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Are You My Mother? A Critique of the Requirements for De Facto Parenthood in Maine Following the Law Court's Decision in *Pitts v. Moore*

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IN *PITTS V. MOORE*

Samuel Johnson

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ARE YOU MY MOTHER? A CRITIQUE OF THE REQUIREMENTS FOR DE FACTO PARENTHOOD IN MAINE FOLLOWING THE LAW COURT'S DECISION IN *PITTS V. MOORE*.

Samuel Johnson*

I. INTRODUCTION

Are you my mother?¹ The answer to this question may not have been very difficult to ascertain years ago, however it is not so easily answered today. With advancements in technology, shifts in family structures, and changes in social norms, new legal issues pertaining to parental rights have materialized.² The right to raise a child as one sees fit is one of the oldest fundamental rights recognized and protected by the United States Constitution.³ However, courts are now being

* J.D. Candidate, 2016, University of Maine School of Law. The Author would first like to thank Professor Dmitry Bam for his guidance and advice, as well as the members of the *Maine Law Review* for their helpful comments and assistance throughout the process. The Author would also like to thank his father Gary Johnson, mother Paula Johnson, and Lydia Holt for their constant support, encouragement, and patience. Finally this Author would like to thank his grandfather, the Honorable Gerald Giles, 1929-2011, for inspiring him to pursue a career in law.

1. See generally P.D. EASTMAN, ARE YOU MY MOTHER? (1960). In this famous children's book, a young bird hatches while his mother is away gathering food, so he sets off to try and learn the identity of his mother. While trying to determine who his mother is, he encounters numerous animals and automobiles, asking, "Are you my mother?" to which they all reply that they are not. Ultimately, the young bird and his mother are reunited and he tells her about the adventures of his day in his search for her.

2. See *Troxel v. Granville*, 530 U.S. 57, 63-64 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household."); *Rideout v. Riendeau*, 2000 ME 198, ¶ 40, 761 A.2d 291 (Wathen, C.J., concurring) ("[T]he court has consistently expanded the definition of family and recognized that individuals other than biological parents may exercise child-rearing authority."); Anne E. Kinsey, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 303 (2014) ("With the increased use of [assisted reproductive technologies], it has become more common for children to have more than two parents."). This article offers another reason why parental rights are changing and may continue to change even further in the future. "To illustrate how quickly parentage is expanding and how necessary it is for the law to catch up, consider the United Kingdom's recent decision to become the first country to allow scientists to experiment with a type of in vitro fertilization that uses DNA from three people. The intended purpose of the treatment is to keep a woman with mitochondrial disease from passing the disease onto her child. Those in support of this technique emphasize the life-saving possibilities; those opposed fear it will open the door to the creation of designer babies. Whichever view one holds, this technique will eventually allow for the creation of children with three genetic parents." *Id.* at 305 (alterations, quotations and footnotes omitted).

3. See *Troxel*, 530 U.S. 57, 65 (2000) ("[The interest of parents in the care, custody, and control of their children] is perhaps the oldest of the fundamental liberty interests recognized . . ."); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) (holding that parents have a fundamental right to determine the religious upbringing of their children without State interference). *Rideout*, 2000 ME 198, ¶ 50, 761 A.2d 291 ("A parent's right to direct the upbringing and control of their children is not a right to be lightly cast aside whenever the State or the courts think they have a better idea about how children should be raised.") (Alexander, J., dissenting).

asked to consider the rights of “legal strangers” at the expense of the biological or legal parent.⁴ One method that a “legal stranger” can use to attain parental rights over the objection of the biological parent is the doctrine of de facto parenthood.

In Maine, there is no statute defining the requirements for de facto parenthood. The doctrine is relatively new, and was first recognized by the Maine Supreme Judicial Court, sitting as the Law Court, in *Rideout v. Riendeau*.⁵ There, the court addressed de facto parenthood as applied to grandparents seeking parental rights, but acknowledged that other jurisdictions have opened the door to non-biological adults who have become de facto parents of a child.⁶ One year later, in *Stitham v. Henderson*,⁷ the court acknowledged granting parental rights to third parties by noting that a court may give such an award to “a person with significant bonds to the child” where that person has more than a limited relationship with that child.⁸ Although the Law Court has recognized that de facto parenthood does exist in Maine, it has only addressed the issue on four occasions since *Stitham*.⁹ In each of these cases the court was asked to determine whether a “legal stranger” was entitled to parental rights under the de facto parenthood doctrine, but the court never established a precise test for making this determination.¹⁰ Due to the lack of legislative guidance, and because deciding to award de facto parenthood necessarily infringes on the fundamental rights of the biological parent, the Law Court in *Pitts v. Moore*¹¹ sought to offer clarity and provide guidance by establishing a clear standard in Maine. While well intentioned, the new standard, ultimately, has muddied the waters for deciding de facto parenthood and fails to adequately account for the constitutionally protected rights of the biological or legal parent.

This Note will argue that, although the Law Court’s desire to announce a clear standard for deciding de facto parenthood is understandable, its newly announced two-part standard does not adequately account for the constitutionally protected fundamental rights of the biological or legal parent. The two-part standard is vague and allows for too much discretion by the decision-maker, and will ultimately result in unpredictable outcomes in Maine. Employing something more akin to a bright-line rule is best when deciding petitions for de facto parenthood. This Note will propose such a rule, which offers clarity in this unsettled area and also accounts for the constitutionally protected right of the biological or legal parent to

4. See generally Rena M. Lindevaldsen, *Sacrificing Motherhood on the Altar of Political Correctness: Declaring a Legal Stranger to be a Parent Over the Objections of the Child’s Biological Parent*, 21 REGENT U.L. REV. 1 (2008).

5. 2000 ME 198, 761 A.2d 291.

6. *Id.* ¶ 40 (Wathen, C.J., concurring).

7. 2001 ME 52, 768 A.2d 598.

8. *Id.* ¶ 17 n.6.

9. See *Philbrook v. Theriault*, 2008 ME 152, 957 A.2d 74; *Leonard v. Boardman*, 2004 ME 108, 854 A.2d 869; *Young v. Young*, 2004 ME 44, 845 A.2d 1144; *C.E.W. v. D.E.W.*, 2004 ME 43, 845 A.2d 1146.

10. See *Philbrook*, 2008 ME 152, ¶ 22, 957 A.2d 74 (“[W]e have not precisely defined the parameters of the de facto parent concept”); *C.E.W.*, 2004 ME 43, ¶ 13, 845 A.2d 1146 (“We do not address the separate and more fundamental question of by what standard the determination of de facto parenthood should be made.”).

11. 2014 ME 59, 90 A.3d 1169.

raise their child as they see fit.

In Part II, I will examine the new standard set forth by the Law Court in *Pitts v. Moore*, the Court's reasoning for the standard, and the dissent's criticism of the standard. In Part III, I will look at the treatment of parental rights in the courts, the changes in family structures that led to the emergence of the de facto parenthood doctrine, and the approach to the de facto parenthood doctrine taken by other jurisdictions. In Part IV, I will examine whether the newly-announced standard infringes on parental rights.¹² In that Part, I will also propose a bright-line style rule for de facto parenthood that offers clarity in this unsettled area, and also accounts for the constitutionally protected rights of the biological or legal parent.

II. *PITTS V. MOORE*

A. *Facts and Background*

Amanda M. Moore and Mathew W. Pitts lived together “on and off again” for over eight years.¹³ While they were separated in 2008, Moore had a brief relationship with Eric B. Hague, which lasted only a few months.¹⁴ Once this brief relationship with Hague ended, Pitts and Moore resumed their relationship and, some months later, Moore learned she was pregnant.¹⁵ During the pregnancy, Pitts attended some prenatal appointments and attended one birthing class.¹⁶ Moore gave birth in November of 2009.¹⁷ After the birth of the child, Moore was the primary caretaker and for the first seven months of the child's life, Pitts was the sole source of financial support.¹⁸ The couple ultimately separated in mid-2011, after which time Pitts had continued contact with the child that “focused on playtime, with occasional feeding and less occasional bathing and changing of diapers.”¹⁹ Pitts brought action in District Court seeking parental rights, at which time Moore asserted that Pitts was not the biological father.²⁰ A paternity test confirmed that Pitts was not the father and he stipulated to these facts.²¹ However, the District Court ultimately concluded that Pitts was a de facto parent of the child.²² Moore appealed the decision claiming that:

12. Because the use of the de facto parenthood doctrine necessarily infringes on a fundamental right, such a decision is analyzed under strict scrutiny. See *Davis v. Anderson*, 2008 ME 125 ¶ 11, 953 A.2d 1166. That is, it must be shown that there is a compelling state interest, and the remedy must be narrowly tailored to achieve that interest. See *id.* ¶ 13 (citing *Conlogue v. Conlogue*, 2006 ME 12, ¶ 16, 890 A.2d 691). However, the new standard in *Moore* seems to lower the bar for demonstrating a compelling state interest, and thus infringes on the biological parents' fundamental right to raise their child as they see fit.

