CHILD CUSTODY, VISITATION & TERMINATION OF PARENTAL RIGHTS

EDITED BY ANNA BURKE, ZACHARY HUGHBANKS, THERESE KILBANE MYERS, CAROLINE NEVILLE, AND HARRY SAMUELS

I. INTRODUCTION

This Article will discuss the evolution of child custody, visitation, and parental rights in the United States. The Article also examines and summarizes how LGBT parents' rights have evolved over the years, especially in light of the dramatic impact of *Obergefell v. Hodges*,[1] which struck down state bans on same-sex marriage by holding that marriage is a right protected by the Fourteenth Amendment. Finally, the Article examines the involuntary and voluntary termination of parental rights.

Part II will discuss current issues in the law of child custody and visitation, first analyzing the history of child custody and visitation law and then analyzing the law under the current regime of a "best interests of the child" balancing test. This section will also examine the problems facing LGBTQ biological parents and third party or de facto parents in obtaining custody and visitation rights, paying special attention to the impact of the Supreme Court's decisions in *Obergefell v. Hodges*[2] and *Pavan v. Smith*[3] in the legal recognition of same-sex couples and on the child custody and visitation rights of gay and lesbian parents. Despite the fact that the Supreme Court has recognized marriage rights for same-sex couples, many states still refuse to extend the marital presumption to nonbirth-non-genetic spouses in custody and visitation disputes, failing to recognize the parental rights of non-biological parents in same-sex marriages. Many courts have also not ruled on cases specifically involving custody and visitation rights for transgender individuals. This section also discusses the effect of *Obergefell* on custody and visitation issues for LGBTQ couples who are unmarried and a possible bias against married vs. unmarried parents.

Part III will discuss the voluntary and involuntary termination of parental rights. The section will begin with a discussion of federal and state guidelines surrounding the involuntary termination of parental rights. At the federal level, the Adoption and Safe Families Act of 1997 ("ASFA") set guidelines on how long children should spend in foster care and when child welfare agencies must take steps toward permanency for the child, including involuntary termination of

1. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
2. *Id.*
3. Pavan v. Smith, 137 S.Ct. 2075, 2076 (2017).

parental rights.[4] The federal requirements outlined in the statute have been adopted by every state with differing methods of enactment. Some populations are particularly affected by involuntary termination of parental rights, including parents with criminal convictions and recently arrived immigrants. This section will also address the origins and implementation of the family separation policy at the United States' southern border, and possible changes coming to US policy on child immigration. The section will then explain the due process standards for parents, including the burden of proof and the right to counsel. Courts will also consider a parent's petition for voluntary termination of parental rights as a precursor to adoption, though parties must follow strict notice requirements and ensure that they are complying with the Indian Child Welfare Act (ICWA). This jurisprudence has become particularly important in the context of the Trump Administration's family separation policy as it is unclear if people being deported are truly voluntarily terminating their parental rights in order to allow their children to stay in the United States.

II. CHILD CUSTODY AND VISITATION

A. A BRIEF HISTORY OF CHILD CUSTODY AND VISITATION RIGHTS

The legal landscape of child custody and visitation rights has changed dramatically over the course of the past one hundred and fifty years. Rigid gender roles for parents were historically used to define the landscape of child custody and visitation disputes. Until the end of the nineteenth century, there was a strong legal presumption favoring fathers in custody disputes.[5] Eventually, the mother became favored in custody disputes, as courts began relying on a "tender years" presumption that mothers were better suited to have custody of very young children.[6] By the early 1970s, however, courts began to abandon the so-called "tender years" presumption that favored mothers in favor of an explicit "best interests of the child" standard.[7] Today, legal custody and visitation determinations must be

4. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

5. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 15 (1996).

6. *Compare* Miner v. Miner, Ill. 43, 45 (Ill. 1849) (finding that "[t]he father has the first right to the guardianship of his children, and to their custody, control, care and raising. This right is incident to and arises out of his duty to maintain them, and, consequently, to instruct them, and his right to their services," despite granting custody to mother), *and* Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 205 (1834) (recognizing that "in general . . . the father is by law clearly entitled to the custody of his child. . .") *with* Commonwealth *ex rel*. Lucas v. Kreischer, 299 A.2d 243, 245 (Pa. 1973) (granting custody to mother under tender years presumption and recognizing that "[i]n fact, that the best interests of children of tender years will be best served under a mother's guidance and control is one of the strongest presumptions in the law"). *See also* MASON, *supra* note 5, at 81 ("[T]he law emphasized the best interests of the child, with a presumption in favor of mothers as the more nurturing parent.").

7. *See, e.g*., State *ex rel*. Watts v. Watts, 350 N.Y.S.2d 285, 289 (N.Y. Fam. Ct. 1973) (finding that "[t]he simple fact of being a mother does not, by itself, indicate a capacity or willingness to render a quality of care different from that which the father can provide" in awarding custody of the couple's three children to the father.); *see also* ROSEMARIE SKAINE, PATERNITY AND AMERICAN LAW 3 (2003). Regardless of the direction of the legal presumption, courts have always taken the child's best interests

gender-neutral and courts can only take the best interests of the child into account when awarding custody.[8]

---

into account. *See, e.g.*, State *ex rel*. Paine v. Paine, 23 Tenn. (4 Hum.) 523, 536 (Tenn. 1843) ("The father is not shown to be disqualified, either morally or physically for their care and culture; and the only question left for consideration is, in whose possession will the interest of the children be best provided for-the father's or the mother's.").

8. *See* ALA. CODE § 30-2-40(e) (Westlaw through Act 2019-540); ALASKA STAT. ANN. § 25.20.060 (West, Westlaw through 2019 First Reg. Sess.); ARIZ. REV. STAT. ANN. § 25-403 (Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. § 9-13-101 (West, Westlaw through 2019 Reg. Sess.); CAL. FAM. CODE § 3011 (West, Westlaw through Ch. 651 of the 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 14-10-124 (West, Westlaw through legis. effective Sept. 1, 2019 of the 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 46b-56 (West, Westlaw through the 2019 January Reg. Sess. and the 2019 July Spec. Sess.); DEL. CODE ANN. tit. 13, § 722 (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914 (West, Westlaw through Sept. 11, 2014); FLA. STAT. ANN. § 61.13(2)(c), (2)(c)(1) (West, Westlaw through 2019 1st Reg. Sess. Of the 26th Leg.); GA. CODE ANN. § 19-9-3 (West, Westlaw through acts passed during the 2019 Sess. of the Gen. Assemb.); HAW. REV. STAT. ANN. § 571-46(a)(l) (West, Westlaw through Act 286 of the 2019 Reg. Sess.); IDAHO CODE ANN. § 32-717 (West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); 750 ILL. COMP. STAT. ANN. 5/602.7(a) (West, Westlaw through P.A. 101-591); IND. CODE ANN. § 31-17-2-8 (West, Westlaw through 2019 First Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN. § 598.41(l)(a) (West, Westlaw through 2019 Reg. Sess.); KAN. STAT. ANN. § 23-3201 (West, Westlaw through laws effective on or before July 1, 2019, enacted during the 2019 Reg. Sess. of the Kansas Leg.);KY. REV. STAT. ANN. § 403.270(2) (West, Westlaw through 2019 Reg. Sess. and 2019 Extraordinary Sess.); ME. REV. STAT. ANN. tit. 19-A, § 1653(3) (West, Westlaw through 2019 First Reg. Sess. and Ch. 531 of the First Spec. Sess. of the 129th Leg.); MASS. GEN. LAWS ANN. ch. 208, § 31 (West, Westlaw through ch. 88 of the 2019 1st Annual Sess.); MICH. COMP. LAWS ANN. §§ 722.23-24 (West, Westlaw through P.A. 2019, No. 51, of the 2019 Reg. Sess.); MINN. STAT. ANN.§§ 257.025(a), 518.17(l)(a) (West, Westlaw through legis. effective through January 1, 2020 from the 2019 Reg. and First Spec. Sessions); MISS. CODE ANN. § 93-5-24(1) (West, Westlaw through with laws from the 2019 Reg. Sess. effective upon passage as approved through Jan. 1, 2020); MO. ANN. STAT. § 452.375(2) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); MONT. CODE ANN. § 40-4-212(1) (West, Westlaw through 2019 Sess.); NEB. REV. STAT. ANN. § 42-364(l)(b) (West, Westlaw through 1st Reg. Sess. of the 106th Leg.); NEV. REV. STAT. ANN. § 125C.0035 (West, Westlaw through end of 80th Reg. Sess. (2019)); N.J. STAT. ANN. § 9:2-4a (West, Westlaw through L.2019, c. 266 and J.R. No. 22); N.M. STAT. ANN.§ 40-4-9(A) (West, Westlaw through end of First Reg. Sess. of the 54th Leg. (2019)); N.Y. DOM. REL. LAW § 240(1) (McKinney, Westlaw through L.2019, ch. 444); N. C. GEN. STAT. ANN. § 50-13.2(a) (West, Westlaw through S.L. 2018-145 of the 2018 Reg. and Extra Sess., including through 2019-163, of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-09-06.2 (West, Westlaw through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); OKLA. STAT. ANN. tit. 43, § 109(A) (West, Westlaw through enacted legis. of the First Reg. Sess. of the 57th Leg. (2019)); OR. REV. STAT. ANN. § 107.137(1) (West, Westlaw through the 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Legislative Assembly; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, effective through October 1, 2019, enacted during the 2019 Reg. Sess. of the 80th Legis. Assemb.); 23 PA. STAT. AND CONS. STAT. ANN. § 5328 (West, Westlaw through 2019 Reg. Sess. Act 75); R.I. GEN. LAWS. ANN. § 15-5-16(d)(2) (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.); S.C. CODE ANN. § 20-3-160 (West, Westlaw through the 2019 Sess.); S.D. CODIFIED LAWS § 25-4-45 (West, Westlaw through 2019 Session Laws, Exec. Order 19-1 and Supreme Court Rule 19-18); TENN. CODE ANN. § 36-6-l01(a)(l) (West, Westlaw through end of the 2019 First Extraordinary Sess. of the 111th Tennessee Gen. Assemb.); TEX. FAM. CODE ANN. § 153.002 (West, Westlaw through the end of the 2019 Regular Session of the 86th Leg.); UTAH CODE ANN. § 30-3-l0(l)(a) (West, Westlaw through 2019 First Spec. Sess.); VT. STAT. ANN. tit. 15, § 665 (West, Westlaw through Acts of the Reg. Sess. of the 2019-2020 Vermont Gen. Assemb. (2019)); VA. CODE ANN. § 20-124.3 (West, Westlaw through end of the 2019 Reg. Sess.); WASH. REV. CODE ANN. § 26.09.002 (West, Westlaw with all legis. from the 2019 Reg. Sess. of the Wash. Leg.); W. VA. CODE ANN. § 48-9-101 (West, Westlaw with the 2019 Reg.

