

WHAT ABOUT SUSAN? THREE’S COMPANY, NOT A
CROWD: THE IMPORTANCE OF ALLOWING THIRD PARENT
ADOPTIONS WHEN BOTH LEGAL PARENTS CONSENT

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INTRODUCTION

In 1994, the popular TV sitcom *Friends* introduced tri-parenting arrangements to the mainstream consciousness. One of the show’s main characters, Ross, finds out his wife, Carol, is involved in a lesbian relationship with a woman named Susan.¹ Things only become more complex when Carol gives birth to Ross’ baby, Ben, leaving Ross, Susan, and Carol to all raise Ben together.² This is a tri-parenting arrangement; however only Ross and Carol are recognized as Ben’s legal parents. Not one single state in the United States recognizes more than two legal parents. So, what about Susan?

Susan raises Ben. She lives with him, loves him, he calls her “mommy,” and for all intents and purposes, Susan is Ben’s mother. Susan is a *de facto*

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1. *Friends: The Pilot* (NBC television broadcast Sept. 22, 1994).

2. *Id.*: Tenth Season.

parent: a person that, although they are not a child's legal parent, has assumed, on a daily basis and for a substantial period of time, the role of parent by fulfilling the child's physical and psychological needs.³ In other words, a *de facto* parent is a parent in every way except for legal recognition. Some courts recognize a *de facto* parent as having legal rights under a petition for custody/visitation upon dissolution of the parents' relationship.⁴

Under a different set of circumstances Susan could have become Ben's legal parent. For example, if Ross failed to claim or terminated his parental rights, Susan could have easily become Ben's legal parent. In situations where a child has only one legal parent, the majority of courts will permit a second parent adoption.⁵ A second parent adoption allows a non-related adult, with the consent of the legal parent, to adopt a child without the "first parent" losing any parental rights. In this way, the child comes to have two legal parents. It also typically grants the second or adoptive parent the same rights as biological parents in custody and visitation matters.⁶ So without Ross, and with Carol's permission, Susan could have legally adopted Ben through a second parent adoption. However, with Ross in the picture, Susan did not have this option because no state explicitly recognizes third parent adoption even with the consent of both legal parents.

These tri-parenting arrangements are real, even if courts do not grant these arrangements legal recognition, and they are becoming more common. However, unlike Ross, Carol, and Susan, many people are now intentionally entering into these arrangements, and planning for their child to have three parents.

Picture this: Joan and Ann are married. They want to have children, so Joan donates an egg, their friend Mark donates his sperm, and Ann carries the pregnancy to term and gives birth to a son, David. Joan and Ann are good friends with Mark, and they think it is important for their child to know his biological father, so Mark agrees to be a part of David's life.⁷

Who then are David's legal parents? David lives with his moms, and sees his dad according to a mutually agreed upon visitation schedule. Who gets to make medical decisions for David? Who can pick him up from school? And what if Joan, Ann, and Mark like parenting together and want to make these decisions as a group? Moreover, what if they all want the other to be a legal parent?

3. See *In re Crystal J.*, 92 Cal. App. 4th 186, 190 (2001). *De facto* parent is a judicial recognition/designation of this role.

4. See *infra* I.b.

5. Only Kentucky, Nebraska, North Carolina, and Ohio do not permit second parent adoptions. Brendan O'Brien, *Couples Challenge Nebraska Ban on Gay Adoptive and Foster Parents*, CHICAGO TRIBUNE (Aug. 27, 2013), http://www.hrc.org/files/assets/resources/parenting_joint-adoption_062013.pdf.

6. *Second Parent Adoption*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/second-parent-adoption> (last visited Mar. 16, 2015).

7. Tri-parenting arrangements also exist in polyamorous relationships. See e.g., BECOMING VISIBLE: COUNSELING BI-SEXUALS ACROSS THE LIFESPAN 315 (Beth Firestein ed. 2007); Kathy Labriola, *Models of Open Relationships*, 3 J. LESBIAN STUD. 217, 221 (1999).

As reproductive technologies improve, more people can decide to have children. However, those same reproductive technologies have also increased the number of people who can claim parent status over a single child. Not surprisingly, the courts and the legislature have failed to anticipate the types of families and parenting arrangements these reproductive technologies create, leaving some who have legitimate claims to legal parenthood without rights or recourse.

This article first examines the expanding legal definition of “family” and the increased prevalence and recognition of *de facto* parents as evidence of this expanding definition. The article then argues that where three mutually consenting parents exist, the courts should have the authority, as they do with second parent adoptions, to recognize all three as legal parents. Given the continuing evolution of family structures, such recognition is inevitable.

