children suffer the stigma of knowing that their families are somehow lesser. They also suffer significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.

To deny standing to a non-biological same-sex parent, when the predicted legitimacy or option to marry was unavailable, is to deny the sanctity of the families the Supreme Court legitimized.

Liberalization of standing in favor of non-biological same-sex parents is consistent with the societal truth that fewer families are embracing the institution of marriage. Many modern families, without regard to same-sex relationships, do not fit the traditional framework of marriage. To

129. Id. at 2600-61 (quoting United States v. Windsor, 133 S. Ct. 2675, 2694-95 (2013)).
130. See Ramey, 362 P.3d at 221 (stating that the uncertainty of a non-biological parent's standing is the "exact peril identified in Obergefell").
131. Obergefell, 135 S. Ct. at 2600.
132. Indeed, one may argue that failure to provide custodial rights to a same-sex spouse exactly equal to that of a biological parent may also be unconstitutional. But that is an argument for another time.
the extent that the limits on third party custodial standing are designed to further the public policy of encouraging marriage, it must be acknowledged that the institution of marriage is on uneven footing amongst opposite and same-sex couples alike. Any rule that discriminates against same-sex non-biological parents at a time when they were unable to marry, but provides custodial rights to unmarried opposite-sex parents, is inherently unequal.

Non-biological same-sex custodial standing is highly distinguishable from other third parties, and the same rules should not apply. In many states, standing is strictly limited for non-biological, non-adoptive third parties. Standing may be limited to grandparents, other blood relatives, or stepparents, but usually only when the biological parent is determined unfit. Non-biological same-sex parents are distinguishable from this group and must not be subject to the same rules. A non-biological same-sex parent may have had the strong desire at the time of the child’s birth to be the legal spouse of the biological parent, but was denied the right to do so; the same-sex partner may have similarly been denied the opportunity to legally adopt the child. These limitations on the ability to marry or jointly adopt a child have now been found unconstitutional and the Supreme Court’s decision was grounded on the idea that non-biological same-sex parents play a unique role compared to other adult third parties. Failure to recognize the existence of these obstacles, now understood to be unconstitutional, is an extension of the discrimination decried under Obergefell. At the very least, these jurisdictions must provide a test, similar to those in Oklahoma and Oregon, to determine whether these couples would have married had the opportunity been available to them.

Any reliance on Troxel in determining the rights of non-biological unmarried same-sex partners is misplaced, as Troxel proceeded on an assumption that those seeking custody are nonparents. Since Troxel, the Supreme Court has explicitly stated that same-sex couples have a right to marry and have families. When a non-biological same-sex parent was

136. See Geiger v. Kitzhaber, 994 F. Supp. 2d 1128 (D. Or. 2014); Ramey v. Sutton, 362 P.3d 217, 221 (Okla. 2015). There is an argument that cases involving grandparents who are third parties to the basic family unit should be treated differently than domestic partners for a number of reasons: the birth mother invites the domestic partner into a parent-like relationship with the child; in some cases, the partner may help with the artificial insemination; the child may share both the birth mother and the partner’s name; the partner's name may be on the child's birth certificate; most importantly, the partner may have been treated as a co-parent for a number of years. Child Custody Prac. & Proc. § 7:15.
caught in the gap before marriage equality, any standing rule must acknowledge this unique position and afford greater rights than those of other third parties. The dichotomy of parent versus nonparent is misplaced here. Even in the context of traditional third party standing, the Court in *Troxel* did not define the biological parent’s rights as absolute; it only required a court to presume that a fit parent is acting in the best interest of a child in the absence of factors showing otherwise.\(^{139}\) Certainly, the non-biological same-sex parent’s bond with the child is one such exceptional factor.

Denial of non-biological same-sex custodial rights is also inconsistent with the intent of the UPA to create a presumption of parentage for non-biological parents outside of marriage. Under the most recent revision of the UPA, “even if unmarried, ‘[a] man is presumed to be the father of a child if . . . for the first two years of the child’s life, he resided in the same household with the child and openly held out the child as his own.’”\(^{140}\) While this 2002 revision does not specifically address the rights of a non-biological same-sex parent, it does support the presumption of parentage when an adult has accepted and represented a child as their own. There is no reason that a non-biological same-sex parent under the UPA should be treated differently. In a world where we acknowledge the fundamental right to same-sex marriage, we must also acknowledge the inherent limitation that one of these individuals was unable to biologically parent the child. Given this limitation, allowing non-biological same-sex parents this presumption affords these individuals with an important right recognized by the drafters of the UPA.