1. Sex-Based Presumption

Until the nineteenth century, the doctrine of *patria potestas*, which regarded children as the property of their fathers,[9] prevailed in making child custody and visitation determinations.[10] In most cases, courts presumed that fathers should maintain absolute authority over the education, discipline, and upbringing of their children.[11] Additionally, social norms meant that mothers during this time were almost always unable to secure gainful employment and were not as financially equipped as fathers to care for their children after a divorce.[12] In 1872, even the Supreme Court acknowledged this difference in opportunity, with Justice Bradley writing "The harmony, not to say identity, of interest and views which belong . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[13] This financial inequality factored in to custody as common law courts repeatedly found fathers to be better able than mothers to provide for the financial needs of their children.[14] The presumption in favor of fathers was slightly tempered in the nineteenth century by the adoption of the "tender years" doctrine, which maintained that it was better for infant children to remain with their mothers, but only where young children were concerned.[15] The British Act of 1839 directed courts to grant custody

---

Sess. and with laws of the 2019 First Extraordinary Sess. approved through August 7, 2019.); WIS. STAT. ANN. § 767.41(2)(a) (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. § 20-2-201(a) (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.).

9. *See* Todd Taylor, *The Cultural Defense and its Irrelevancy in Child Protection Law*, 17 B.C. THIRD WORLD L.J. 331 (1997) ("Roman law, for instance, gave a father life and death power over his minor children based on the principle of *patria potestas:* he who gave life also had the power to take it away."); *see also* Brian D. Gallagher, *A Brief Legal History of Institutionalized Child Abuse*, 17 B.C. THIRD WORLD L.J. 1, 8 (1997) ("[T]he [Roman] Emperor Hadrian introduced the concept that 'patria potestas in pietate debed, non in atrociate, consistere' (parental authority should be exercised in affection, not in atrocity).").

10. *See, e.g.*, *Briggs*, 33 Mass. (16 Pick) at 205 (awarding a father custody of his children unless he was determined to be "a vagabond and apparently wholly unable to provide for the safety and wants" of the children).

11. *See, e.g.*, JAMES C. BLACK & DONALD J. CANTOR, CHILD CUSTODY 8 (1989) (citing Miner v. Miner, 11 Ill. 43, 49 (1849)) ("In 1819 the Supreme Court of Illinois reaffirmed in principle the legal right of the father of custody of his children, 'unless he has forfeited, waived or lost it, either by misconduct, misfortune or some peculiar circumstances, sufficient in the opinion of an enlightened chancellor to deprive him of it.'").

12. MASON, *supra* note 5, at 54 ("A mother's lack of power over her children was an aspect of the general legal impotence of married women."); *see also id*. at 14.

13. Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

14. Hellen Y. Chang, *My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgendered Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649, 656–57 (2003) ("Early American colonists continued this paternal presumption from the common law in part because of women's inferior status under the law, but also because of the assumption that men were better able to financially provide for the child."); *see also Ex parte* Davidge, 51 S.E. 269, 269 (S.C. 1905) ("The father is held to have higher claim to the custody of the children, because upon him the law imposes the responsibility of their support and education.").

15. *See, e.g.*, Miner v. Miner, 11 Ill. 43, 50 (Ill. 1849) ("[A]n infant of tender years is generally left with the mother . . . even when the father is without blame, merely because of his inability to bestow

to the mother for children under seven, and many American states adopted statutes based on the Act.[16]

By the late nineteenth century, a series of societal changes coalesced to shift the presumption for children of all ages from fathers to mothers. First, the burgeoning women's rights movement[17] called for equal custody for mothers as a part of a broader push for women's property rights.[18] Secondly, increasing urbanization and female employment outside the home contributed to the shift as men left the house in search of work.[19] As men spent more time out of the house in industrializing jobs, couples divided their labor into wage earner and child nurturer.[20] Thirdly, the assumption that women were natural nurturers arose in both the legal field[21] and the scientific field.[22] Freudian psychoanalytic theory posited the mother as the first and most important relationship in the child's life, and subsequent research on infant attachment to the mother supported the preference for the mother as the custodial parent.[23] The combination of these factors shifted the legal presumption to favor mothers, a presumption that solidified in the early part of the twentieth century.[24] The new preference was short-lived, as the advent of second-wave feminism in the 1960s and 1970s[25] and the increased prominence of women in the workforce prompted judges and legislatures to reexamine these

upon it that tender care which nature requires and which it is the peculiar province of the mother to provide."); State v. Stigall, 22 N.J.L. 286 (N.J. 1849) (granting custody of three-year-old and thirteen-month-old child to mother under tender years doctrine, but not five-year-old child).

16. Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 121, 121–122 (1994).

17. MASON, *supra* note 5, at 51 ("The status of mothers was transformed by two conflicting historical movements: the cult of motherhood and the campaign for women's rights.").

18. *Id*. at 53.

19. *Id*. at 51 ("The nineteenth-century family . . . depended increasingly on adult men going outside the home to find work in developing urban industry or trade in order to support the family.").

20. Kelly, *supra* note 16, at 122.

21. *See, e.g*., Wand v. Wand, 14 Cal. 512, 518 (1860) ("[A] child of the tender age of this could be better cared for by the mother, with whom she could be almost constantly, than the father, whose necessary avocations would withdraw him, in a great measure, from personal superintendence and care of her."); State *ex rel*. Landis v. Landis, 39 N.J.L. 274, 278 (1877) (establishing a child's mother was entitled to custody under the act of 1860 "unless she [was] of such character and habits as to render her an improper guardian" and the child's father was no longer presumed to have right of custody). *See also* BLACK & CANTOR, *supra* note 11, at 14.

22. Kelly, *supra* note 16, at 122.

23. *Id*.