13. *Moore*, 2014 ME 59, ¶ 2, 90 A.3d 1169.

14. *Id.*

15. *Id.*

16. *Id.* ¶ 4.

17. *Id.* ¶ 2.

18. *Id.* ¶ 5.

19. *Id.* ¶¶ 2, 5-6.

20. *Id.* ¶ 3.

21. *Id.*

22. *Id.* ¶ 8 (the District Court found that, “Pitts has made an unequivocal permanent commitment to the child and considers him to be his son The child has formed a bond of attachment with [Pitts]

Pitt[s'] role in the child's life has been short, inconsistent, and devoid of the daily caretaking functions that characterize a de facto parent; that Pitt[s'] removal from the child's life will cause no trauma to the child; and the . . . award[] . . . intrudes on the parent-child relationship between Moore and the child.²³

B. Plurality Opinion

On appeal, the Law Court articulated that the issue to be addressed was “how a person who is not a biological or adoptive parent may, over the objection of the child's fit biological or adoptive parent, obtain not just contact or access to the child, but the *full panoply of parental rights and responsibilities* as a de facto parent.”²⁴

The court then noted that defining parenthood involves matters of policy that are best addressed by the legislature rather than the courts.²⁵ However, the court goes on to conclude that because this area of law is unsettled in Maine, the court must provide guidance to trial courts, which will ultimately decide petitions for de facto parenthood.²⁶ In 2000, the court first addressed de facto parenthood regarding grandparent visitations.²⁷ The following year, in *Stitham v. Henderson*, the court held that judges may award contact to “a person with significant bonds to the child.”²⁸ Since *Stitham*, the court has only addressed rights regarding a de facto parent in four other cases.²⁹ However, the court pointed out that “through these . . . decisions, [the court had] not yet determined what precise test of de facto parenthood w[ould] satisfy the exceptional circumstances requirement of strict scrutiny.”³⁰

While no clear test for determining de facto parenthood was established in these cases,³¹ they serve as an example of situations where, under a certain set of

and his family. A complete disruption of that bond would have an adverse impact on the child Based on this language and [the District Court's] other findings . . . Pitts is the child's de facto parent.”)

23. *Id.* ¶ 9.

24. *Id.* ¶ 17 (emphasis added).

25. *Id.* ¶ 18; *Miller v. Youakim*, 440 U.S. 125, 142 (1979); *Brann v. State*, 424 A.2d 699, 704 (Me. 1981).

26. *Moore*, 2014 ME 59, ¶ 19, 90 A.3d 1169 (citing *Cheshire Med. Ctr. v. W.R. Grace & Co.*, 49 F.3d, 26, 33 (1st Cir. 1995)) (“Ordinarily issues of public policy are in the first instance appropriate for the legislature's determination by statute and, if not determined by statute, may be determined by a state court of last resort in its decisions setting precedents.”).

27. *See Rideout*, 2000 ME 198, 761 A.2d 291.

28. *Moore*, 2014 ME 59, ¶ 19, 90 A.3d 1169; *Stitham v. Henderson*, 2001 ME 52, ¶ 17 n.6, 768 A.2d 598.

29. *See Philbrook*, 2008 ME 152, 957 A.2d 74; *C.E.W.*, 2004 ME 43, 845 A.2d 1146; *Leonard*, 2004 ME 108, 854 A.2d 869; *Young*, 2004 ME 44, 845 A.2d 1144.

30. *Moore*, 2014 ME 59, ¶ 24, 90 A.3d 1169.

31. *See id.* (“[W]e have not precisely defined the parameters of the de facto parent concept”); *see also C.E.W.*, 2004 ME 43, ¶ 13, 854 A.2d 1146 (“[W]e do not address the separate and more fundamental question of by what standard the determination of de facto parenthood should be made.”). However, the dissent in *Moore* notes that each of these cases involved a child who “had been cared for by a non-parent for a significant period of time of at least five continuous years.” *Moore*, 2014 ME 59, ¶ 65, 90 A.3d 1169. This temporal requirement is necessary to ensure that the child has become psychologically attached to the non-parent and separation from the non-parent will result in harm to the child. *Id.*; *see also supra* note 1.

facts, de facto parenthood has or has not been recognized. In *Young v. Young*,³² the court announced that “[t]he District Court possesses broad powers to ensure that a child does not, without cause, lose the relationship with the person who has previously been acknowledged to be the [parent] . . . through the development of the parental relationship over time.”³³ In a case involving a similar set of facts, *Leonard v. Boardman*,³⁴ the court determined that a man, although not a biological parent of the child, was a de facto parent.³⁵ In that same year the Law Court decided *C.E.W. v. D.E.W.*³⁶ There, the court concluded that it did not need to address this fundamental question because the parties had agreed that the non-biological parent was a de facto parent.³⁷ The court noted, however, that such a determination “must surely be limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible role in the child’s life.”³⁸ Finally, in *Philbrook v. Theriault*,³⁹ the court reiterated its pronouncement from *C.E.W.* and added that in each of the cases in which the court had recognized a de facto parent, that person had been acknowledged “to be the child’s parent both by the child and the child’s biological or adoptive parent.”⁴⁰

Despite these precedent cases, Moore encouraged the court to adopt the standard for de facto parenthood set forth the by American Law Institute (ALI) in *Principles of the Law of Family Dissolution*.⁴¹ The ALI standard requires that the

32. *Young*, 2004 ME 44, 845 A.2d 1144. In this case, a man married a woman who already had a child, who was only months old. *Id.* ¶ 2. The man was the only person acting as a father to the child during the five years the couple was together. *Id.* The couple eventually separated and during divorce proceedings, the mother sought to have the child excluded from consideration because she was not a child of the parties. *Id.* The District Court agreed with the mother. *Id.* at ¶ 3. The Law Court, however, vacated the decision and noted that the District Court had authority to determine whether the man was the de facto parent of the child. *Id.* at ¶¶ 5-6.

33. *Id.* ¶ 5 (citations omitted) (internal quotation marks omitted).

34. 2004 ME 108, 854 A.2d 869. Similar to the facts in *Young*, a man began a relationship with a woman who was already pregnant, the two ultimately ended up living together for several years, and had two biological children together. *Id.* ¶¶ 3-5. The woman suffered from substance abuse and the couple ended up separating. *Id.* ¶¶ 4-5. The court was asked to determine the man’s parental rights regarding the eldest (non-biological) child, and ultimately concluded that he was a de facto parent. *Id.* ¶ 11.

35. *Id.* ¶ 16.

36. 2004 ME 43, 845 A.2d 1146. In this case two women had agreed to conceive a child through artificial insemination, with one of the women carrying the child. *Id.* ¶ 2. Five years after the birth of the child the couple separated, but executed a parenting agreement. *Id.* ¶ 3. The biological mother then sought to deny parental rights and responsibilities to the non-biological mother. *Id.* ¶ 5. The case reached the Law Court, which noted that because the parties agreed that the non-biological parent was a de facto parent in their parenting agreement, the court did not need to address this fundamental question. *Id.* ¶ 13.

37. *Id.* ¶ 13.

38. *Id.* ¶ 14.

39. 2008 ME 152, 957 A.2d 74. This case involved a woman and her two children who lived with the mother’s parents for large periods of time over the course of ten years as a result of several failed attempts to reconcile her relationship with the children’s father. *Id.* ¶¶ 2-6. The children’s grandparents sought parental rights and responsibilities of the children under the doctrine of de facto parenthood. *Id.* ¶ 7. The Law Court ultimately determined that the grandparents did not satisfy the requirements for de facto parenthood. *Id.* ¶ 26.

40. *Id.* ¶ 23.