I. THE CHANGING FACE OF THE AMERICAN FAMILY

Current U.S. laws address a hypothetical family that no longer reflects the majority of American families. The presumption that families consist of one man married to one woman with children who were either conceived naturally or legally adopted is outdated.⁸ Despite there being over 600,000 same-sex-couple households in the United States,⁹ sixteen (16) states¹⁰ currently have constitutional or statutory bans on same-sex marriages. While over 100,000 same-sex households have children in them,¹¹ no states confer *de facto* parenthood or a presumption of parentage on same-sex couples unless they are legally married.¹²

Though not necessarily causal, the increase in both the legal recognition and presence of same-sex couples throughout the United States has been accompanied by an increase in the availability and use of Alternative Reproductive Technologies (ART). According to the Centers for Disease Control and Prevention (CDC), ART includes all fertility treatments in which both eggs and sperm are handled.¹³ In general, ART procedures involve surgically removing eggs from a woman’s ovaries, combining them with sperm

8. The presence of same-sex households in the U.S. has increased by 80.4% between 2000 and 2010 according to the U.S. Census Bureau. Caitlin Start & Amy Robers, *By the numbers: Same-sex marriage*, CNN (May 11, 2012), <http://www.cnn.com/2012/05/11/politics/btn-same-sex-marriage>.

9. *Id.*

10. Alabama, Arkansas, Georgia, Kentucky, Louisiana, Michigan, Montana, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, and Texas all ban same-sex marriage as of February 21, 2015. However, these laws are quickly being overturned by the Courts, and the Supreme Court is expected to take up this issue in 2015/2016.

11. Start & Robers, *supra* note 8.

12. See Michele Zavos and Cody Perkins, *Parentage, Parental Rights, and the LGBT Community*, 46 Md. B.J. 25, 26 (2013).

13. *ART Success Rates*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/art/reports/index.html> (last visited Apr. 8, 2015).

in the laboratory, and returning them to the woman's body or donating them to another woman.¹⁴

According to the CDC's 2012 ART Fertility Clinic Success Rates Report, "176,247 ART cycles were performed at 456 reporting clinics in the United States during 2011, resulting in 51,267 live births (deliveries of one or more living infants) and 65,160 live born infants."¹⁵ Although the use of ART is still relatively low given its potential applications, its use has doubled over the past decade.¹⁶ Over 1% of all infants born in the United States every year are now conceived using some form of ART.¹⁷ ART is often used in situations which result in tri-parenting arrangements, such as that of Joan, Ann, and Mark above.

Due to these changing social norms and advancements in reproductive technology, the question of what constitutes a legally recognized parent-child relationship is one of the most complex issues in family law.¹⁸ As second parent adoptions¹⁹ become more common²⁰ the trend towards, and need for, third parent legal adoptions is emerging.²¹ Recognition of a third legal parent is both inevitable and imperative to achieving the best interest of the child. Closely following a ground-breaking decision by the Court of Appeal for Ontario,²² recent trends show that American courts are on the verge of legally recognizing third parents. An examination of current laws and recent developments reveals that while the age-old best interest of the child standard still governs in family law cases, courts are accepting a broader range of possibilities as being in a child's best interest. Recognition of *de facto* parents in some jurisdictions is an example of the evolution of this standard. The trend towards third parent legal adoption is evidenced by a few low-profile custody disputes across the country,²³ but it is a necessary next step in legally recognizing today's American family.

II. CURRENT LAWS/RECENT DEVELOPMENTS

The rapidly changing nature of the American family makes it difficult and impractical to apply antiquated laws to modern notions of parenthood. Yet defining "parenthood" continuously falls to both the judiciary and the

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351 (2006).

19. Second parent adoption is the recognition of an unmarried individual's right to adopt his or her partner's child and is common among same-sex couples. *Id.* at 374 n.117.

20. As of 2005, an estimated 270,313 children in the United States live in households headed by same-sex couples. The Williams Institute, *United States Census Snapshot: 2010*, UCLA SCHOOL OF LAW, [HTTP://WILLIAMSINSTITUTE.LAW.UCLA.EDU/WP-CONTENT/UPLOADS/CENSUS2010SNAPSHOT-US-V2.PDF?R=1](http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot-US-v2.pdf?r=1).

21. Wendel, *supra* note 18, at 354.

22. A.A. v. B.B., 2007 ONCA 2 (Can.).

23. *See id.*

legislature, two institutions so often caught behind the times. In *Troxel v. Granville*,²⁴ the Supreme Court held that the Fourteenth Amendment protects the rights of legal parents to direct and govern the care, custody, and control of their children.²⁵ Despite its protection of legal parents' rights, the Court noted the evolution of the American family, stating that "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."²⁶ In recognition of the changing and diversifying landscape of family compositions, and in addition to nearly all courts granting second parent adoptions,²⁷ some state courts have granted rights and recognition to *de facto* parents,²⁸ holding that *de facto* parents too have legal rights under the best interest of the child standard. This recognition signals a further expansion of the definition of "legal parents" from second parent adoption as *de facto* parents are granted legal recognition and rights by courts without the legal parents' consent.