24. *See, e.g*., Blankenship v. Blankenship, 28 So. 2d 409, 410 (Ala. 1946) (granting custody of the couple's six-year-old son to the child's mother, acknowledging that she was "best fitted to bestow the affection, care, companionship and early training suited to its needs"); *see also* BLACK & CANTOR, *supra* note 11, at 14 ("Mothers were not generally superior custodians because they were better with infants; mothers were better custodians for all children and, *a fortiori*, they were better with children of tender years.").

25. *See* MASON, *supra* note 5, at 124 ("The push for equal treatment between men and women in divorce and custody . . . was particularly impelled by the newly formed movement to obtain equal rights for women.").

assumptions yet again.[26] The assumption that women would be homemakers, unable to secure gainful employment but better positioned to raise children, no longer applied as women fought and secured equal rights to men in multiple arenas. Today, fathers and mothers now theoretically enjoy equal legal status when applying for custody of their children.[27] The broad judicial discretion inherent in the best interests of the child analysis has allowed the courts to adapt the doctrine to a wider range of disputes, including disputes between same-sex partners.[28]

2. Best Interest Analysis

One of the earliest articulations of the best interests of the child standard came from Justice Cardozo, who wrote that where child custody was concerned, a judge "is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child' or between one parent and another . . . Equity does not concern itself with such disputes . . . Its concern is for the child."[29] Cardozo rested his decision on the common law doctrine of *parens patriae*, where the court steps into the role of the parent to determine what was best for the child.[30] State statutes have since codified factors deemed relevant for consideration under this standard. Such factors include: (1) the child's physical, emotional, mental, religious, and social needs;[31] (2) each parent's ability and desire to meet those needs;[32] (3) the child's

26. *See id*. at 126 ("It was not only feminist rhetoric promoting equal treatment that persuaded legislators and judges to abandon the maternal presumption; equal treatment arguments were combined with the reality that great numbers of women had abandoned full-time housekeeping for the workplace, moreover, most of these new workers were mothers.").

27. *See e.g*., Moore v. Barrett, 786 N.Y.S.2d 825, 827 (N.Y. App. Div. 2004) (awarding a father custody of his daughter upon finding that doing so is in the best interest of the child). A study of custody decisions by appellate courts found that in 1995, fathers won forty-two percent of custody cases (as opposed to thirty-five percent in 1960). Of course, the fact that the study examined only appellate cases may mean that its findings do not reflect trends at the trial court level. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes -1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215, 228 (quoted in Herma Hill Kay, *No Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 28-29 (2002)).

28. *See, e.g., In re* E.L.M.C., 100 P.3d 546 (Colo. App. 2004) (applying best interests analysis to a dispute involving the former same-sex partner of adoptive parent).

29. Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925).

30. *Id*. at 626.

31. *See, e.g*., ALASKA STAT. ANN. § 25.24.150(c)(l) (West, Westlaw through 2019 1st Reg. Sess.); GA. CODE ANN. § 19-9-3 (West, Westlaw through acts passed during 2019 Sess. of the Gen. Assemb.); IOWA CODE ANN. § 598.41 (3)(b) (West, Westlaw through 2019 Reg. Sess); MO. ANN. STAT. § 452.375 (1)(6) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); NEB. REV. STAT. § 42-2923(6)(c) (West, Westlaw through end of 1st Reg. Sess. of the 106th Leg. (2019)); S.D. CODIFIED LAWS § 25-4-45 (West, through 2019 Session Laws, Exec. Order 19-1 and Supreme Court Rule 19-18); VA. CODE ANN § 20-124.3 (West, Westlaw through end of the 2019 Reg. Sess.).

32. *See, e.g*., ALASKA STAT. ANN. § 25.24.150(c)(2) (West, Westlaw through 2019 1st Reg. Sess.); CONN. GEN. STAT. ANN. § 46b-56 (West, Westlaw through the 2019 January Reg. Sess. and the 2019 July Spec. Sess.); N.D. CENT. CODE ANN. §§ 14-09-06.2(b) (West, Westlaw through legislation effective Jan. 1, 2020, from the 66th General Assembly.); VT. STAT. ANN. tit. 15, § 665(b)(2) (West, Westlaw

preference, provided that the child is of sufficient age to articulate and comprehend such a preference;[33] (4) the parents' preferences;[34] (5) the interaction with his or her parents and siblings;[35] (6) whether one parent is the primary caretaker;[36]

---

through Acts of the Reg. Sess. of 2019-2020 Vermont Gen. Assemb. (2019)); WYO. STAT. ANN. § 20-2-201(ii), (iv) (West, Westlaw through 2019 Gen. Sess. of the Wyo. Leg.).

33. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(3) (West, Westlaw through 2019 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 25-403(A)(4) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); DEL. CODE ANN. tit. 13, § 722(a)(2) (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914(a)(3)(A) (West, Westlaw through Sept. 11, 2019); HAW. REV. STAT. ANN. § 571-46(a)(3) (West, Westlaw through Act 286 of the 2019 Reg. Sess.); IDAHO CODE ANN. § 32-717(l)(b) (West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); IND. CODE ANN. § 31-17-2-8(3) (West, Westlaw through 2019 First Reg. Sess. of the 121st Gen. Assemb.); NEB. REV. STAT. § 42-2923(6)(b) (West, Westlaw through the end of the 1st Reg. Sess. of the 106th Leg. (2019)); NEV. REV. STAT. ANN. § 125.0035(4)(a) (West, Westlaw through the end of the 80th Reg. Sess. (2019)); N.M. STAT. ANN. § 40-4-9(A)(2) (West, Westlaw through the end of the First Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE ANN. §§ 14-09-06.2(i) (West, Westlaw current through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); S.D. CODIFIED LAWS § 25-4-45 (West, Westlaw through 2019 Session Laws, Exec. Order 19-1 and Supreme Court Rule 19-18); VA. CODE ANN. § 20-124.3(8) (West, Westlaw through end of 2019 Reg. Sess.); WIS. STAT. ANN. § 767.41(5)(2) (West, Westlaw through 2019 Act 5, published May 4, 2019).

34. *See, e.g.*, DEL. CODE ANN. tit. 13, § 722(a)(l) (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914(a)(3)(B) (West, Westlaw through Sept. 11, 2019); IDAHO CODE ANN. § 32-717(l)(a) (West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); IND. CODE ANN. § 31-17-2-8(2) (West, Westlaw through 2019 First Reg. Sess. of the 121st Gen. Assemb.); KY. REV. STAT. ANN. § 403.270(2)(a) (West, Westlaw through 2019 Reg. Sess. and 2019 Extraordinary Sess.); MINN. STAT. ANN. § 518.17(1)(a)(7) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); MO. ANN. STAT. § 452.375(2)(1) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); NEV. REV. STAT. 125.480(4)(b) (West, Westlaw through the end of the 80th Reg. Sess. (2019)); N.M. STAT. ANN. § 40-4-9(A)(l) (West, Westlaw through the end of the First Reg. Sess. of the 54th Leg. (2019))); UTAH CODE ANN. § 30-3-10(2)(c) (West, Westlaw through 2019 First Spec. Sess.); WIS. STAT. ANN. § 767.41(5)(l) (West, Westlaw through 2019 Act 5, published May 4, 2019).

35. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(A)(2) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); DEL. CODE ANN. tit. 13, § 722(a)(3) (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914(a)(3)(C) (West, Westlaw through Sept. 11, 2019); IDAHO CODE ANN. § 32-717(1)(c)(West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); IND. CODE ANN. § 31-17-2-8(4)(A),(B) (West, Westlaw through 2019 First Reg. Sess. of the 121st Gen. Assemb.); MINN. STAT. ANN. § 518.17(1)(a)(9) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); MO. ANN. STAT. § 452.375(2)(3) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); N.M. STAT. ANN. § 40-4-9 (A)(3) (West, Westlaw through the end of the First Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE ANN. § 14-09-06.2(a) (West, Westlaw current through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); VT. STAT. ANN. tit. 15, § 665(b)(1) (West, Westlaw through Acts of the Reg. Sess. of the 2019-2020 Vermont General Assembly (2019)); VA. CODE ANN. § 20-124.3(4) (West, Westlaw through end of 2019 Reg. Sess.); WIS. STAT. ANN. § 767.41(5)(3) (West, Westlaw through 2019 Act 5, published May 4, 2019).