41. § 2.03(1)(c) (2002). In this model statute, the ALI defines a de facto parent by the following criteria:

de facto parent has lived with the child for a time not less than two years; with the consent of the legal parent, formed a parent-child relationship; and [has] regularly performed a majority of the caretaking functions, or a share of the caretaking functions at least as great as that of the legal parent.⁴² The court considered and rejected this standard for de facto parenthood.⁴³ The plurality opinion concluded that the legislature may choose to adopt some or all of the standards set forth by the ALI, but until such time that the legislature takes action, the court declined to adopt these standards.⁴⁴

In order to offer clarity and guidance, the court announced its new standard.⁴⁵ Where an individual is seeking to be deemed a de facto parent, the individual must demonstrate that, “(1) he or she has undertaken a ‘permanent, unequivocal, committed, and responsible parental role in the child’s life,’ and (2) that there are exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parents’ rights.”⁴⁶

Discussing the first prong of the new standard, the court noted that it chose to define a “permanent, unequivocal, committed, and responsible parental role” by looking to elements of de facto parenthood employed in Massachusetts.⁴⁷ According to the Massachusetts court, “[t]he de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of the caretaking functions”⁴⁸ The court stated that this language will provide courts and litigants with the necessary elements “for determining whether an individual’s relationship with a child is permanent, unequivocal, committed, and responsible.”⁴⁹ The court further reasoned that the test requires not only that a petitioner establish that they resided with the child as a member of the family, but also that the petitioner partook in caretaking functions, not merely parenting functions.⁵⁰ The plurality opinion noted, however, that while the Massachusetts

(c) a *de facto parent* is an individual other than a legal parent or a 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 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 care taking 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.

42. *Id.*

43. *Moore*, 2014 ME 59, ¶ 26, 90 A.3d 1169.

44. *Id.* (“[I]f and when the Legislature ventures into this area, it may choose to adopt some or all of the ALI standards.”).

45. *Id.* ¶ 19 (“In the absence of Legislative action in such an important and unsettled area . . . we must provide some guidance to trial courts faced with de facto parenthood petitions.”).

46. *Id.* ¶ 27 (citations omitted).

47. *Moore*, 2014 ME 59, ¶ 28, 90 A.3d 1169. *See also* *E.N.O v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999).

48. *E.N.O.*, 711 N.E.2d at 891.

49. *Moore*, 2014 ME 59, ¶ 28, 90 A.3d 1169.

50. *See id.* The court distinguished between parenting functions, which it deemed to be an umbrella term that may provide benefit to the child but ultimately require little or no direct involvement, and caretaking functions, which require direct delivery of day-to-day care and can include activities

standard required showing a caretaking function equal to or greater than that of the biological parent, the new standard in Maine does not impose such a high bar.⁵¹

Discussing the second prong of the new standard, the plurality opinion noted that to establish an exceptional circumstance, and thus obtain the full panoply of rights and responsibilities, the petitioner must show by clear and convincing evidence that harm to the child will occur if he or she is not awarded de facto parenthood.⁵² The court went on to state that “contemplating an order that makes a parent out of a non-parent” will require a showing of a substantial negative effect on the child by removal of the person who has undertaken “a permanent, unequivocal, committed, and responsible parental role” in that child’s life.⁵³

Finally, the Law Court noted that an award of de facto parenthood establishes that the petitioner has the same parental rights and responsibilities as a biological or adoptive parent.⁵⁴ The court reiterated that “once a court finds that a party is a de facto parent, that party is a parent for all purposes, and the court must then go on to consider the appropriate award of parental rights and responsibilities”⁵⁵ The plurality opinion then set out a three-part procedure for determining the rights and responsibilities of someone petitioning for de facto parenthood.⁵⁶ First, the party must establish a prima facie showing of de facto parenthood in light of the new two-part standard announced by the court.⁵⁷ Second, the petitioner must then establish by clear and convincing evidence that the new two-part standard announced by the court has been satisfied.⁵⁸ Finally, if de facto parenthood is established pursuant to the new standard, the court must determine the extent of the de facto parents’ rights pursuant to 19-A M.R.S. § 1653.⁵⁹ The parental rights determination is made using a preponderance of the evidence standard after the petitioner has established that he or she is in fact the child’s de facto parent.⁶⁰ The court noted that the best interests of the child will guide the determination of the de facto parents’ rights and responsibilities.⁶¹

Because this was the first articulation of the new two-part standard, the court remanded to allow the lower court to apply the newly established test.⁶² On remand, the lower court was instructed to consider the evidence submitted by Pitts

such as bathing, feeding, and physical supervision. *See id.*; *see also* A.H. v. M.P., 857 N.E.2d 1061, 1071-72 (Mass. 2006) (noting that a parent-child bond grows by the adult tending to the child through hands-on activities).

51. *Moore*, 2014 ME 59, ¶ 28 n.14, 90 A.3d 1169.

52. *Id.* ¶ 29 (“[An exceptional circumstance will occur] only when the non-parent can establish, by clear and convincing evidence, that harm to the child will occur if he or she is not acknowledged to be the child’s de facto parent.”).

53. *Id.*

54. *Id.* ¶ 30 (“[A] de facto parent . . . is a parent on equal footing with a biological parent or adoptive parent . . .”).

55. *Id.* ¶ 32.

56. *Id.* ¶¶ 35-37.

57. *Id.* ¶ 35.

58. *Id.* ¶ 36.

59. *Id.* ¶ 37.

60. *Id.*

61. *Id.* ¶ 38. The court noted that the best interests of the child is determined by a balancing of the nineteen factors set forth in 19-A M.R.S.A. § 1653(3). *Id.*

62. *Id.* ¶ 40.

in light of this new standard, and determine whether or not he meets the requirements for de facto parenthood.⁶³

C. Dissent

Justice Levy,⁶⁴ joined by Justice Alexander, wrote the dissenting opinion. At the outset, Justice Levy acknowledged the court's good intentions to offer clarity in an area where there has been no legislatively declared policy.⁶⁵ However, the dissent noted that the court's "prior decisions provide sufficient guidance . . . to conclude that Pitts failed to prove his status as a de facto parent."⁶⁶ The dissent then addressed the constitutional requirement of harm, critiqued the new standard announced by the court, and explained why Pitts failed to prove his de facto parent status under existing precedent.⁶⁷

The dissent first noted that because a decision to award de facto parenthood necessarily infringes on a biological parents' constitutionally protected rights—to satisfy strict scrutiny—the state must demonstrate that harm or threat to the child will occur absent the award in order to constitute a compelling state interest.⁶⁸ Essentially, a failure to award de facto parenthood must result in consequences "sufficiently serious [to] the child's long-term physical, emotional, or developmental well-being."⁶⁹ The dissent further noted that the new standard established by the plurality opinion has no temporal requirement.⁷⁰ A "temporal . . . requirement ensures that de facto parent claims are limited to those cases in which it is probable that the child has become psychologically attached to the person claiming de facto parent status."⁷¹ In each of the court's five prior de facto parenthood cases, a non-parent cared for the child for at least five continuous years.⁷² The dissent also pointed out that the ALI model statute suggests that a de facto parent is "an individual who has lived with the child for a significant period of time not less than two years."⁷³ Ultimately, the dissent seemed to indicate that a temporal requirement may be a necessary element for establishing that harm would

63. *Id.* ¶ 41. Justice Jabar was joined by Justice Silver in a concurring opinion. *Id.* ¶ 42. The Justices noted that they joined the plurality opinion with regards to its efforts to offer clarity in this unsettled area of the law and with its ultimate result. *Id.* However they wrote separately because they did not agree that harm to the child was "constitutionally required in order to obtain de-facto-parenthood status over a fit parent's objection. *Id.* Because this Note focuses on the test established by the plurality opinion, the concurring opinion is not discussed further.

64. Now Judge Levy, serving on the United States Federal District Court for the District of Maine.

65. *Moore*, 2014 ME 59, ¶ 59, 90 A.3d 1169

66. *Id.*

67. *Id.* ¶ 60.

68. *Id.* ¶¶ 61-62 ("[C]ourts may interfere with a parents lawful right to prevent his or her child from having a relationship with a person seeking de facto parenthood only if measurable harm would befall the child on the disruption of that relationship.") (citations omitted) (internal quotation marks omitted); *see also infra* III.A.

69. *Moore*, 2014 ME 59, ¶ 63, 90 A.3d 1169

70. *Id.* ¶ 68.

71. *Id.* ¶ 65.

72. *Id.*; *see Philbrook*, 2008 ME 152, ¶ 12, 957 A.2d 74 (nine years); *C.E.W.*, 2004 ME 43, ¶¶ 1-4, 845 A.2d 1146 (nine years); *Leonard*, 2004 ME 108, ¶ 16, 854 A.2d 869 (eight years); *Young*, 2004 ME 44, ¶ 2, 845 A.2d 1144 (five years); *Stitham*, 2001 ME 52, ¶ 2, 768 A.2d 598 (five years).