A. The Best Interest of the Child

Courts are rightfully cautious when hearing and considering family law cases as these cases are so personal in nature and often call for emotional or value judgments rather than the pragmatic approach of the judiciary.²⁹ The "best interest of the child"³⁰ is the pervasive standard used when the courts consider custody³¹ or visitation³² of children.³³ State statutes and subsequent case law govern family law, frequently incorporating a "best interest of the child" provision.³⁴ Even those statutes that do not have an express "best

24. 530 U.S. 57 (2000).

25. *Id.* at 65.

26. *Id.* at 63.

27. *See supra* note 10.

28. The term "*de facto* parent" means "parent in fact," and describes "a party who claims custody or visitation rights based upon the party's relationship, in fact, with a non-biological, non-adopted child." *Janice. M. v. Margaret K.*, 404 Md. 661, 680–81, 948 A.2d 73, 84 (2008).

29. Robin L. Marshall, *In the Best Interest of the Child: Establishing a Right for Half Siblings to Remain Together After the Death of the Common Parent*, 22 J. JUV. L. 100 (2002).

30. There is no exhaustive list of considerations for what constitutes the best interest of the child. *See, e.g.*, *Adoption of Michelle T.*, 44 Cal. App. 3d 699, 704 (1975) ("While the child's "best interest" is "an elusive guideline that belies rigid definition," its overall purpose "is to maximize a child's opportunity to develop into a stable, well-adjusted adult.").

31. Custody encompasses both legal and physical custody. Legal custody is "the authority to make significant decisions on a child's behalf, including decisions about education, religious training, and health care." BLACK'S LAW DICTIONARY 467 (10th ed. 2004). Physical custody refers to "the right to have the child live with the person awarded custody by the court." *Id.* at 1331.

32. Visitation is "a relative's, especially a noncustodial parent's, period of access to a child." *Id.* at 1802.

33. Marshall, *supra* note 29.

34. *Id.*

interest” provision usually incorporate one by implication.³⁵ In the end, whether explicit or implicit, this standard governs the decision making process in family law cases across the country.

B. De Facto Parents

Many states now recognize *de facto* parenthood, and a few grant it statutory recognition.³⁶ A *de facto* parent is “one who is not a child’s legal parent, but has been found by a court to have assumed, on a daily basis, the role of parent, fulfilling both the child’s physical and psychological needs for care and affection, and has assumed that role for a substantial period of time.”³⁷ In fulfilling such a role, the *de facto* parent shares the same legal privileges and recognition as the legal parent.³⁸ The trend of recognizing *de facto* parents and their rights in relation to the best interest of the child has been growing for over a decade.

Judicial recognition of *de facto* parenthood dates back at least sixteen years. In *E.N.O. v. L.M.M.*, the birth mother’s former same-sex partner filed a complaint against the birth mother, seeking specific performance of the parties’ agreement to allow the partner to adopt the child and assume joint custody.³⁹ The Supreme Court of Massachusetts held that the trial court had equity jurisdiction to grant visitation between the child and the former partner as the child’s *de facto* parent because a continued relationship with a *de facto* parent is often in the best interest of the child.⁴⁰ The court defined a *de facto* parent as:

[O]ne who has no biological relation to the child, but has participated in the child’s life as a member of the child’s family. The *de facto* parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent.⁴¹

35. See, e.g., MD. CODE ANN., Family Law §§9-101 to 9-108(LexisNexis 2012). The Child Custody and Visitation Article of the Maryland Rules does not specifically state that custody shall be determined using the best interest standard. However, the best interest standard is prevailing law in Maryland. See, e.g., *Taylor v. Taylor*, 306 Md. 290, 303 (1986) (“[T]he best interest of the child is therefore not considered as one of many factors, but as the objective to which virtually all other factors speak.”).

36. See, e.g., California Rules of Court 5.502(10) (2015), D.C. CODE § 16-831.03(LexisNexis 2001) (Action for custody of a child by a *de facto* parent), and Idaho Code § 15-5-213 (De facto custodian). These states have codified *de facto* parenthood.

37. California Rules of Court 5.502(10) (2015); see also, *In re Crystal J.*, 92 Cal. App. 4th 186, 190 (2001).

38. *De facto* parents are often recognized in same-sex couples where the partner who is not the legal parent never executed a second parent adoption despite parenting the child from birth. Legal recognition of *de facto* parenthood most often happens upon dissolution of the couple when the non-legal parent seeks custody and/or visitation with the parties’ child.

39. *E.N.O. v. L.M.M.* 711 N.E.2d 886, 888-89 (Mass. 1999).

40. *Id.* at 893.

41. *Id.* at 891.