36. *See, e.g.*, MINN. STAT. ANN. § 518.17(1)(a)(6) (West, Westlaw through legis. effective through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); N.D. CENT. CODE ANN.§§ 14-09-06.2(d) (West, Westlaw current through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); VA. CODE ANN. § 20-124.3(5) (West, Westlaw through end of the 2019 Reg. Sess.). West Virginia remains the only state retaining a presumption in favor of the primary caretaker. *See, e.g.* B.M.J. v. J.D.J., 575 S.E.2d 272, 277 (W. Va. 2002) (holding that "[u]nless otherwise resolved by agreement of the parents under section 9-201 or unless manifestly harmful to the child, the court shall allocate custodial responsibility

(7) the bond between the child and each parent;[37] (8) the suitability of the existing custody and visitation arrangement, including whether it has provided a stable environment to which the child is well-adjusted;[38] (9) the parent's ability and willingness to encourage the child's relationship with the other parent and cooperate in decisions regarding the child's welfare;[39] (10) any history of domestic violence, child abuse, or child neglect;[40] (11) substance abuse by a parent or

---

so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation.").

37. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(4) (West, Westlaw through 2019 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 25-403(A)(l) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); D.C. CODE ANN. § 16-914(A)(3)(C) (West, Westlaw through Sept. 11, 2019); MINN. STAT. ANN. § 518.17(1)(a)(9) (West, Westlaw through legis. effective through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); NEB. REV. STAT. § 42-2923(6)(a) (West, Westlaw through the end of the 1st Reg. Sess. of the 106th Leg. (2019).); N.D. CENT. CODE ANN.§ 14-09-06.2(a) (West, Westlaw through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); OR. REV. STAT. ANN.§ 107.137(1)(a) (West, Westlaw through the 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Legis. Assemb.; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, effective through Oct. 1, 2019, enacted during the 2019 Reg. Sess. of the 80th Legis. Assemb.); VT. STAT. ANN. tit. 15, § 665(b)(l) (West, Westlaw through Acts of the Reg. Sess. of the 2019-2020 Vt. Gen. Assemb. (2019)).

38. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(5) (West, Westlaw through 2019 1st Reg. Sess.); DEL. CODE ANN. tit. 13, § 722(a)(4) (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914(a)(3)(D) (West, Westlaw through Sept. 11, 2019); IDAHO CODE ANN. § 32-717(l)(f) (West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); KY. REV. STAT. ANN. § 403.270(2)(e) (West, Westlaw through 2019 Reg. Sess. and 2019 Extraordinary Sess.); MINN. STAT. ANN. § 518.17(1)(a)(8) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); MO. ANN. STAT. § 452.375(2)(5) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); N.M. STAT. ANN. § 40-4-9(A)(4) (West, Westlaw through the end of the First Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE. ANN. § 14-09-06.2(d) (West, Westlaw through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); VT. STAT. ANN. tit. 15, § 665(b)(4) (West, Westlaw through Acts of the Reg. Sess. of the 2019-2020 Vt. Gen. Assemb. (2019)); WIS. STAT. ANN. § 767.41(5)(4-5) (West, Westlaw through 2019 Act 5, published May 4, 2019).

39. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(6) (West, Westlaw through 2019 1st Reg. Sess.); ARIZ. REV. STAT. ANN. § 25-403(A)(6) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); ARK. CODE ANN. §§ 9-13-10l(b)(2), (c) (West, Westlaw through 2019 Reg. Sess.); D.C. CODE ANN. § 16- 914(a)(3)(G) (West, Westlaw through Sept. 11, 2019); IOWA CODE ANN. § 598.41(l)(c) (West, Westlaw through 2019 Reg. Sess.); MINN. STAT. ANN.§ 518.17(1)(a)(11) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); MO. ANN. STAT. § 452.375(2)(4) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); OR. REV. STAT. ANN. § 107.137(l)(f) (West, Westlaw through the 2018 Reg. Sess. and 2018 Special Sess. of the 79th Legis. Assemb.; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, effective through Oct. 1, 2019, enacted during the 2019 Reg. Sess. of the 80th Legis. Assemb.).

40. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(7) (West, Westlaw through 2019 1st Reg. Sess.); ARIZ. REV. STAT. ANN. §§ 25-403(A)(8) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019).); ARK. CODE ANN. § 9-13-l0l(c) (West, Westlaw through 2019 Reg. Sess.); CAL. FAM. CODE § 3011(a)(2)(A) (West, Westlaw through Ch. 651 of the 2019 Reg. Sess.); DEL. CODE ANN. tit. 13, § 722 (a)(7) (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914(a)(3)(F) (West, Westlaw through Sept. 11, 2019); GA. CODE ANN. § 19-9-3(a)(4) (West, Westlaw through acts passed during the 2019 Sess. of the Gen. Assembly.); IDAHO CODE ANN. § 32-717(l)(g) (West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); IND. CODE ANN. § 31-17-2-8(7) (West, Westlaw through 2019 First Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN. § 598.41(l)(d) (West, Westlaw through 2019 Reg. Sess.); MINN. STAT. ANN. § 518.17(1)(a)(4) (West, Westlaw

member of the household;[41] (12) each parent's criminal record;[42] (13) the mental and physical health of all involved;[43] (14) a parent's bad faith, coercion, or duress in negotiating the custody agreement;[44] (15) the child's age and sex;[45] (16) each parent's moral fitness;[46] and (17) the child's cultural background.[47] Courts evaluate the facts of each case in light of these considerations and arrive at a decision

---

through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); MO. ANN. STAT. § 452.375(3)(c) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); NEB. REV. STAT. § 42-2923(2)(d), (e) (West, Westlaw through the end of the 1st Reg. Sess. of the 106th Leg. (2019).); NEV. REV. STAT. ANN. 125.480(4)(j) (West, Westlaw through the end of the 80th Reg. Sess. (2019)); N.Y. DOM. REL. LAW § 240(1) (McKinney, Westlaw through L.2019, ch. 444); N.D. CENT. CODE ANN. § 14-09-06.2(j) (West, Westlaw through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); OKLA. STAT. ANN. tit. 43, § 109(I)(1) (West, Westlaw through enacted legis. of the First Reg. Sess. of the 57th Leg. (2019)); 23 PA. CONS. STAT. ANN. § 5303(a)(2) (West, Westlaw through 2019 Reg. Sess. Act 75); R.I. GEN. LAWS ANN.§ 15-5-16(g)(l) (West, Westlaw through Ch. 310 of the 2019 Reg. Sess.); TENN. CODE ANN. § 36-6-101(a)(4) (West, Westlaw through end of 2019 First Extraordinary Sess. of the 111th Tenn. Gen. Assemb.); TEX. FAM. CODE ANN. § 153.004 (Vernon, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. § 30-3-10.2(3)(a) (West, Westlaw through 2019 First Spec. Sess.); VT. STAT. ANN. tit. 15, § 665(b)(9) (West, Westlaw through Acts of the Reg. Sess. of the 2019-2020 Vt. Gen. Assemb. (2019)); VA. CODE ANN. § 20-124.3 (9) (West, Westlaw through end of the 2019 Reg. Sess.); WIS. STAT. ANN.§ 767.41(5)(l2-13) (West, Westlaw through 2019 Act 5, published May 4, 2019); WYO. STAT. ANN. § 20-2-201(c) (West, Westlaw through the 2019 Gen. Sess. of the Wyo. Leg.).

41. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(8) (West, Westlaw through 2019 1st Reg. Sess.); CAL. FAM. CODE § 3011(a)(4) (West, Westlaw through Ch. 651 of the 2019 Reg. Sess.).

42. *See, e.g.*, FLA. STAT. ANN. § 61.13(2)(c)(2) (West, Westlaw through 2019 1st Reg. Sess. of the 26th Leg.); MASS. GEN. LAWS ANN. ch. 208, § 28 (West, Westlaw through ch. 88 of the 2019 1st Annual Sess.).

43. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(A)(5) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); DEL. CODE ANN. tit. 13, § 722(a)(5) (West, Westlaw through ch. 218 of the 150th Gen. Assemb. (2019-2020)); D.C. CODE ANN. § 16-914(a)(3)(E) (West, Westlaw through Sept. 11, 2019); IDAHO CODE ANN. § 32-717(2) (West, Westlaw through 2019 First Reg. Sess. of the 65th Idaho Leg.); IND. CODE ANN. § 31-17-2-8(6) (West, Westlaw through 2019 First Reg. Sess. of the 121st Gen. Assemb.); MINN. STAT. ANN. § 518.17(1)(a)(1), (1)(a)(5) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); MO. ANN. STAT. § 452.375(2)(6) (West, Westlaw through the end of the 2019 First Reg. and First Extraordinary Sess. of the 100th Gen. Assemb.); N.M. STAT. ANN. § 40-4-9 (A)(5) (West, Westlaw through the end of the First Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE ANN. §§ 14-09-06.2(g) (West, Westlaw through legis. effective Jan. 1, 2020, from the 66th Gen. Assemb.); VA. CODE ANN. § 20-124.3(1), (2) (West, Westlaw through end of the 2019 Reg. Sess.).

44. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(A)(5) (West, Westlaw through 1st Reg. Sess. of the 54th Leg. (2019)); N.D. CENT. CODE ANN. §§ 14-09-06.2 (West, Westlaw through Jan. 1, 2020, from the 66th Gen. Assemb.).

45. *See, e.g.*, D.C. CODE ANN. § 16-914(a)(3)(M) (West, Westlaw through Sept. 11, 2019); IND. CODE ANN. § 31-17-2-8(1) (West, Westlaw through 2019 1st Reg. Sess.); VA. CODE ANN.§ 20-124.3(1) (West, Westlaw through end of the 2019 Reg. Sess.). *But see* Hubbell v. Hubbell, 702 A.2d 129 (Vt. 1997) (prohibiting consideration based on sex of child).

46. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23 (West, Westlaw through P.A. 2019, No. 51, of the 2019 Reg. Sess.); N.D. CENT. CODE ANN. §§ 14-09-06.2 (West, Westlaw through Jan. 1, 2020, from the 66th Gen. Assemb.).

47. *See, e.g.*, MINN. STAT. ANN. § 518.17(a)(ll) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sessions); *In re* Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983) (holding that "religious belief and training is a factor to be considered in a custody determination," but should not be determinative).

that, if Justice Cardozo's exhortations receive due weight, will reflect the best possible custodial arrangement for the child.[48]

B. CUSTODY AND VISITATION AWARDS

Prior to intervening in custody disputes, courts in some states may require the parties to engage in alternative dispute resolution.[49] In conducting the best interests of the child analysis, courts cannot technically take into account any conduct by a party that does not affect the party's relationship with the child.[50] However, in evaluating the best interests of the child of a gay, lesbian, bisexual, or transgender parent, courts have also focused on extrinsic factors, including the potential for stigmatization and concern about the morality of homosexuality, in addition to the statutory factors listed above.[51]

1. Custody

States generally have a statutory presumption favoring joint, or shared, custody of children.[52] Even in states where there is not a statutory presumption of joint

48. As argued above, courts cannot consider gender as the sole determinative factor in awarding custody. *See* statutes and cases requiring a gender-neutral approach, *supra* note 8.

49. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-128.5 (West, Westlaw through 2019 Sept. Reg. Sess.) (permitting a court to appoint an arbitrator to resolve disputes over children); CONN. GEN. STAT. ANN. § 46b-56a(c) (West, Westlaw through 2019 Jan. Reg. Sess.) (allowing a court to order parties to submit to conciliation).

50. *Compare* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003) (denying modification of custody due to a custodial parent's same-sex partner household absent evidence of harm or potential harm to children), *with* J.L.S. v. D.K.S., 943 S.W.2d 766, 772 (Mo. Ct. App. 1997) (holding the lower court's restrictions on the father's visitation rights proper upon finding that visitation with father immediately after sex confirmation surgery would impair the child's emotional development).

51. Matt Larsen, *Lawrence v. Texas and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53, 54 (2004) (arguing that such considerations are unconstitutional in light of the Court's decision in *Lawrence*).

52. *See, e.g.*, D.C. CODE ANN. § 914(a)(2) (2019) ("[R]ebuttable presumption that joint custody is in best interests of the child or children . . . ."); IDAHO CODE ANN. § 32-717B(4) (West, Westlaw through 2020 2nd Reg. Sess. Of the 65th Idaho Leg.) ("[P]resumption that joint custody is in the best interests of a minor child or children."); N.M. STAT. ANN. § 40-4-9.1(A) (West, Westlaw through Ch.4 of the 2nd Reg. Sess. of the 54th Leg.) ("[P]resumption that joint custody is in the best interests of child in an initial custody determination."); *see also, e.g.*, ALA. CODE § 30-3-152(c) (West, Westlaw through Act 2019-540) ("If both parents request joint custody, the presumption is that joint custody is in the best interest of the child."); CAL. FAM. CODE § 3080 (West, Westlaw through Ch.1 of 2020 Reg. Sess.) ("[P]resumption . . . that joint custody is in the best interest of a minor child . . . where the parents have agreed to joint custody."); CONN GEN. STAT. ANN. § 46b-56a(b) (West, Westlaw through the 2020 Supp. to the Gen. Statutes of CT, Revision of 1958) ("[P]resumption . . . that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody . . . ."); MINN. STAT. ANN. § 518.17(2)(d) (West, Westlaw through Jan. 1, 2020 from the 2019 Reg. and 1st Special Sess.) ("[R]ebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child."); MISS. CODE ANN. § 93-5-24(4) (West, Westlaw through 2019 Reg. Sess.) ("[P]resumption that joint custody is in the best interests of a minor child where both parents have agreed to an award of joint custody."); TENN. CODE ANN. § 36-6-101(a)(2)(A) (West, Westlaw through Jan. 24, 2020) ("[P]resumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody . . . ."). *But see* ARIZ. REV. STAT. ANN. § 25-403.01(A) (West, Westlaw through legislation effective Feb. 18, 2020 of the 2nd Reg. Sess. of the Fifty-Fourth Leg.) ("In awarding

custody, there is often an implicit judicial bias favoring joint custody.[53] However, courts have discretion to grant a parent sole custody when joint custody would be detrimental to a child's best interests.[54] Courts view joint custody as a means of "further[ing] gender equality and shared parental responsibility"[55] and of avoiding the child's alienation from either parent.[56] In *Scott v. Scott*, the South Carolina Supreme Court held that—while the state disfavors joint custody—in this situation, a sole-custody arrangement had the potential to effectively alienate the child from the non-custodial parent, as there was a history of marital turbulence and interpersonal dispute between the parents combined with husband and wife both loving and wanting the child.[57]

Joint custody arrangements may include joint legal custody, joint physical custody, or both. When courts grant joint legal custody, "both parents retain equal legal rights and responsibilities with regard to their children at all times, regardless of with which parent the child is living."[58] This arrangement usually means that parents will have joint physical custody as well, but exceptions to this general rule exist.[59] When parents share joint physical custody, the child spends a significant amount of time with each parent.[60] By contrast, a sole custody arrangement

---

legal decision-making, the court may order sole legal decision-making or joint legal decision-making." The statute does not create a presumption in favor of one custody arrangement over another.); CAL. FAM. CODE § 3040(b) (West, Westlaw through Ch.1 of Reg. Sess.) ("[No] preference . . . [or] presumption for or against joint legal custody, joint physical custody, or sole custody [created], but . . . the court and the family [are allowed] the widest discretion to choose a parenting plan that is in the best interests of the child or children."); OKLA. STAT. ANN. tit. 43, § 112(C)(2) (West, Westlaw through the 1st Reg. Sess. of the 57th Leg.) ("[N]either a legal preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody.").

53. Kirsti Kurki-Suonio, *Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective*, 14 INT'L J. L. POL'Y & THE FAM. 183, 186–89 (2000) (arguing that the contribution of children's psychology in the 1970s fostered the presumption favoring joint custody, implicitly and textually).

54. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403.01(A) (West, Westlaw through 2nd Reg. Sess. of the Fifty-Fourth Leg.) ("In awarding child custody, the court may order sole custody or joint custody."); FLA. STAT. ANN. § 61.13(2)(c)(2) (West, Westlaw through the 2019 1st Reg. Sess. of the 26th Leg.) ("The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.").

55. Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 678 (2003). *But cf.* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502–03 (1988) (arguing that judges often resort to joint custody awards to avoid making difficult custody decisions, instead of focusing solely on the best interest of the child).

56. *See, e.g.*, Scott v. Scott, 579 S.E.2d 620, 622–24 (S.C. 2003) (awarding joint custody for fear that to do otherwise would result in the child's alienation from the non-custodial parent).