73. *Moore*, 2014 ME 59, ¶ 65, 90 A.3d 1169. (citation omitted) (internal quotation marks omitted).

occur to the child but for an award of de facto parenthood.

The dissent next set out a five-part critique of the new standard announced by the court.⁷⁴ First, the dissent argued that the plurality opinion's "negative effect" standard is vague and possibly unconstitutional.⁷⁵ This standard of harm, the dissent suggested, is merely a "different way of asking whether an award of de facto parent status to a nonparent would be in the best interests of the child."⁷⁶ The dissent noted that the United States Supreme Court in *Troxel*⁷⁷ deemed a "best interest of the child standard [to be] constitutionally insufficient to support judicial interference with a parents' rights."⁷⁸

Second, the dissent argued that the new standard does not recognize any minimum temporal requirement.⁷⁹ According to the dissent, the lack of a temporal requirement disregards precedent by deemphasizing the requirement that, "for a court to review a fit parent's decisions to exclude a nonparent from the child's life, it must be shown that the nonparent acted as a 'primary caregiver and custodian for [the] child over a *significant period of time*.'"⁸⁰

Third, the dissent noted that in establishing the new standard, the plurality opinion distinguished between "parenting functions" and "care taking functions."⁸¹ In doing so, the court was essentially embracing a distinction made in the ALI model statute regarding de facto parents but which effectively excludes those who would be considered a "parent by estoppel" pursuant to § 2.03(1)(b).⁸² The Massachusetts Supreme Judicial Court has said that in applying the ALI principles, parents by estoppel are awarded the full panoply of parental rights, but de facto

74. *Id.* ¶¶ 67-71.

75. *Id.* ¶ 67.

76. *Id.*

77. 530 U.S. 57 (2000).

78. *Moore*, 2014 ME 59, ¶ 68, 90 A.3d 1169 (citing *Troxel*, 530 U.S. at 67-73).

79. *Id.*

80. *Id.* (quoting *Rideout*, 2000 ME 198 ¶ 27, 761 A.2d 291).

81. *Id.* ¶¶ 28, 69.

82. ALI Principles (2002). § 2.03(1)(b) provides:

A parent by estoppel is an individual who, though not a legal parent,

(i) is obligated to pay child support under Chapter 3; or

(ii) lived with the child for at least two years and

(A) over that period had a reasonable, good-faith belief that he was the child's biological father, based on marriage to the mother or on the actions or representations of the mother, and fully accepted parental responsibilities consistent with that belief, and

(B) if some time thereafter that belief no longer existed, continued to make reasonable, good-faith efforts to accept responsibilities as the child's father; or

(iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or

(iv) lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

parents are not⁸³ This is important because it leaves the state of the law in Maine “confused in relation to both the law of Massachusetts, on which the plurality opinion is ostensibly based, and the ALI Principles,”⁸⁴ which the court had stated that it declined to adopt.⁸⁵

Fourth, the dissent took issue with the plurality opinion’s treatment of how a non-parent establishes a “permanent, unequivocal, committed, and responsible role in the child’s life.”⁸⁶ Most notably, the dissent highlighted that the plurality opinion had adopted the definition of de facto parenthood as established by the Massachusetts Supreme Judicial Court, but then only used part of the definition, which resulted in a less demanding standard in Maine.⁸⁷ Although the court quoted that a de facto parent “resides with the child and, with the consent and encouragement of the legal parent, performs a share of the caretaking functions,”⁸⁸ it excised the last part of this sentence, which reads: “at least as great as the legal parent.”⁸⁹ The dissent noted that the plurality opinion tried to explain this omission away in a footnote by stating, “we do not set the bar so high for this portion of the de facto parenthood standard,”⁹⁰ yet it offered no explanation as to why a less demanding approach was appropriate for Maine.⁹¹

Fifth, the dissent argued that the plurality opinion failed to explain why it adopted the less stringent preponderance of the evidence burden of proof instead of the more stringent clear and convincing evidence burden of proof in determining parental rights based on the best interests of the child.⁹² The plurality opinion stated that this determination is generally made after a petitioner has established that he or she is the de facto parent, which essentially divorces the best interests of the child question from the question of whether the petitioner should be a de facto parent at all.⁹³ To demonstrate this issue, the dissent offered the following example: “a non-parent who may have had a permanent, unequivocal, committed, and responsible parental role in the child’s life in the past, but whose continued presence in the child’s life will be detrimental to the child, may nonetheless be entitled to a declaration of de facto parenthood.”⁹⁴

Lastly, the dissent argued that this case could have and should have been decided under Maine’s existing precedent.⁹⁵ Pitts resided with the child for only eleven months, which is far less than the two years required by the ALI Principles, and falls far short of the five or more years established in the court’s recent decisions.⁹⁶ Pitts was unable to establish that he was the child’s primary caregiver

83. *A.H. v. M.P.*, N.E.2d 1061, 1073 (Mass. 2006).

84. *Moore*, 2014 ME 59, ¶ 69, 90 A.3d 1169

85. *Id.* ¶ 26.

86. *Id.* ¶ 70.

87. *Id.*

88. *Id.* ¶ 28 (quoting *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891 (Mass. 1999)).

89. *Id.* ¶ 70.

90. *Id.* ¶ 28 n.14.

91. *Id.* ¶ 70.

92. *Id.* ¶ 71.

93. *Id.*

94. *Id.*

95. *Id.* ¶ 73.

96. *Id.* ¶ 74.

during those eleven months.⁹⁷ Further, Pitts failed to establish that harm or threat of harm would result to the child if Moore's decision to restrict contact were allowed.⁹⁸ Finally, the dissent noted that Pitts "failed to demonstrate by clear and convincing evidence that any award of parental rights and responsibilities . . . is in the best interest of the child."⁹⁹ Therefore, the dissent reasoned that because Pitts was unable to establish that he was suited for parental responsibilities, it did not follow that he qualified as the child's de facto parent.¹⁰⁰

III. OVERVIEW OF DE FACTO PARENTHOOD

As can be seen from the decision in *Pitts v. Moore*,¹⁰¹ awarding de facto parenthood has significant implications. Of primary importance are the constitutionally protected fundamental rights of the biological or legal parent.¹⁰² This Part will first examine these rights and their treatment in the courts. Next, it will highlight the changes in family dynamics that have resulted in challenges to these parental rights. Finally, this Part will examine the treatment of de facto parenthood in other jurisdictions, both by the courts and by state legislatures.

A. Fundamental Rights and Strict Scrutiny

The Fifth and Fourteenth Amendments guarantee due process, and due process has been interpreted to include the protection of fundamental rights and liberty interests from government interference.¹⁰³ The right to raise one's child as he or she sees fit is one of these fundamental rights recognized and protected by the substantive component of Due Process.¹⁰⁴ This interest was first recognized by the Supreme Court more than ninety-one years ago in *Meyer v. Nebraska*,¹⁰⁵ in which the Court held that "the liberty protected by the Due Process Clause includes the right of parents to establish a home and bring up their children" ¹⁰⁶ The

97. *Id.*

98. *Id.* ¶ 75.

99. *Id.*

100. *See id.*

101. 2014 ME 59, 90 A.3d 1169.

102. *See supra* Part III.A.

103. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). This is a distinction between procedural and substantive due process. While procedural due process guarantees "fair process," substantive due process protects an individual's fundamental rights from being infringed by the government. *See id.*; *see also Reno v. Flores*, 507 U.S. 292, 301-02 (1993) ("Fifth and Fourteenth Amendments' guarantee of 'due process of the law' [includes] a substantive component, which forbids the government to infringe certain fundamental liberty interests . . . unless the interest is narrowly tailored to serve a compelling state interest."); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he [Amendment] also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests.") (citations omitted) (internal quotation marks omitted).

104. *Moore*, 2014 ME 59, ¶ 11, 90 A.3d 1169; *see also Davis v. Anderson*, 2008 ME 125, ¶ 18, 953 A.2d 1166 ("Parents have a fundamental liberty interest to direct the care, custody, and control of their children."); *Troxel*, 530 U.S. at 65 (2000) ("[T]he liberty protected by the Due Process Clause includes the right of the parents to establish a home and bring up children" (internal quotation marks omitted)).

105. 262 U.S. 390 (1923).

106. *Id.* at 399.