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The Court further noted that recognition of *de facto* parenthood is in accord with notions of the modern family and that, therefore, the best interest analysis must take the child's relationship with both the legal and *de facto* parent into account.⁴²

Just one year later, in *T.B. v. L.R.M.*,⁴³ the state of Pennsylvania followed suit. The biological mother's former same-sex partner filed a complaint for shared legal custody and partial physical custody for purposes of visitation.⁴⁴ The Superior Court of Pennsylvania decided that a third party who stood *in loco parentis*⁴⁵ has a *prima facie* right sufficient to grant standing to litigate questions of custody of the child for whom he or she has cared.⁴⁶

Five years later, in *Elisa B. v. Superior Court*,⁴⁷ the Supreme Court of California ruled that the mother's former same-sex partner was a parent under the Uniform Parentage Act (UPA) and was thus required to pay child support.⁴⁸ In that case, the county filed an action to establish that the former partner was obligated to pay child support to the mother, who was receiving public assistance, for children who were conceived intentionally during the relationship.⁴⁹ The Court noted that "[o]ne purpose of the UPA was to eliminate distinctions based upon whether a child was born into a marriage, and thus "legitimate," or was born to unmarried parents, and thus "illegitimate."⁵⁰ The Court concluded that "the parent and child relationship extends equally to every child and parent, regardless of the marital status of the parents."⁵¹ The Court here not only recognized the legitimacy of the modern family, but specifically the legitimacy of same-sex parents.

Recognition of *de facto* parents and the importance of their recognition to the best interest of the child continues to increase as courts recognize that children form strong bonds with all parental figures regardless of the parent's legal rights.

42. *Id.*

43. *T.B. v. L.R.M.*, 753 A.2d 873 (Pa. Super. Ct. 2000).

44. *Id.* at 876 – 77.

45. The court noted that the phrase "*in loco parentis*" "refers to a person who puts [herself] in the situation of assuming the obligation incident to a parental relationship without going through the formality of a legal adoption. The status of *in loco parentis* embodies two ideas: first, the assumption of a parental status, and second, the discharge of parental duties." *Id.* at 882.

46. *Id.* at 882.

47. *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005).

48. *See*, UNIF. PARENTAGE ACT, Art. 1 § 102(14) ((2002). The UPA defines the "[p]arent and child relationship" "as "the legal relationship existing between a child and the child's natural or adoptive parents. The term includes the mother and child relationship and the father and child relationship." *Elisa B. v. Superior Court*, 117 P.3d at 664 (citing CAL. FAM. CODE § 7601) (explaining how the UPA defines the parent child relationship).

49. *Elisa B. v. Superior Court*, 117 P.3d at 662.

50. *Id.* at 664.

51. *Id.*

i. Stuck in the Past

A few states will be dragged kicking and screaming into the 21st century; only a handful of states refuse to recognize *de facto* parenthood.⁵² For example, Maryland joined the minority in 2008 and became the sixth state to declare that it would not recognize *de facto* parenthood.⁵³ In *Janice M. v. Margaret K.*,⁵⁴ the Maryland Court of Appeals considered whether *de facto* parent status was legally recognized in Maryland.⁵⁵ The parties, members of a separated same-sex couple, had been together for 18 years.⁵⁶ Janice always wanted a child and adopted Maya, who lived with the couple for five years before their break up.⁵⁷ After the couple split, Margaret petitioned the court for custody or visitation.⁵⁸ Ignoring the forward-thinking dicta found in *Troxel*, the Court held that *de facto* parenthood is not a recognized status in Maryland reasoning that such recognition would usurp legal parents' Fourteenth Amendment right to determine the care, custody, and control of their children.⁵⁹ The decision overturned eight years of Maryland law stemming from a 2000 Court of Special Appeals decision declaring that *de facto* parenthood was a legally recognized status in Maryland.⁶⁰

It is worth noting that where a legal parent wants legal recognition for a *de facto* parent, courts, even those in Maryland, will grant second parent adoptions.⁶¹ Second parent adoptions may be executed in non-traditional families, especially where one same-sex partner adopts the other partner's legal child.⁶² Such recognition of second parent adoptions in these situations signals that courts are opening up to various family structures as long as the adoption is in the best interest of the child, and the legal parent consents. Third parent adoptions, therefore, could be recognized by courts in analogous situations – where the third parent adoption is the desire of both legal parents – as long as the adoption is in the child's best interest.

52. Currently, Kentucky, Ohio, West Virginia, New York, and Maryland do not recognize the status or rights of *de facto* parents.

53. *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008).

54. *Id.*

55. *Id.* at 74.

56. *Id.* at 75.

57. *Id.* at 75–76.

58. *Id.* at 76; *see Janice M. v. Margaret K.*, 948 A.2d 73. A.2d 1145, 1147-48 (Md. Ct. App. 2006)(denying Margaret's Emergency Motion for Visitation on the grounds that Maryland does not recognize *de facto* parenthood).

59. *Id.* at 664, 671.

60. *S.F. v. M.D.*, 751 A.2d 9 (Md. App. 2000).

61. *Adoption by LGBT Parents*, NATIONAL CENTER FOR LESBIAN RIGHTS, http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf (last visited Mar. 1, 2015).

62. *See, e.g., In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2008).