57. *Id.*

58. Judith Bond Jennison, Note, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1147 (1991).

59. *Compare Ex parte* Byars, 794 So. 2d 345, 347 (Ala. 2001) (defining "joint custody" as "joint legal custody and joint physical custody"), *with In re* Marriage of Burgess, 913 P.2d 473, 477 (Cal. 1996) ("The trial court issued a ruling providing that the father and the mother would share joint legal custody, with the mother to have sole physical custody.").

60. *See, e.g.*, IDAHO CODE ANN. § 32-717B(2) (West, Westlaw through the 2020 2nd Reg. Sess. of the 65th Idaho Leg.) ("'Joint physical custody' means an order awarding each of the parents significant

gives both legal and physical custody of the child to one parent, although an award of sole custody does not preclude visitation by the non-custodial parent. [61]

Divorce is particularly common in the United States and other western countries, and negative effects of parental separation on child well-being have been well documented.[62] "In general, children with divorced parents face increased risks of social maladjustment and ill-health compared with those in intact families."[63] These negative effects can often at least partly be attributed to economic changes due to the parental separation. [64] However, recent research suggests that "joint physical custody might counteract the potential negative effects of parental separation."[65]

2. Visitation

Despite a strong presumption in favor of visitation by a non-custodial parent,[66] judges maintain broad discretion to determine whether such visitation is in the best interests of the child.[67] Courts may deny or restrict visitation when faced

---

periods of time in which a child resides with or is under the care and supervision of each of the parents or parties.").

61. *See* James W. Bozzomo, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547, 553 (2002).

62. Emma Fransson et al., *Psychological complaints among children in joint physical custody and other family types: Considering parental factors*, SCANDINAVIAN J. OF PUB. HEALTH 177, 177 (2016).

63. FRANSSON, *supra* note 62, at 181.

64. *Id*.

65. *Id*. at 183.

66. *See, e.g*., Prater v. Wheeler, 322 S.E.2d 892 (Ga. 1984) (holding that a fourteen-year-old had the right to decide not to visit his non-custodial parent, but that a court order must be obtained to enforce that right); Roberts v. Roberts, 489 N.E.2d 1067, 1069 (Ohio Ct. App. 1985) ("Ordinarily, it will be in the best interests of children that they receive the love, affection, training, and companionship of their noncustodial parent" through visitation.).

67. *See* ALA. CODE § 30-2-40(e) (West, Westlaw through Act2019-540); ALASKA STAT. ANN. § 25.20.060 (West, Westlaw through the 2019 1st Reg. Sess. and 2019 1st Spec. Sess. of the 31st Leg.); ARIZ. REV. STAT. ANN. § 25-403 (West, Westlaw through 2nd Reg. Sess. of the 54th Leg.); ARK. CODE ANN. § 9-13-101 (West, Westlaw through the end of the 2019 Reg. Sess. of the 92nd Gen. Assemb. 2019); CAL. FAM. CODE § 3040 (West, Westlaw through Ch.1 of 2020 Reg. Sess.); COLO. REV. STAT. ANN. § 14-10-124 (West, Westlaw through the 2019 Reg. Sess.); CONN. GEN. STAT. ANN. § 46b-56 (West, Westlaw through the 2020 Supp. to the Gen. Stat. of Conn); DEL. CODE ANN. tit. 13, § 722 (West, Westlaw through ch. 232 of the 150th Gen. Assemb.); D.C. CODE ANN. § 16-914 (West, Westlaw through Jan. 29, 2020); FLA. STAT. ANN. § 61.13(2)(c)(1) (West, Westlaw through the 2019 1st Reg. Sess. of the 26th Leg.); GA. CODE ANN. § 19-9-3 (West, Westlaw through Laws 2020); HAW. REV. STAT. ANN. § 571-46(a)(1) (West, Westlaw through the end of the 2019 Reg. Sess.); IDAHO CODE ANN. § 32-717 (West, Westlaw through the 2020 2nd Reg. Sess. of the 65th Idaho Leg.); 750 ILL. COMP. STAT. ANN. 5 / 601.2(a) (West 2016); IND. CODE ANN. § 31-17-2-8 (West, Westlaw through the 2020 2nd Reg. Sess. of the 121st Gen. Assemb.); IOWA CODE ANN. § 598.41(1)(a) (West, Westlaw through the 2019 Reg. Sess.); KAN. STAT. ANN. § 23-3203 (a)(3)(B) (West, Westlaw through the 2019 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 403.270(2) (West, Westlaw through ch.1 of the 2020 Reg. Sess.); LA. CIV. CODE ANN. art. 134 (West, Westlaw through the 2019 Reg. Sess.); ME. REV. STAT. ANN. tit. 19-A, § 1653(3) (West 2019); MD. CODE ANN., FAM. LAW § 9-105 (West, Westlaw through the 2019 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 208, § 28 (West, Westlaw through ch.153 of the 2019 1st Ann. Sess. and ch. 16 of the 2020 2nd Ann. Sess.); MICH. COMP. LAWS ANN. § 722.23 (West, Westlaw through 2020 Reg. Sess., 100th Leg.; MINN. STAT. ANN. § 257.025(a) (West, Westlaw

with evidence demonstrating that visitation with a non-custodial parent has caused or would likely cause harm to the child.[68] Courts have frequently used concern for the well-being of children to restrict or deny custody and visitation rights to gay and lesbian parents.[69] Once a court has determined that visitation with a non-custodial parent is in a child's best interests, however, that court may not then restrict visitation without a showing that continuing visitation would cause harm.[70]

---

through Jan. 1, 2020 from the 2019 Reg. and 1st Spec. Sess.); MISS. CODE ANN. § 93-5-24(1) (West, Westlaw through the 2019 Reg. Sess.); MO. ANN. STAT. § 452.375(2) (West, Westlaw through the end of the 2019 1st Reg. and 1st Extra. Sess. 100th Gen. Assemb.); MONT. CODE ANN. § 40-4-212(1) (West, Westlaw through the 2019 Sess.); NEB. REV. STAT. ANN. § 42-364(1)(b) (West, Westlaw through the 2nd Reg. Sess. of the 106th Leg.); N.J. STAT. ANN. §§ 9:2-3 (West, Westlaw through L.2019, c.436 and J.R. No.22); N.M. STAT. ANN. § 40-4-9(A) (West, Westlaw through Ch.4 of the 2nd Reg. Sess. of the 54th Leg.); N.Y. DOM. REL. LAW § 240(1) (West, Westlaw through L.2019, ch. 758 & L.2020); N.C. GEN. STAT. ANN. § 50-13.2(a) (West, Westlaw through the end of the 2019 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 14-09-06.2 (West, Westlaw through Jan. 1, 2020, from the 66th Gen. Assemb.); OKLA. STAT. ANN. tit. 43, § 112.5(D)(1) (West, Westlaw through 1st Reg. Sess. of the 57th Leg.); OR. REV. STAT. ANN. § 107.137(1) (West, Westlaw through laws enacted in the 2018 Reg. Sess. and 2018 Spec. Session of the 79th Leg. Assemb.) 23 PA. CONS. STAT. ANN. § 5323(a)(1) (West, Westlaw through 2020 Reg. Sess. Act 8.); 15 R.I. GEN LAWS ANN. § 15-5-16(d)(2) (West 2019); S.C. CODE ANN. § 20-3-160 (West, Westlaw through the 2019 sess.); S.D. CODIFIED LAWS § 25-4-45 (West. Westlaw through 2019 Sess. Laws); TENN. CODE ANN. § 36-6-101(a)(1) (West, Westlaw from the 2020 1st Reg. Sess. of the 111th Gen. Assemb.); TEX. FAM. CODE ANN. § 153.002 (West, Westlaw through the end of the 2019 Reg. Sess. of the 86th Leg.); UTAH CODE ANN. § 30-3-10(1)(a)(Current through ch.1 of the 2020 Gen. Sess.;VT. STAT. ANN. tit. 15, § 665 (West, Westlaw through Acts of the Reg. Sess. West. Westlaw current through Acts of the Reg. Sess. of the 2019–2020); VA. CODE ANN. § 20-124.3 (West 2019); WASH. REV. CODE ANN. § 26.09.184(1)(g) (West, Westlaw current through Chap. 2 of the 2020 Reg. Sess. in the Washington Legislature 2019); W. VA. CODE ANN. § 48-9-101 (West 2019) (current through the 2020 Reg. Sess.); WIS. STAT. ANN. § 767.41(2)(a) (West, Westlaw through 2019 Act 76 (WYO. STAT. ANN. § 20-2-201(a) (West 2019).