Supreme Court again emphasized this fundamental right two years later in *Pierce v. Society of Sisters*.¹⁰⁷ There, the Court reiterated that the liberty of parents and guardians includes the right to direct the upbringing and education of children under their control.¹⁰⁸ The Court further explained that “the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁰⁹ The Supreme Court confirmed this protection nineteen years later in *Prince v. Massachusetts*.¹¹⁰ Again, the Court stated that “[i]t is cardinal . . . that the custody, care and nurture of the child reside first with the parents . . .”¹¹¹ Inherent in the right to direct the upbringing of their children is the parental right to decide who may associate with the child.¹¹² This is because parents are presumed to make decisions that are in the best interests of their child.¹¹³ This fundamental right continues to be recognized and protected.¹¹⁴

While it is clear that the right to raise one’s child as one sees fit is a protected fundamental right, it is not completely protected from government interference.¹¹⁵ When the government does interfere, a court must analyze that interference using the lens of strict scrutiny, the highest level of scrutiny.¹¹⁶ That is to say, the government must show that there is a compelling state interest and that the remedy is narrowly tailored to achieve that state interest.¹¹⁷ Generally, a State’s intrusion into the parent-child relationship is allowed upon some showing of an urgent reason or exceptional circumstance, where failure to intrude would result in harm

107. 268 U.S. 510 (1925).

108. *See id.* at 534-35.

109. *Id.* at 535.

110. 321 U.S. 158 (1944).

111. *Id.* at 166.

112. *See Rideout*, 2000 ME 198, ¶ 12, 761 A.2d 291 (noting that the right to decide who may associate with the child is included in a parents’ protected fundamental right); *Guardianship of Jewel M.*, 2010 ME 80 ¶¶ 4-5, 2 A.3d 301 (noting that fit parents act in the best interests of their child, including decisions regarding third-party visitation or parental rights).

113. *See Troxel*, 530 U.S. at 68 (stating that “[T]here is a presumption that fit parents act in the best interests of their children.”).

114. *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (The “primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American Tradition.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (discussing “the fundamental liberty interest of natural parents in the care, custody, and management of their child.”).

115. *Moore*, 2014 ME 59, ¶ 12, 90 A.3d 1169; *see also Rideout*, 2000 ME 198, ¶ 19, 761 A.2d 291 (noting that a parents’ “constitutional liberty interest in family integrity is not . . . absolute, nor forever free from state interference.”); *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (stating that “rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.”); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (noting that fundamental rights “may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”).

116. *See Davis v. Anderson*, 2008 ME 125 ¶ 11, 953 A.2d 1166 (noting that when state actions interfere with a parents’ fundamental liberty interests, the State is required to demonstrate that the actions satisfy strict scrutiny); *see also Troxel*, 530 U.S. at 80 (noting that when a fundamental right is infringed, strict scrutiny should apply) (Souter, J., concurring).

117. *Rideout*, 2000 ME 198, ¶ 19, 761 A.2d 291 (noting that strict scrutiny requires “that the State’s action be narrowly tailored to serve a compelling state interest.”).

to the child.¹¹⁸ Moreover, the Supreme Court in *Troxel*¹¹⁹ noted that, in making this determination, the best interest of the child standard alone is constitutionally insufficient to warrant an infringement on the parent's fundamental right.¹²⁰

In Maine, the Law Court has recognized two instances that constitute an exceptional circumstance, thus justifying state interference. First, in *In Re Jazmine*,¹²¹ the court recognized that there is a compelling state interest where harm to the child would result without interference from the government.¹²² In the second instance, although it has only been recognized with respect to the Grandparents Visitation Act,¹²³ the court stated that the government may interfere where it is necessary to preserve the child's "sufficient existing relationship."¹²⁴

B. Changes in Family Dynamics

There have been significant changes in the notion and structure of the American family. Once thought to be a married husband, wife, and their biological children, the idea of family has changed dramatically in recent years.¹²⁵ There are several reasons for this change in family dynamics, including higher divorce rates, more single-parent households, and increased cohabitating heterosexual and same sex-couples.¹²⁶

Former Maine Supreme Court Chief Justice Wathen eloquently explained one reason for this change in his concurring opinion from *Rideout*.¹²⁷ He started by noting that demographic changes in the recent century make speaking of the "average American family" very difficult.¹²⁸ He also noted that the make-up of "families varies greatly from household to household."¹²⁹ This means that some families are composed of married parents, while others may be composed of single

118. *Moore*, 2014 ME 59, ¶ 12, 90 A.3d 1169; *see also Davis*, 2008 ME 125, ¶ 11, 953 A.2d 1166 (reiterating that parents' rights in care and control of their children should be limited only for urgent reasons); *Rideout*, 2000 ME 198, ¶ 24, 761 A.2d 291 ("[T]he natural right of a parent to the care and control of a child should be limited only for the most *urgent reasons*." (citations omitted) (internal quotation marks omitted); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (noting that "the state has . . . power for limiting parental freedom . . . in things affecting the child's welfare.").

119. 530 U.S. 57 (2000).

120. *Id.* at 67-73.

121. 2004 ME 125, 861 A.2d 1277.

122. *Id.* ¶¶ 14-15; *see also* Guardianship of Jewel M., 2010 ME 17, ¶ 12, 989 A.2d 726 (noting that proof that the parent is unable to meet the needs of the child would constitute an urgent reason and thus satisfy strict scrutiny).

123. 19-A M.R.S. §§ 1801-1805 (2013).

124. *Passalaqua v. Passalaqua*, 2006 ME 123, ¶ 12, 908 A.2d 1214.

125. *See* Jason M. Merrill, *Two Steps Behind: The Law's Struggle to Keep Pace with the Changing Dynamics of the American Family*, 11 J.L. FAM. STUD. 509, 510 (2009) ("In 1970 more than forty percent of families fit the traditional family definition of married parents and their biological children; currently less than a quarter of families fit this definition."); Anne E. Kinsey, *A Modern King Solomon's Dilemma: Why State Legislatures Should Give Courts the Discretion to Find that a Child has More than Two Legal Parents*, 51 SAN DIEGO L. REV. 295, 301 (2014) ("The 'traditional' family, in which a child's parents are husband and wife, has been steadily declining for years.").

126. Merrill, *supra* note 125.

127. 2000 ME 198, 761 A.2d 291.

128. *Id.* ¶ 37 (Wathen, J., concurring) (quoting *Troxel v. Granville*, 530 U.S. 57, 63 (2000)).

129. *Id.*

parents or may include grandparents and other relatives. Chief Justice Wathen, quoting *Troxel*, stated that in these “single-parent households, persons outside the nuclear family are called upon with increasing frequency to assist in the everyday tasks of child rearing.”¹³⁰ The number of single-parent households has tripled in the past quarter century, and as many as sixty percent of children will live in a single-parent household at some point during their lives.¹³¹

In addition, there has also been an increase in cohabitating, unmarried couples. In the last thirty years this number has risen from “450,000 to 4.6 million, forty-five percent of which include children.”¹³² These children may be born of the cohabitating couple, or may be from previous relationships. A person with no biological connection to a child may still form a parent-child bond in a cohabitating relationship.

Another reason for the change in family dynamics is an increase in cohabitating same-sex couples. The 2000 census noted that 594,000 households are comprised of same-sex couples.¹³³ This increase is due, in part, to state recognition of same-sex marriages and domestic partnerships.¹³⁴ While there is a clear increase in cohabiting same-sex households, the introduction of artificial insemination and in vitro fertilization has also lead to the change in family dynamics.¹³⁵ Adoption used to be the only means by which same-sex couples were able have children. However, the advancements in reproductive technologies allow same-sex couples an opportunity to have children in which fifty percent of the genetic make-up is contributed by one of the partners.

All of these changes in family dynamics have created considerable challenges in addressing parental rights. There is no longer a presumption that a child born to

130. *Id.* Justice Wathen, citing *Troxel*, noted statistics from the U.S. Dept. of Commerce Bureau of Census, Current Population reports, 1997 Population Profile of the United States 27 (1998) to support this claim, noting that “[i]n 1996, children living with only one parent accounted for 28 percent of all children under the age of 18 in the United States.” *Id.* He also noted that in 1998, “4 million children—or 5.6 percent of all children under age 18—lived in the household of their grandparents.” *Id.*

131. See Merrill, *supra* note 125, at 510; see also Barbara R. Rowe & Kay W. Hansen, *Child Support Awards in Utah: Have Guidelines Made a Difference?*, 21 J. CONTEMP. L. 195, 195 (1995) (“[S]ix out of every ten children born today will spend some time living in single-parent families . . .”).