III. TOWARDS THIRD PARENT LEGAL ADOPTION

While *de facto* parent recognition is a fairly radical idea for the courts, such recognition echoes the sentiments of the Supreme Court in *Troxel*: we must accept an ever-expanding definition of the family.⁶³ Thus far, *de facto* parent cases in the United States arise only from acrimonious custody or visitation battles.⁶⁴ Despite a deteriorating relationship between parents, courts recognize *de facto* parents where continuation of that close parental relationship between a non-legal parent and the child is in the best interest of the child.

Conversely, second parent adoptions, which also reflect evolving definitions of family, have been met with little resistance by the courts, as such requests come with the support of the legal parent.⁶⁵ Without a party challenging the adoption petition, second parent adoptions are often granted pro forma. Therefore, courts are more likely to grant a request for a third parent adoption if it came before the court at the request of the legal parents. In this way, third parent legal adoptions are arguably less radical than *de facto* parenthood.

It is in this spirit, where legal parents are actively seeking a legally recognized tri-parenting arrangement, that third parent adoptions should be granted. Generally, in these cases, there is no hostility between the parties; rather, legal parents seek a third parent legal adoption in order to bestow legitimacy upon a harmonious tri-parenting arrangement. The Court of Appeal for Ontario recently decided such a case.

A. Controversy in Canada

In 2007, the Court of Appeal for Ontario handed down a controversial yet groundbreaking decision in *Between A.A. and B.B. and C.C.*⁶⁶ The parties, A.A. and C.C., had been in a stable same-sex union since 1990.⁶⁷ In 1999, the couple decided to start a family with the assistance of their friend B.B.⁶⁸ The two women believed it would be in the child's best interest that B.B. remain involved in the child's life.⁶⁹ Therefore, the child's two biological parents remained in the child's life and the biological mother's same-sex partner would also act as a parent figure. Both biological parents, A.A. and B.B., supported

63. See *Troxel v. Granville*, 530 U.S. 57 (2000).

64. A *de facto* parent only needs recognition of this status when the parents' relationship is ending, and the legal parent seeks to minimize or terminate the *de facto* parent's relationship with the child(ren).

65. *Sharon S. v. Superior Court*, 73 P.3d 554, 558 n.2 (Cal. 2003) (quoting *Doskow, The Second Parent Trap* (1999) 10 J. JUV. L. 1, 5) ("The phrase 'second-parent adoption' refers to an independent adoption whereby a child born to [or legally adopted by] one partner is adopted by his or her non-biological or non-legal second parent, with the consent of the legal parent, and without changing the latter's rights and responsibilities.")

66. *A.A. v. B.B.*, 2007 ONCA 2 (Can.).

67. *Id.* at § 2.

68. *Id.*

69. *Id.*

C.C.'s petition to become one of the child D.D.'s legal parents.⁷⁰ Despite public concern over such a non-traditional family structure, the Court found that "the child is a bright, healthy, happy individual who is obviously thriving in a loving family that meets his every need."⁷¹ The Court of Appeal for Ontario found it had the power to recognize a third legal parent by exercising its *parens patriae* jurisdiction.⁷²

The primary concern of all parties involved was what was best for D.D. The Court's decision to recognize a third legal parent of D.D. was based on the child's best interest, the same standard used in the United States.⁷³ The Court noted the profound impact the declaration of a third legal parent would have on D.D., such as allowing the parent to fully participate in the child's life.⁷⁴ The declaration would also recognize the parent's ability to consent to any future adoption, impact the determination of lineage, and ensured that the child will inherit in intestacy.⁷⁵

The Court further found that non-birth mothers often encounter obstacles, ignorance, and at times hostility in dealing with government agencies and service providers where legal status is a relevant factor.⁷⁶ Most importantly, the Court recognized the significance of familial legitimacy to the welfare of the child, a stance proffered by the Lesbian Parents Project Group (LPPG).⁷⁷ According to LPPG, it is important to recognize that the role of a parent is essential to a child's safety and social well-being because it is critical that children realize the value and integrity of their lives including the recognized legal legitimacy of their families.⁷⁸

i. Reaction of Christian and Pro-Family Groups

The decision of the Court of Appeal for Ontario met great opposition from conservative and Christian groups alike. When Ontario's Attorney General declined to appeal the Court of Appeal's decision, the Alliance for Marriage and the Family – a coalition of Evangelical Christian Groups and the Catholic Civil Rights League – sought leave to appeal the judgment.⁷⁹ However, the Supreme Court dismissed its application, concluding that the coalition did not

70. *Id.* at § 5.

71. *Id.* at § 2.

72. *Id.* at § 5.

73. *See* Marshall, *supra* note 34, at I.a.

74. *A.A. v. B.B.*, 2007 ONCA 2 at 4-5.

75. *Id.*

76. *Id.* at § 16 (quoting the Victorian Law Reform Commission's position paper entitled *Assisted Reproductive Technology and Adoption: Position Paper Two: Parentage* at 15, 17).