68. *See, e.g.*, Trombley v. Trombley, 754 N.Y.S.2d 100, 101–102 (N.Y. App. Div. 2003) (denying visitation rights when daughter experienced "anxiety and concentration problems" due to her father's abusive behavior toward women); Roberts v. Roberts, 586 S.E.2d 290, 293, 295, 298 (Va. Ct. App. 2003) (denying father in-person visitation rights after he threatened his children with damnation and referred to their mother as devil, adulteress, and fornicator, causing emotional and psychological harm to the children).

69. *Compare* Chicoine v. Chicoine, 479 N.W.2d 891, 894 (S.D. 1992) (remanding visitation rights case to determine the safety of the environment in mother's home, given evidence of past open displays of affection between the children's mother and her same-sex partner), *and In re* J.S. & C., 324 A.2d 90, 97 (N.J. Super. Ct. Ch. Div. 1974) (restricting indications of father's homosexuality during child's visits), *with In re* Marriage of Birdsall, 243 Cal. Rptr. 287, 290–91 (Cal. Ct. App. 1988) (holding that a restraining order prohibiting a gay father's visitation with his son was unreasonable). While all determinations of potential future harm are by their very nature speculative, courts are more inclined to indulge such speculation when one of the parents seeking custody is LGBT. For a discussion of this issue, *see* Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L.J. 623, 624 (1996), and Bruce D. Gill, *Best Interest of the Child? A Critique of Judicially Sanctioned Arguments Denying Child Custody to Gays and Lesbians*, 68 TENN. L. REV. 361, 361–62 (2001).

70. *Compare In re* Marriage of Diehl, 582 N.E.2d 281, 294 (Ill. App. Ct. 1991) (holding the lower court erroneously prohibited visitation in the presence of mother's same-sex partner, absent proof that visitation with a noncustodial parent would seriously endanger the child), *with* J.L.S. v. D.K.S., 943 S.W.2d 766, 772 (Mo. Ct. App. 1997) (holding that restriction on father's visitation rights was proper

3. Modification of Awards

Courts will only modify custody awards if evidence is presented demonstrating a significant change in circumstances.[71] Trial courts have broad discretion to find such a change.[72] Courts often weigh the child's interest in a stable living situation against the claimed change in circumstances.[73] Some of the changed circumstances that have warranted modification of custody and visitation decisions include remarriage,[74] relocation,[75] improved financial status,[76] domestic violence,[77] incarceration,[78] recognition of HIV-positive status,[79] and the recognition or revelation of a parent as lesbian, gay, bisexual, or transgender.[80] Although courts have considered each one of these factors a significant change in circumstances, no single factor is dispositive.[81]

---

upon a finding that immediate visitation after the father's sex confirmation surgery would impair the child's emotional development).

71. *See e.g.*, Pulliam v. Smith, 501 S.E.2d 898, 899 (N.C. 1998) (party seeking modification must show substantial change, but the change need not have an adverse effect on child; it could be a substantial change that would benefit child).

72. *See, e.g.*, Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002) (holding a trial court's judgment in modifying custody and visitation rights will only be reversed if "clearly erroneous").

73. WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 809 (2d ed. 1997); *see also* Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L. J. 757, 759–60 (1985) (arguing that courts should value the stability of custodial arrangements for children more highly).

74. *See, e.g.*, Hamilton v. Barrett, 989 S.W.2d 520, 524–25 (Ark. 1999) (holding that remarriage constituted material change in circumstances); *In re* Marriage of Hubbard, 315 N.W.2d 75, 81–82 (Iowa 1982) (holding that a material change in circumstances justified custody modification from mother to father when both parents remarried, father settled down with a good income, and mother had extramarital affairs and neglected the children's educational needs and medical treatment).

75. *See, e.g.*, Hayes v. Gallacher, 972 P.2d 1138, 1141 (Nev. 1999) (holding that the mother's proposed relocation to Japan constituted a substantial change in circumstances that would impair the father's continuing relationship with his children).

76. *See, e.g.*, Jackson v. Jackson, 96 P.3d 21, 22, 24–25 (Wyo. 2004) (finding no error in a change of custody when father had been employed regularly for over eighteen months and was financially responsible and mother was unable to keep steady job over the course of five months); *see also* JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4-20, at 253–54 (2d ed. 2002) ("[F]inancial resources of the parties are normally irrelevant to a custody determination . . . . [But] financial resources of the parents have been found to be relevant to the extent that they reflect a parent's ability to provide a stable home.").

77. *See e.g.*, Williams v. Barbee, 243 P.3d 995, 997 (Alaska 2010) (finding history of domestic violence is rebuttable presumption against granting custody).

78. *See e.g.*, Naylor v. Kindred, 620 N.E.2d 520, 531 (Ill. Ct. App. 1993) (holding that incarceration of custodial parent justified change of custody without showing of serious endangerment).

79. *See e.g.*, H.J.B. v. P.W., 628 So. 2d 753, 754–56 (Ala. Civ. App. 1993) (upholding change in custody from father to mother was upheld based on various factors including the revelation of the father's HIV-positive status); *see generally* Elizabeth B. Cooper, *HIV-Infected Patients and the Law: Issues of Custody, Visitation and Guardianship*, AIDS AGENDA: EMERGING ISSUES IN CIVIL RIGHTS 69–117 (Nan D. Hunter & William B. Rubenstein eds., 1992).

80. *See, e.g.*, Davidson v. Coit, 899 So. 2d 904, 911 (Miss. Ct. App. 2005) (affirming modification to custody where the mother's "homosexual lifestyle" was a factor).

81. *See, e.g.*, Gerot v. Gerot, 61 S.W.3d 890, 896 (Ark. Ct. App. 2001) ("[R]elocating in order to obtain employment itself does not constitute a material change in circumstances.").

"Unstable" financial and employment situations have been factors for the modification of custody.[82] In *Holmes v. Holmes*, an Arkansas court weighed many factors including sexuality in a custody dispute; the court found that husband's more stable financial status to be a factor in awarding custody over wife.[83] However, the general rule is that changed economic situations are not dispositive.[84] Nevertheless, socioeconomic status can be a barrier to a parent retaining custody when the other parent possesses greater means under a "best interest of the child" analysis.

The general doctrine of recognizing and giving effect to the decisions of the courts of other states has endured challenges where one state recognizes the legal rights of gay and lesbian parents and the other does not, however, and some state courts have been hostile to custody decisions from other states which grant visitation and other custody rights to the former partners of gay and lesbian biological parents.[85]

C. COURT TREATMENT OF GAY, LESBIAN, BISEXUAL & TRANSGENDER BIOLOGICAL PARENTS

In adjudicating custodial disputes involving, lesbian, gay, bisexual, and transgender (LGBT) parents, courts have adapted and at times rejected traditional approaches to custody and visitation.[86] There are two primary doctrinal approaches to a best interests of the child determination with regard to LGBT biological parents, the nexus approach being the most compatible with LGBT rights. In contrast, visitation determinations involving LGBT biological parents are generally more neutral, favoring the biological parents regardless of sexual orientation. However, parental sexuality continues to play a role in both custody and visitation awards, with restrictions and modifications often weighted by issues connected to sexual orientation.

---

82. *See* Holmes v. Holmes, 98 Ark. App. 341, 349 (Ark. Ct. App. 2007) ("The record is also replete with evidence of appellant's lack of financial, residential, and employment stability . . . This evidences little effort by appellant to maintain a stable life for her son.").

83. *Id.*

84. *See e.g.*, Gary D.B. v. Elizabeth C.B., 722 N.Y.S.2d 323, 326 (4th Dep't 2001) ("[C]hildren should not be shuttled back and forth between divorced parents merely because of changes in . . . economic circumstances . . . at least so long as the custodial parent has not been shown to be unfit, or perhaps less fit, to continue as the proper custodian.").

85. *See, e.g.*, Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951, 956, 958 (Vt. 2006) (discussing conflicting holdings of courts in Vermont and Virginia and holding that Vermont's decision, which was first in time, was valid); Gestl v. Frederick, 754 A.2d 1087 (Md. Ct. App. 2000) (addressing whether a Maryland court should have dismissed a custody case in favor of a more convenient forum in another state when that state's laws did not grant standing to a non-biological de facto parent).