132. Merrill, *supra* note 124, at 510; ROSE M. KREIDER, U.S. CENSUS BUREAU HOUSING AND HOUSEHOLD ECONOMIC STATISTICS DIVISION, HOUSING AND HOUSEHOLD ECONOMICS STATISTICS DIVISION WORKING PAPER, at 1 (2010) (“In 2009 there [were] 6.7 million unmarried couples living together, while in 2010, there [were] 7.5 million.”).

133. Merrill, *supra* note 125, at 510; see also DAPHNE LOFQUIST, U.S. CENSUS BUREAU HOUSING AND HOUSEHOLD ECONOMIC STATISTICS DIVISION, SAME-SEX COUPLES’ CONSISTENCY IN REPORTS OF MARITAL STATUS, at 4 (2012).

134. See LOFQUIST, *supra* note 133, at 2 (reporting that in 2010 only five states, including the District of Columbia had same-sex marriage: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia. Ten states recognized domestic partnerships or civil unions: California, Colorado, Delaware, Hawaii, Maine, Nevada, New Jersey, Oregon, Washington, and Wisconsin).

135. See generally Josh Deutsch, *Finders-Keepers: A Bright-Line Rule Awarding Custody to Gestational Mothers in Cases of Fertility Clinic Error*, 12 CARDOZO J. L. & GENDER 367, 369 (2005) (“Artificial insemination entails the introduction of the male’s sperm into the female’s body and fertilization takes place in the womb In vitro fertilization involves the fertilization of the male’s sperm and the female’s egg in a laboratory dish, and the resulting embryo is implanted inside the woman’s uterus.”).

a married couple is the biological child of that family.¹³⁶ Further, non-biological parents in cohabitating households (heterosexual and same-sex) may seek an award of parental rights. The introduction of new reproductive technologies has further complicated the determination of parental rights.¹³⁷ The doctrine of de facto parenthood has emerged as a method by which a legal stranger, or non-biological parent, can obtain an award of parental rights and responsibilities. Although the essence of de facto parenthood remains consistent, its treatment and requirements vary from state to state.

C. De Facto Parenthood in Other Jurisdictions

The shift in family dynamics that has led to the development of the de facto parenthood doctrine is not unique to Maine. In response to these changes, the application of the doctrine can be seen across the United States. However, the requirements to establish de facto parenthood differ from state to state. A look at some approaches taken by other states is useful.¹³⁸

In Washington, for example, the state's Supreme Court addressed the issue of de facto parenthood in *In re the Matter of the Parentage of L.B.*¹³⁹ In that case, two same sex partners began a relationship that lasted for twelve years.¹⁴⁰ During that time, the couple decided to use artificial insemination to have a child together with one of the women carrying the child.¹⁴¹ The result of the pregnancy was a daughter; the couple co-parented the child sharing parental rights and responsibilities, until she was six years old.¹⁴² At that time, the relationship ended, and the biological parent cut off all of her ex-partner's contact with the child.¹⁴³ The ex-partner then filed a petition in superior court to establish parentage.¹⁴⁴ The case ultimately reached the Supreme Court of Washington, where the court was asked to determine whether, absent legislation, the State recognized a common law claim for de facto parenthood and, if so, what rights and responsibilities were

136. See *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989) (“[A] child born to a woman living with her husband is presumed to be a child of the marriage.”). This is due in large part to advances in technology, and now paternity testing allows for an accurate determination of whether or not a man is the child's biological father. *Id.* at 161 (Brennan, J., dissenting) (“[W]e have now clearly recognized the use of blood tests as an authoritative means of evaluating allegations of paternity.”); see also *Little v. Streater*, 425 U.S. 1, 7 (1981) (“[T]here is now . . . practically universal and unanimous judicial willingness to give decisive and controlling evidentiary weight to a blood test exclusion of paternity.” (citations omitted) (internal quotation marks omitted)).

137. See *Deutsch*, *supra* note 135, at 369-70 (“Children born from donor surrogacy arrangements can have as many as six different parents: (1) a sperm donor; (2) an egg donor; (3) the intended mother; (4) the intended father; (5) the surrogate mother; (6) the surrogate mother's husband.” (citations omitted) (internal quotation marks omitted)).

138. For a more in depth look at the treatment of de facto parenthood in other jurisdictions, see generally Andrew L. Weinstein, *The Cross Roads of a Legal Fiction and the Reality of Families*, 61 ME. L. REV. 319 (2009).

139. 122 P.3d 161 (2005).

140. *Id.* at 163-64.

141. *Id.* at 164.

142. *Id.*

143. *Id.*

144. *Id.*

included in such an award.¹⁴⁵ The court ultimately concluded that such a claim did exist and adopted a four-part test for determining de facto parenthood.¹⁴⁶ The court's criteria are as follows:

- (1) The natural or legal parent consented to and fostered the parent-like relationship,
- (2) the petitioner and the child lived together in the same household,
- (3) the petitioner assumed obligations of parenthood without expectation of financial compensation, and
- (4) the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.¹⁴⁷

In Delaware, legislation was passed creating a legal status of de facto parenthood.¹⁴⁸ There, the legislature announced that:

A de facto parent is established if the Family Court determines that the de facto parent: (1) has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent; (2) has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and (3) has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.¹⁴⁹

In Massachusetts, the state's Supreme Court addressed the issue of de facto parenthood in *E.N.O. v. L.M.M.*¹⁵⁰ In this case, two women were in a committed and monogamous relationship over the course of thirteen years.¹⁵¹ The couple wanted to become parents, and to that end, one of the partners became pregnant through artificial insemination.¹⁵² After the birth of the child, the parties executed an agreement stating their intent to co-parent the child.¹⁵³ The couple ended up separating, at which time the biological partner denied her ex-partner any access to the child.¹⁵⁴ Upon reaching the Massachusetts Supreme Judicial Court, the court held that a de facto parent is a non-legal parent that has participated in the child's life as a member of the child's family.¹⁵⁵ With the consent and encouragement of the legal parent, the de facto parent resides with the child and performs a share of the caretaking functions at least as great as the legal parent.¹⁵⁶ The court further noted that "[w]e must balance the [biological parent's] interest in protecting her custody of her child with the child's interest in maintaining her relationship with the child's de facto parent."¹⁵⁷

145. *Id.* at 166.

146. *Id.* at 176. The court's four-part-test was drawn from the Wisconsin Supreme Court case *In re Custody of H.S.H-K*, 533 N.W.2d 419, 435-36 (Wis. 1995).

147. *In re Parentage of L.B.*, 122 P.3d, at 176.

148. *See* 77 Del. Laws 97 §§ 1-3 (2009).

149. DEL. CODE ANN. tit. 12, § 8-201 (2015).

150. 711 N.E.2d, 886 (Mass. 1999).

151. *Id.* at 888.

152. *Id.*

153. *Id.* at 889.

154. *Id.*

155. *See id.* at 891.

156. *Id.*

157. *Id.* at 893.

While each of these approaches seem to offer a higher threshold than the two-part standard established in *Pitts v. Moore*, none of them seem to fully account for the constitutional rights of the parent. However, in Part IV, borrowing on some of the language discussed in these jurisdictions, this Note will propose a more rigid bright-line rule style approach that offers clarity in this unsettled area, adequately accounts for the constitutional rights of the parent, and would ultimately be best for Maine.

IV. ANALYSIS AND DISCUSSION

With the recent and swift development of de facto parenthood, it is not surprising that the Law Court wished to offer clarity and guidance in this unsettled area of the law. However, the new standard has muddied the waters in deciding de facto parenthood in Maine, and fails to adequately account for the constitutionally protected rights of the biological or legal parent. The court's desire to establish a standard to guide trial courts, though well intentioned, would have been more effective had it established something more akin to a bright-line rule.

A. Standards, Bright-Line Rules, and Balancing Tests

There are several options on the judicial menu for establishing or refining the law. However, whether courts should choose to employ bright-line rules, standards, or balancing tests has been a point of considerable debate.¹⁵⁸ It is argued that rule-based jurisprudence operates “by identifying constitutional principles and then positing rigid safeguards against their infringement.”¹⁵⁹ The resulting safeguards are essentially bright-line rules that offer predictability in the law and limit judicial discretion, which “fosters a sense of true equality before the law.”¹⁶⁰ Others have argued that while these bright-line rules provide clarity, they are often too rigid. It has been argued that “formal rules . . . should coexist with balancing tests, because both rules and standards can generate the appropriate solution to a particular constitutional problem.”¹⁶¹ Balancing tests typically require the court “to weigh . . . competing clusters of facts and norms.”¹⁶² Balancing often takes place between some protected right and the ability of the government to regulate that right.¹⁶³ However, critics have argued that at times this may require balancing two

158. See generally James G. Wilson, *Surveying the Forms of Doctrine on Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J., 773 (1995) [hereinafter *Wilson Balancing*]; Josh Deutsch, *Finders-Keepers: A Bright-Line Rule Awarding Custody to Gestational Mothers in Cases of Fertility Clinic Error*, 12 CARDOZO J.L. & GENDER 367 (2005); James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431 (1985) [hereinafter *Wilson Formalism*]; Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995); Jacob D. Briggs, *Gonzalez-Lopez and Its Bright-Line Rule: Result of Broad Judicial Philosophy or Context-Specific Principles?*, 2007 BYU L. REV. 531 (2007).