77. *Id.*

78. *Id.*

79. THE TABLET, *Court Rules that Lesbian Partner is Third Legal Parent* 30 (Sept. 2007).

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sufficiently explain why it or the case met the test for public-interest standing.⁸⁰ The Evangelical Fellowship of Canada (EFC) also reacted strongly to the Court's decision. The EFC was granted intervener status in this case as part of a coalition of Christian pro-family groups, and claimed it intervened to "protect the rights of children."⁸¹ The EFC posted on its website under "current initiatives" that:

It has been the consistent societal opinion that recognition of multiple numbers of parents would be confusing for children. The recognition of a third legal parent in this case opens the doors to a wide variety of adults wanting to have their family situations reassessed. Children could be subjected to numerous applications from various adults wanting to have their "parenthood" recognized.⁸²

The EFC then calls on all supporters to "[p]ray that the Ontario Provincial Parliament will take positive action to affirm the two parent family in law."⁸³

Similarly, Life Site News, a pro-life news source, featured the Court of Appeal of Ontario's decision on its website, calling it "an acquiescence to the homosexual agenda."⁸⁴ The article continuously calls the Court "activist" and expresses concern over the impact this decision will likely have on children.⁸⁵ The article then quotes Mary Ellen Douglas, the National Organizer of the Campaign Life Coalition: "[a]ttacks on the family unit will ultimately lead to the destruction of our society. Where will the line be drawn on such multiple parent rulings, and what is the future environment for our children?"⁸⁶

Most of this backlash ignored the importance of the decision in relation to the best interest of the child standard. The pro-family groups ignored the familial structure that children such as D.D. are already living in, as well as the importance of maintaining the strong bonds they have developed with those they consider parents. Claims that children can only thrive in two-parent heterosexual households are deeply out of touch with both the changing face of today's family, and the varied situations constituting a beneficial environment for a child's development and well-being.

80. *Id.* ("[P]ublic-interest standing" is one by which third parties can contest judgments in which they are not directly involved.).

81. *Three Parents Case*, EVANGELICAL FELLOWSHIP OF CANADA, <http://www.evangelicalfellowship.ca/NetCommunity/Page.aspx?pid=889> (last visited Apr. 2, 2015).

82. *Id.*

83. *Id.*

84. Gudrun Schultz, *Ontario Court Rules Five-Year Old Has Three Legal Parents – Father, Mother, Lesbian Partner*, LIFE SITE (Jan. 3, 2007), <https://www.lifesitenews.com/news/ontario-court-rules-five-year-old-has-three-legal-parents-father-mother-les>.

85. *Id.*

86. *Id.*

B. Recognizing Legal Third Parents in America

Quietly, but surely, the United States is following Canada's lead. A select few family law cases across the country presented situations in which three parents claimed custody or visitation rights to a child. In some of these cases, the courts recognized that the best interest of the child(ren) involved were realized through a continuation of those tri-parenting arrangements, ensuring that the child(ren) maintained a relationship with all three parents, even upon the dissolution of the relationships between those parents.

i. LaChappelle v. Mitten

During the beginning of the *de facto* parent debate, a 2000 Minnesota case was ahead of the curve. In *LaChappelle v. Mitten* the Court of Appeals of Minnesota resolved the custody battle of a fractured family by recognizing the existence of three legal parents.⁸⁷

During the course of their relationship, appellant Mitten, and her partner, respondent Ohanian, decided to have a child.⁸⁸ Mitten gave birth to a child as a result of artificial insemination from sperm donated by respondent LaChappelle.⁸⁹ The women agreed that LaChappelle should be a part of the child's life, and allowed him some custody and visitation rights for about nineteen or twenty months.⁹⁰ However, the women later ended LaChappelle's visitation and he commenced paternity proceedings.⁹¹ The situation was further complicated when Mitten and Ohanian terminated their relationship and all parties commenced various proceedings to determine custody and visitation rights over the child.⁹² The Court awarded visitation to LaChappelle, sole physical custody of the child to Mitten, and joint legal custody of the child to Mitten and Ohanian, recognizing that the child had three legal parents all entitled to either custody or visitation.⁹³ When making its determination, the Court recognized that its "paramount commitment" was to the best interest of the child.⁹⁴ Using this standard, the Court found continuing the child's relationship with all three parents to be in the child's best interest.⁹⁵

ii. Sharon S. v. Superior Court of San Diego

The controlling standard for a second parent adoption is simply the best interest of the child, and does not require termination of at least one biological parent's parental rights. In *Sharon S. v. Superior Court of San Diego*, the

87. *LaChappelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000).

88. *Id.* at 157.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 157-58.

94. *Id.* (quoting *Olson v. Olson*, 534 N.W.2d 547, 549 (Minn. 1995)).

95. *Id.* at 165.