**V. APPROPRIATE FACTORS FOR DETERMINING NON-BIOLOGICAL SAME-SEX PARENT STANDING**

States that have denied non-biological same-sex parents standing for custodial rights require reform, and other states should take swift legislative action to solidify the custodial standing of these individuals.\(^{141}\) In the states that have adopted a version of the UPA or something similar, legislative action or court interpretation should grant non-biological same-sex parents a presumption of parenthood. The UPA creates a presumption of

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139. *See Troxel*, 530 U.S. at 64; *see also In re E.L.M.C.*, 100 P.3d 546, 558 (Colo. App. 2004).


141. *See Russell v. Pasik*, 178 So. 3d 55, 61 (Fla. Dist. Ct. App. 2015) (stating that the court was not unsympathetic to a non-biological parent’s position, but needed direction from the legislature); *see also In re Visitation of J.T.H.*, 42 N.E.3d 433, 440 (Ill. App. Ct. 2015) (stating that the court is not “unsympathetic” to the non-biological parent, but cannot grant standing under current state law).
parenthood when a father receives a child into their home and openly holds them out as his child.\textsuperscript{142} Courts should reject a binary reading of this provision that allows a child to only have one father and one mother, as was done in Missouri.\textsuperscript{143} Instead, states should embrace the spirit of the UPA, including recent revisions,\textsuperscript{144} acknowledging that parental relationships can arise without regard to biology and grant standing under this provision to non-biological same-sex parents, as has been done in California\textsuperscript{145} and Kansas.\textsuperscript{146}

In states that choose not to create a parental presumption for non-biological same-sex parents under a version of the UPA or similar statute, a unique test must be adopted to define the standing of these individuals distinct from traditional third party custodial standing rules. A non-biological same-sex parent should have standing when (i) the non-biological parent and biological parent engaged in intentional family planning to have a child and to co-parent and (ii) the biological parent acquiesced and encouraged the non-biological parent’s role following the birth of the child. As discussed above, only one party in a same-sex couple is able to act as biological parent to a child. The parties’ joint intent and the biological parent’s acquiescence are appropriate substitutes to establish the joint custodial standing of the non-biological parent when participating in conception was impossible.

A court could consider other factors in determining a non-biological same-sex parent’s custodial standing, but these factors should be given less weight. Considerations could include whether the parties: (i) attempted to get married or enter into a domestic partnership and whether the non-biological non-legal parent attempted to adopt the child; (ii) held themselves out as a domestic unit; (iii) considered themselves as a domestic unit; (iv) shared childrearing responsibilities; or (v) comingled their assets or made significant financial decisions together. While these objective indicators may be instructive of the parties’ intent, it is important that these factors not be determinative. At the time of these families’ formations, the legal uncertainty and challenge of societal acceptance of their domestic unit cannot be over-emphasized. The parents’ outward and objectively viewed representation may not have been indicative of their subjective intent to create a family.

\textsuperscript{142} See UNIF. PARENTAGE ACT § 204(a)(5).
\textsuperscript{143} See White v. White, 293 S.W.3d 1, 9-11 (Mo. Ct. App. 2009).
\textsuperscript{144} UNIF. PARENTAGE ACT § 204.
\textsuperscript{146} Frazier v. Goudschaal, 295 P. 3d 542, 545-46 (Kan. 2013).
Marriage equality has likely provided a clear path for same-sex couples to establish joint custodial rights to children if their relationships dissolve. Non-biological same-sex parents and the children born to them before marriage equality are at risk in the wake of this sweeping change. Failing to understand the unique position of these individuals through application of traditional third party custody rules will result in tragic results; a non-biological same-sex parent will be unable to get past the courtroom door in making their case for custodial rights and the child could be separated from someone that he or she had always perceived as a parent. Courts and legislatures have the opportunity to prevent this injustice through the design of standing thresholds that acknowledge the unique role of the non-biological same-sex parent.