159. Briggs, *supra* note 158, at 532.

160. *Id.*

161. *Wilson Balancing*, *supra* note 158, at 776.

162. *Id.* at 805.

163. *Id.* at 806 (“Once one concedes that particular constitutional text protects some rights but does not completely preclude governmental regulation, balancing has begun.”).

non-similar things that cannot be easily be compared.¹⁶⁴ Often associated with balancing tests are standards. Standards are “sufficiently vague to allow the adjudicator discretion in their implementation.”¹⁶⁵ In constitutional law, deciding between standards and bright-line rules is difficult: “bright-line rules are hard to alter . . . but failure to create rules can diminish the Constitution’s force.”¹⁶⁶

While the debate on this topic continues, I believe that bright-line style rules are necessary when addressing constitutionally protected fundamental rights. This is so for several reasons. First, bright-line style rules promote fairness and formal equality.¹⁶⁷ Rules require decision makers to be consistent in their application, and to treat like cases alike; “[o]n this view, rules reduce the danger of official arbitrariness or bias by preventing decision makers from factoring the parties’ particular attractive or unattractive qualities into the decision-making calculus.”¹⁶⁸ This approach provides a clear announced rule that one can point to in explanation of a decision, and limits discretion of decision makers that may distort the notion of justice.¹⁶⁹ This is important when dealing with constitutional rights because it ensures that like cases will be treated alike. Actors will know whether or not their fundamental rights have been violated, and how courts will treat their situation given the clear rule.

A second reason is that rules offer utility and predictability.¹⁷⁰ That is to say, with rules, citizens are able to order their affairs to conform to a clearly stated rule. While rules provide utility and predictability for private actors, they also provide utility and predictability for decision makers.¹⁷¹ In this sense, rules promote judicial economy because judges are not constantly engaged in “elaborate, time-consuming, and repetitive application of background principles to facts.”¹⁷² When dealing with constitutional rights, it is imperative that citizens know clearly what rule governs, so that they know how to act and what actions violate their

164. See *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (noting that “[t]his process is ordinarily called ‘balancing,’ but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.”) (citations omitted).

165. James G. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 435 (1985).

166. *Id.*

167. See Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 62-66 (1992) (discussing the benefits of rules in constitutional jurisprudence).

168. *Id.* at 62.

169. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989). In this essay, Justice Scalia offers an interesting example of how rules promote fairness and how allowing discretion can distort the notion of justice. He posits:

Parents know that children will accept quite readily all sorts of arbitrary substantive dispositions— no television in the afternoon, or no television in the evening, or even no television at all. But try to let one brother or sister watch television when the others do not, and you will feel the fury of the fundamental sense of justice unleashed . . . [a]nd the trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. *Id.*

170. See Sullivan, *supra* note 167 (discussing the benefits of rules in constitutional jurisprudence).

171. *Id.* at 63; see also Scalia, *supra* note 169, at 1179 (“Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”).

172. Sullivan, *supra* note 167, at 63.

fundamental rights.

Finally, rules promote judicial restraint.¹⁷³ Unconstrained discretion can lead to a disparity in results. A case with similar or identical facts decided by one decision-maker may reach the opposite conclusion when decided by a different decision-maker. With a lack of rules, decision-makers use their discretion in balancing and weighing certain facts and standards. That is to say, decision-makers in administering a balancing test may impose their political or policy preferences; yet, with implementation of rules, courts “hedge [themselves] in.”¹⁷⁴ As previously stated, this is especially important when dealing with constitutionally protected rights. With rules, decision-makers are limited in imposing their own views in a given situation, and must apply a rule to a set of facts—providing consistency to those looking to have their constitutional rights protected. While rules do inhibit courts to some degree, it may also embolden them when they are called to “stand up to what is generally supreme in democracy: the popular will.”¹⁷⁵ When faced with a decision that may be unpopular, implementing such a decision becomes easier to administer while standing behind the shield of a clearly stated and established rule.¹⁷⁶

When dealing with constitutionally protected fundamental rights, rules are best because they offer predictability, clarity, utility, and promote judicial restraint. Unlike rules, standards and balancing tests do not promote clarity, often give too much discretion to decision makers, and do not offer adequate protection of the constitutional right. The two-part standard adopted by the Law Court in *Pitts v. Moore* does not offer adequate protection of the biological or legal parent’s constitutional rights.

B. The Court’s Vague Two-Part Standard is Inadequate

The vague two-part standard announced in *Pitts v. Moore*—that an individual seeking to be deemed a de facto parent must demonstrate: “(1) he or she has undertaken a ‘permanent, unequivocal, committed, and responsible parental role in the child’s life,’ and (2) that there are exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent’s rights”¹⁷⁷—does not adequately account for the parent’s constitutional rights. This is evident because it lowers the bar for a showing of harm that is necessary to satisfy strict scrutiny, and leaves too much discretion to the decision-maker, which will lead to unpredictable outcomes in Maine. The standard will ultimately muddy the waters in this area of the law rather than promote clarity, as the court sought to do.

To satisfy the compelling state interest requirement in the strict scrutiny

173. See Scalia, *supra* note 169, at 1179 (“[W]hen, in writing for the majority of the Court, I adopt a general rule, and say, ‘This is the basis of our decision,’ I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite the opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.”).

174. *Id.* at 1180.

175. *Id.*

176. *Id.* (“The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”).

177. *Moore*, 2014 ME 59, ¶ 27, 90 A.3d 1169 (citations omitted) (internal quotation marks omitted).

analysis, there must be a showing that harm to the child will result if the state fails to act.¹⁷⁸ The plurality opinion did note that a showing of harm must be established by clear and convincing evidence, and required that “the child’s life . . . be substantially and negatively affected,” if a person satisfying the first part of the standard is removed.¹⁷⁹ As the dissent noted, this seems to equate to a mere best interest of the child standard, which the United States Supreme Court in *Troxel*, deemed constitutionally insufficient to support judicial interference with parental rights.¹⁸⁰

The Law Court’s standard does not provide for any temporal requirement, which seems essential to a showing of harm. A “temporal . . . requirement ensures that de facto parent claims are limited to those cases in which it is probable that the child has become psychologically attached to the person claiming de facto parent status.”¹⁸¹ That is to say that a temporal requirement ensures that sufficient time has occurred to establish a bonded parent-child relationship, and that failure to enforce the relationship will result in psychological harm to the child. It is interesting that in each of the court’s prior decisions regarding de facto parenthood, the non-parent had been involved in the child’s life for at least five years,¹⁸² yet the plurality opinion chose to employ a concrete temporal requirement, or any form of temporal requirement. The absence of a temporal requirement seems to promote vagueness regarding a showing of harm and ignores language from the court’s prior decisions in which the court required that “the nonparent [has] acted as a ‘primary caregiver and custodian for [the] child over a significant period of time.’”¹⁸³ In light of this vague standard, actors will be left wondering how to conform their conduct, and what actions may be a permissible infringement of their constitutional rights.

Further, the new standard leaves too much discretion in the hands of the decision-maker. Whether a “permanent, unequivocal, committed, and responsible parental role has been established,” and what circumstances are “exceptional,” will all ultimately be decided at the decision-maker’s discretion. “[The decision-maker] begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application.”¹⁸⁴ Allowing for this discretion does not promote clarity, equality, or utility.

178. See *Pierce v. Soc’y of Sisters*, 286 U.S. 510, 534-35 (1925).

179. *Moore*, 2014 ME 59, ¶ 29, 90 A.3d 1169.

180. See *Troxel v. Granville*, 530 U.S. at 67-73 (2000).

181. See *Moore*, 2014 ME 59, ¶ 65, 90 A.3d 1169.

182. See *Stitham*, 2001 ME 52, ¶ 2, 768 A.2d 598; *Young*, 2004 ME 44 ¶ 2, 845 A.2d 1144; *Leonard*, 2004 ME 152 ¶ 14, 854 A.2d 869; *Philbrook*, 2008 ME 152 ¶ 12, 957 A.2d 74; *C.E.W.*, 2004 ME 43 ¶¶ 1-4, 845 A.2d 1146.