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Supreme Court of California declared that termination of birth parents' rights is not a mandatory prerequisite to every adoption.⁹⁶ The case involved Sharon S. and her former partner Annette F.⁹⁷ Sharon gave birth, through artificial insemination, to Zachary whom Annette legally adopted. Three years later, Sharon gave birth to another child, Joshua.⁹⁸

After Annette, with Sharon's consent, petitioned the court to adopt Joshua, the couple split up and Sharon attempted to withdraw her consent to the adoption.⁹⁹ The court found that the essential elements of adoption did not include the termination of the biological parent's rights.¹⁰⁰ The Court specifically noted that one of the essential elements of an adoption proceeding is a judicial determination that the adoption will be in the best interest of the child.¹⁰¹ The Court did not restrict this power to situations in which there are only two parents.¹⁰² The Court further noted the widespread acceptance of second-parent adoptions and their "effectiveness in promoting the fundamental purposes" of adoption such as the welfare, protection, and betterment of the child.¹⁰³ In response to the dissent's concern that this broad holding would open the door for "new and even bizarre family structures," the majority clarified that only an adoption that is in the child's best interest can be validated, and "[n]othing we say in this case can validate an adoption that is not in the child's interest."¹⁰⁴ Here, the Court explained that the fear of a "new and bizarre family structure"¹⁰⁵ was unwarranted because a child would never be subject to such a situation if it was not in the child's best interest.

iii. *Jacob v. Shultz-Jacob*

In an appellate case that flew almost entirely under the radar following the *In Between A.A. and B.B. and C.C.* decision, the Superior Court of Pennsylvania declared, that a child may have three legal parents.¹⁰⁶ Jodilynn and Jennifer lived together for nine years during which time they entered into a

96. *Sharon S. v. Superior Court of San Diego*, 73 P.3d 554 (Cal. 2003).

97. *Id.* at 557.

98. *Id.* at 558.

99. *Id.* at 558-59.

100. *Id.* at 562. The court stated that "the essential elements of every valid adoption are: a voluntary and informed parental consent to the adoption except where the parent has surrendered or has been judicially deprived of parental control; a suitable adoptive parent at least 10 years older than, or in a specified preexisting family relationship with, the child; and a judicial determination that "the interest of the child will be promoted by the adoption." *Id.* (quoting *In re Johnson's Estate*, 33 P. 460)

101. *Id.*

102. *Id.* at 570.

103. *Id.* at 568. The court estimated the number of second parent adoptions in California to be somewhere between 10,000 and 20,000. *Id.*

104. *Id.* at 570.

105. *Id.*

106. *Jacob v. Shultz-Jacob*, 2007 Pa. Super 118.

civil union.¹⁰⁷ Jodilynn had two nephews whom she had adopted and two biological children with longtime friend Carl Frampton.¹⁰⁸

In February 2006, after the women decided to end their relationship, Jodilynn relocated with the four children. Jennifer then filed a lawsuit seeking legal and physical custody of the four children.¹⁰⁹ The Court made a temporary award of primary custody to Jodilynn while the case was pending, with partial custody (visitation) for Jennifer and Carl.¹¹⁰ The Superior Court affirmed this order.¹¹¹ Even in the face of such a complex family structure, the Superior Court noted that “[u]nder any circumstances, the axiom that the paramount interest to be served in custody disputes is that of the children remains undisturbed.”¹¹² The Court’s decision reaffirmed the growing understanding that the familial structure is irrelevant as long as it is in the child’s best interest.

IV. ANALYSIS

The uniform standard for determining issues of custody, visitation, and adoption is the best interest of the child.¹¹³ Third parent legal adoptions, when sought with the permission of the legal parents, meet the criteria set forth under this omnipresent standard. As articulated by the Court of Appeal for Ontario, it is critical that children feel as though their families are legitimate.¹¹⁴ Much of the controversy that surrounded the Ontario Court’s decision focused on the importance of stability in children’s families;¹¹⁵ stability is the goal of third parent legal adoptions. When both legal parents consent, as in D.D.’s case, the adoption is a matter of bestowing legal rights and legitimacy, for the benefit of the child, on a family that is practically and functionally already in existence.

With legal legitimacy comes the right and ability to take care of many of the practical necessities in a family’s daily life that a *de facto* third parent would not otherwise have. Without the benefit of legal recognition, a *de facto* third parent is unable to make medical decisions regarding the child, visit the child in the hospital, or sign school documents. The child may suffer consequences too if he or she is unable to collect social security benefits or inherit in intestacy should the third parent pass away. Essentially, without legal recognition, the *de facto* third parent cannot fully participate in the child’s life. While D.D. was too young to testify to the importance of having three legal parents, the record from *M.D.R. v. Ontario (Deputy Registrar General)* makes clear how essential this is to the child’s best interest. In her affidavit, the twelve-year-old child of one of the applicants said:

107. *Id.* at 476.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 482.

112. *Id.* at 478 (quoting *Charles v. Stehlik*, 744 A.2d 1255, 1258 (Pa. 2000)).

113. *See supra* I.a.

114. *In Between A.A. v. B.B and C.C.*, 2007 ONCA 2, § 15 (Can.).

115. *Supra*, notes 83-90.