183. See *Moore*, 2000 ME 198 ¶ 27, 761 A.2d 291 (quoting *Rideout*, 2000 ME 128 ¶¶ 18-19, 761 A.2d 291).

184. See Scalia, *supra* note 169, at 1182. Justice Scalia continued:

[T]o reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired. *Id.*

In order to adequately account for the parent's constitutional rights, while also offering clarity in this area of law, and guidance to trial courts, the court should have employed a more bright-line style rule.

C. A Clear Bright-Line Approach for Maine

The two-part standard announced by the Court in *Pitts v. Moore* is vague and discounts the constitutionally protected rights of the biological or legal parent. While public policy decisions are best addressed by the Legislature,¹⁸⁵ the Law Court's desire to implement a new test in order to offer guidance in this unsettled area would have been most effective had it employed a more rigid bright-line style rule.

A bright-line rule is best for Maine because it provides predictability, clarity, ease in administration, and limits discretion regarding this fundamental right. Drawing on language used in other jurisdictions, a petitioner for de facto parenthood should have to show: (1) the biological or adoptive parent consented to and fostered the parent-like relationship; (2) that the petitioner has lived with the child in the same household for at least two years, unless the petitioner can show by clear and convincing evidence that a bonded and dependent relationship with the child has occurred; (3) that the petitioner has performed a share of the parental caretaking functions at least as great as the legal or adoptive parent; and (4) that the petitioner has undertaken a responsible parental role in the child's life.¹⁸⁶ Because an award of de facto parenthood implicates the constitutional rights of the parents, these showings should also be made by clear and convincing evidence.

With any approach—bright-line rules, balancing tests, or standards—there will be advantages and disadvantages.¹⁸⁷ However, the advantages of a more bright-line style rule outweigh the disadvantages. While some may argue that a bright-line rule approach is too rigid, this approach is still best for Maine for several reasons.

First, a bright-line style rule, such as the one proposed in this section, promotes equality and clarity. Parents will know the precise elements of de facto parenthood, and will be able to order their conduct accordingly. It is clear that the legal parent must have consented to and fostered the relationship. There is a clear and concrete temporal requirement of two years that will ensure sufficient time has passed for a parent-child bond to occur, and therefore, it is probable that termination of the relationship will likely result in harm to the child. While this two-year requirement is rigid, it still accounts for the possibility of exceptional circumstances. If a petitioning de facto parent fails the two-year requirement, but satisfies all other elements of the rule, he or she may establish by clear and

185. See *Brann v. State*, 424 A.2d 699, 704 (Me. 1981) ("It is appropriate for the legislature rather than the court to make the policy decision regarding what is practicable in a given situation."). However, such an analysis is outside the scope of this Note.

186. This proposed bright-line rule raises the bar from the standard announced in *Moore*, which only required the de facto parent show: "(1) he or she has undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life, and (2) that there are exceptional circumstances sufficient to allow the court to interfere with the legal or adoptive parent's rights." *Moore*, 2014 ME 59, ¶ 27, 90 A.3d 1169 (citations omitted) (internal quotation marks omitted).

187. See *Wilson*, *supra* note 165, at 436 ("Supreme Court Justices spend much time, space and energy quarrelling over whether to draw bright-lines or formulate balancing tests.").

convincing evidence that such a relationship has occurred, and still be determined a de facto parent. The petitioner must have engaged in a proportional share of the parental care-taking functions. This again establishes that a bonded parent-child relationship has likely occurred and that disruption of this relationship would likely cause harm to the child. A bright-line rule sets clear guidelines that must be satisfied before a court may interfere with a parent's constitutional rights.

Second, a bright-line style rule limits a decision-maker's discretion. This is important because it will offer predictability. Under the court's two-part standard, much will be left to the determination of the decision-maker, and thus, any result that could occur from a given set of facts will be unclear. While the court sought to offer clarity in this area, allowing for this much discretion will ultimately have the opposite effect. By employing a more bright-line style rule, discretion is significantly reduced, whereas clarity and predictability are promoted. It is clear that the legal parent must have consented to the relationship; there is a clear two-year temporal requirement; and the petitioner must have engaged in at least a proportional share of parental caretaking functions. With these clear and rigid guidelines, a court's ability to impose its own views while interpreting a given situation is limited. As a result, those whose rights are challenged could examine the rule, their situation, and predict the outcome with relative certainty. This fosters a "sense of true equality before the law."¹⁸⁸

Finally, while there is a possibility for exceptional circumstances to arise that may make rigid application difficult, it is of utmost importance to account for the constitutionally protected fundamental rights of the biological and legal parents in the majority of situations that will likely occur. Although it could be argued that this proposed bright-line rule will fail to account for the best interests of the child, it should be noted that fit parents are presumed to act in the best interest of their child.¹⁸⁹ Therefore, in establishing a bright-line rule that protects the fundamental right of parents to raise their children, the presumption that they will act in the best interest of their child should be respected. Further the proposed rule includes an element for determining whether the petitioner has fulfilled a "responsible parental role." This will allow courts some discretion in deciding whether an award of de facto parenthood will be in the best interests of the child in those exceptional

188. See *Briggs*, *supra* note 158 at 533.

189. See *Troxel v. Granville*, 530 U.S. at 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children."). One classic example of this notion is the story of King Solomon and the two women claiming to be a child's parent. See 1 *Kings* 3:16-28. The story goes that two women gave birth to children within three days of one another. *Id.* at 3:17-18. The two women also shared a home together. *Id.* However, one of the woman's babies died during the night, and when she realized this she switched the babies and claimed in the morning that the surviving child was hers. *Id.* at 3:19-22. The two women then went to see King Solomon to resolve the dispute, at which time he ordered that the surviving child be cut in two so that each woman could have one half. *Id.* at 3:24-25. While the woman who had stolen the child agreed to the remedy, the biological mother stopped King Solomon and stated, "give her the living baby! Don't kill him!" *Id.* at 3:26. King Solomon ultimately concluded that the real mother would not allow her child to be killed, and therefore awarded the child to his biological mother. *Id.* at 3:27. King Solomon knew that by ordering the child to be cut in half, the real mother would rather lose her child than see him killed. *Id.* at 3:28. Therefore, while weighting the best interests of the child with the biological parents' right to raise their child as they see fit, strong deference should be given to a parent's decisions, as fit parents will act in the best interests of the child.

circumstances that may arise where the other three prongs are satisfied, but granting parental rights and responsibilities to the petitioning parent may still result in harm to that child.¹⁹⁰

Ultimately, the proposed bright-line rule is a better choice for Maine because it offers clarity and predictability by imposing concrete requirements and limiting the decision-maker's discretion regarding this constitutionally protected fundamental right.

V. CONCLUSION

An award of de facto parenthood is not merely an award of visitation, but an award of the full panoply of parental rights and responsibilities. As a result, such an award necessarily infringes on the constitutionally protected fundamental right of a parent to raise their child as they see fit. The two-part standard announced by the Law Court in *Pitts v. Moore* is vague and muddies the water in this unsettled area of law, rather than promoting the clarity it sought to offer. In light of the new two-part standard, the bright-line rule proposed in Part IV of this Note is best for assessing awards of de facto parenthood because it offers clarity, ease in administration, and predictability, while still accounting for the parent's constitutionally protected fundamental right to raise their child as they see fit. Because the significant changes in social norms and family structures will continue to evolve, so too will challenges to parental rights. In light of these continued changes, the bright-line rule proposed in Part IV of this Note will offer clarity and guidance to those deciding the question, as well as to those asking, "Are You My Mother?"¹⁹¹

190. See generally Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute's Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103 (2010). Wilson's article begins by examining a situation in Massachusetts where a child was brought to a hospital with severe brain injuries and then shortly after, she lost her adoptive mother in a bizarre murder-suicide leaving only her stepfather to step forward to make medical decisions for her. *Id.* at 1104. Under Massachusetts precedent, the stepfather met the requirements for de facto parenthood. However, it was found that he was the cause of the brain injuries to the child and the court stated it would be "unthinkable [under] the circumstances" to conclude he was a de facto parent. *Id.* at 1105. The proposed rule in this Note leaves a carve-out for the child's interest in the fourth prong by requiring a responsible parental relationship, and therefore, would have excluded the stepfather in this situation.

191. See Eastman, *supra* note 1, at 1 and accompanying text.