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I just want both my moms recognized as my moms. Most of my friends have not had to think about things like this – they take for granted that their parents are legally recognized as their parents. I would like my family recognized the same way as any other family, not treated differently because both my parents are women.¹¹⁶

This statement exemplifies the profoundly positive effect that both second and third parent legal adoptions can have on a child. A child's wishes as well as the child's physical and mental health, which may be affected by outsiders' perceptions of his/her family not being legally recognized, are all considerations of what is in the best interest of the child.¹¹⁷

While in some instances *de facto* parents are recognized by the courts only at custody or visitation proceedings, in *E.N.O.*, the Massachusetts Supreme Court decided that a *de facto* parent can exist with as little as the consent and encouragement of the legal parent.¹¹⁸ Echoing this same sentiment, the Court of Appeal for Ontario recognized a third legal parent only when that status was supported by both legal parents.¹¹⁹ In doing so, the Court legitimized a unified tri-parenting arrangement. The Court of Appeal for Ontario recognized that this family unit existed regardless of whether the law bestowed legitimacy upon it, and it was in the child's best interest to bestow that legitimacy on the third parent.¹²⁰ The Court determined that the legal rights of the third parent were consistent with the best interest of the child.¹²¹ If, for example, one or both biological parents died, the child would then face the additional strain of losing the third parent who would have no legal claim over the child.¹²² In this sense, moving towards third parent legal adoptions is not about further fracturing or destabilizing families, but about recognizing stable, cohesive family units upon which children may rely and thrive.

The concern that legal recognition of third parents infringes upon the constitutional rights of legal parents is negated by the circumstances surrounding D.D.'s case, which should serve as the "gold standard" in third parent adoption petitions. In *Troxel v. Granville*,¹²³ the Supreme Court held that the constitutional rights of parents to the custody of their children rests on a presumption that parents act in their children's best interests.¹²⁴ Accordingly, the decision in *A.A.* is in accordance with the *Troxel* ruling and would likely be upheld in a United States court. If courts follow a presumption that parents act in their children's best interest, and both legal parents consent to a third party

116. *A.A.*, 2007 ONCA 2, § 15 (quoting *M.D.R. v. Ontario* (Deputy Registrar General), 2006 CanLII 19053 (ON SC)).

117. *See supra* I.a.

118. *See E.N.O. v. L.M.M.*, 711 N.E.2d 886,891 (Mass. 1991).

119. *A.A. v. B.B.*, 2007 ONCA at § 2.

120. *Id.* at § 37.

121. *Id.*

122. *Id.* at § 15.

123. *Troxel v. Granville*, 530 U.S. 57 (2000).

124. *Id.* at 68-69.

adoption, then a rebuttable presumption is created that a third parent legal adoption is in the child's best interest. Although a few states still do not recognize *de facto* parents,¹²⁵ the constitutional rights of parents are not infringed by the recognition of *de facto* parents or third parents because the test for *de facto* parents, and the proposed test for third parent adoptions, requires only that legal parents consent to the relationship,¹²⁶ not that legal parents sacrifice their rights.

CONCLUSION

The composition of families is changing on a global scale. With the existence, recognition, and legitimacy of divorce, re-marriage, homosexuality, cohabitation, adoption, and ART, the notion of what constitutes a family has shifted, and the importance of legal recognition as a parent has come to the forefront. Without legal rights, a *de facto* parent can't fully participate in his/her child's life.¹²⁷ The majority of states have given legal recognition to *de facto* parents in same sex relationships,¹²⁸ and it is imperative that this same recognition is extended to third parent legal adoptions when both legal parents support the adoption. It is in the best interest of every child that his/her family is seen as legitimate through the eyes of the law, and is afforded the same legal rights as that of a "traditional" family.

The Supreme Court best articulated what it is that makes a parent a parent: "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."¹²⁹ Here, the Supreme Court did not define a parent by biology or adoption proceedings, but by those who take the time and shoulder the responsibility to nurture and raise a child. As families take on "new and bizarre forms,"¹³⁰ it is important that we not only honor the wishes of legal parents, if they want to give their child a third legal parent (as they are presumed to act in the best interest of their child), but that we also recognize the rights and roles of those *de facto* third parents so they are fully able to nurture and raise their children.

125. See T.B. v. L.R.M., 753 A.2d 873, 884-85 (Pa. Super. Ct. 2000)..

126. Emily R. Lipps, JANICE M. V. MARGARET K.: *Eliminating Same-Sex Parents' Rights to Raise Their Children by Eliminating the De Facto Parent Doctrine*, 68 MD. L. REV. 691, 711 (2009).

127. A.A. v. B.B., 2007 ONCA §§ 2, 15.

128. See Lipps, *supra* note 126, at 710.

129. Troxel v. Granville, 530 U.S. 57, 65 (2000) (quoting Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925)).

130. See Sharon S. v. Superior Court, 73 P.3d 554, 577 (Cal. 2003) (J. Baxter, concurring and dissenting).