86. *Compare* T.C.H. v. K.M.H., 784 S.W.2d 281, 284–85 (Mo. Ct. App. 1989) (stating that the mother's "homosexual conduct" could have adverse effects on the "morality" and "well-being" of her children), *with* Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001) (holding that there was no abuse of discretion where the court granted visitation rights to a lesbian mother absent evidence showing that her child had been, or would be, harmed by overnight visits with the mother and the mother's same-sex partner).

1. Custody Determinations

In custody disputes involving LGBT biological parents, courts generally rely on either a "per se" approach or a "nexus" approach. While both approaches are ostensibly predicated upon a best interest of the child analysis, they differ in the way that they balance a parent's sexual orientation and/or gender identity with other interests.[87]

a. Per se approach. The per se approach, adopted by only a minority of jurisdictions, assigns dispositive weight to a parent's sexual orientation in making custody determinations.[88] Under this approach, courts apply a presumption that exposure to a LGBT biological parent's sexual orientation is adverse to the best interests of the child[89] and will deny custody to such a parent even if there is no evidence that the parent's sexual orientation has had any adverse effect on the child.[90] Courts applying the per se approach rely solely on a parent's sexual orientation in their best interest analysis, despite the presence of other potentially relevant circumstances.[91] On some level, this constitutes a repudiation of the balancing approach generally utilized in such cases in favor of the type of categorical, gender-dispositive rules states rejected when best interests analysis became the norm.

Courts largely have used the per se approach to deny custody to gay, lesbian, or bisexual parents; however, courts have also used the approach with regards to transgender parents.[92] Some cases using this rule not only deny custody to transgender parents, but also revoke all visitation and parental rights. An Illinois court annulled a transgender father's parental rights, finding that laws protecting a

87. Shapiro, *supra* note 69, at 641. Shapiro also defines a third standard, derived from the per se approach, which she refers to as the "permissible determinative inference" approach.

88. *See* White v. Thompson, 569 So. 2d 1181, 1183–84 (Miss. 1990) (affirming a restriction of the lesbian mother's visitation rights because the mother's sexual orientation was found to be inimical to the child's best interest); J.P. v. P.W., 772 S.W.2d 786, 793–94 (Mo. Ct. App. 1989) (holding that unrestricted visitation rights to a gay father would not serve the child's best interest); Dailey v. Dailey, 635 S.W.2d 391, 396 (Tenn. Ct. App. 1981) (limiting a lesbian mother's visitation rights because open same-sex relationship deemed detrimental to child); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (denying a gay father custody when the court believed the child would face social condemnation).

89. *See* Jeffrey L. Hall, *Coming Out in West Virginia: Child Custody and Visitation Disputes Involving Gay or Lesbian Parents*, 100 W. VA. L. REV. 107, 111 (1997) (arguing the per se rule amounts to an irrebuttable presumption that lesbian or gay parents are unfit for custody); Shapiro, *supra* note 69, at 633–35 (arguing that a per se rule divests trial courts of discretion to grant custody to a lesbian or gay parent, by preventing courts from comparing the characteristics and conduct of both parents in a custody dispute). For arguments in support of the per se approach, see Lynn Wardle, *The "Inner Lives" of Children in Lesbigay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 540–41 (2005).

90. *See* Eileen P. Huff, *The Children of Homosexual Parents: The Voices the Courts Have Yet to Hear*, 9 AM. U. J. GENDER SOC. POL'Y & L. 695, 699–700 (2001).

91. *Id.* at 700.

92. *See* Chang, *supra* note 14, at 697.

father's parental rights in the case of artificial insemination and granting a legal presumption of parental rights to a husband in a marriage do not apply to transgender males.[93]

b. Nexus approach. Under the nexus approach,[94] a court will consider a parent's sexual orientation relevant to a custody determination only if the parent's sexual orientation is shown to harm the child.[95] Unlike the per se approach, the nexus approach does not assign dispositive weight to a parent's sexuality in making custody determinations. However, some commentators have noted that, despite this apparent prohibition on relying solely on a parent's sexual orientation, courts may still give more primacy to potential harm to children deriving from the stigmatization of homosexuality.[96] For example, in one case, courts declined to remove a fifteen-year-old child from the home of his mother who, since her divorce from his father, had married two convicted felons, the most recent of whom was an unemployed drug addict who sometimes physically abused her, citing the father's sexual orientation and the child's resulting occasional embarrassment as a major factor in its decision.[97] The District of Columbia is the only jurisdiction that uses a nexus test, which statutorily forbids the use of a parent's sexual orientation as the sole basis for denying child custody or visitation rights.[98]

---

93. *In re* Marriage of Simmons, 825 N.E.2d 303, 311–12 (Ill. App. Ct. 2005).

94. *See* Packard v. Packard, 697 So. 2d 1292, 1293 (Fla. Dist. Ct. App. 1997) (holding that an award of custody to the father instead of the lesbian mother, when based on notion of "traditional family environment," was insufficiently vague and unsupported by evidence of a direct impact on child); Pryor v. Pryor, 709 N.E.2d 374, 378 (Ind. Ct. App. 1999) (holding that homosexuality as the sole determination is insufficient to render a parent unfit in a child custody determination); Doe v. Doe, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) ("[A] parent's life-style must be evaluated 'in terms of the interpersonal relationships of the persons involved as they affect the well-being of the child or children whose custody is under consideration.'"); A.C. v. C.B., 829 P.2d 660, 664 (N.M. Ct. App. 1992) (holding that sexual orientation alone may not be used to deny custody or visitation to a biological mother's same-sex partner; instead the court should look to any effects on the child); Van Driel v. Van Driel, 525 N.W.2d 37, 39–40 (S.D. 1994) (upholding the awarding of custody to a child's mother when her sexual orientation did not have harmful effect on the child); *In re* Parsons, 914 S.W.2d 889, 894 (Tenn. Ct. App. 1995) (upholding the awarding of custody to a child's mother when she showed more dedication to providing a stable environment and had not exposed her son to "inappropriate expression of sexual conduct" with her same-sex partner); *In re* Marriage of Wicklund, 932 P.2d 652, 653 (Wash. Ct. App. 1996) (held that prohibiting the father's display of affection with his same-sex partner, including hand-holding and kissing, was an abuse of discretion in making a custody determination).

95. *See* Shapiro, *supra* note 69, at 636 (arguing that the "[a]pplication of a nexus test to the question of a parent's homosexuality is consistent with the general family law principle that most parental characteristics are relevant only if they can be shown to have an impact on the child").

96. *See* Shapiro, *supra* note 69, at 636; *see also* GILL, *supra* note 69, at 387; Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) (denying a gay father custody where the court believed the child would face social condemnation).

97. Weigand v. Houghton, 730 So. 2d 581, 584–85 (Miss. 1999), as discussed in GILL, *supra* note 69, at 387.

98. *See* D.C. CODE ANN. § 16-914(a)(1)(A) (West, Westlaw through Jan., 29, 2010. ("In any proceeding between parents in which the custody of a child is raised as an issue, the best interest of the

In custody determinations involving same-sex couples, where courts have tended to rely on biological realities denying custody to same-sex divorced partners (when there is not a legal relationship to the child such as adoption).[99] However, post *Obergefell*, courts have been more willing to recognize same-sex married couples as "legitimate" parents for custody purposes.[100]

Courts applying the nexus approach have been more amicable to transgender parents than those applying the per se approach. Advocates of the nexus approach have argued that courts will be less likely to allow the gender identity of a parent to negatively affect custody decisions as they gain a greater understanding of transgender issues.[101] In 1973, a Colorado Court of Appeals held that it "shall not consider conduct of a proposed custodian that does not affect his relationship with the child," quoting the Colorado custody statute.[102] This ruling spawned several cases in a variety of jurisdictions holding that transition was relevant in custody determinations to the extent that the transition impacted the children. For example, a Montana court found that a parent's "cross-dressing," was not relevant to the issue of custody, as there was no evidence that the parent's behavior would harm the child.[103] Despite this, some courts using the nexus approach have found a parent's gender identity as grounds for termination of parental rights. In a Missouri case, the court overturned a joint custody award on concerns that a transgender person may harm a child. [104] The court used a definition of best interest of the child that included "consideration of what conduct a parent may inspire by example."[105]

2. Visitation Determinations

While many courts are reluctant to award custody to LGBT biological parents, courts are much more willing to grant visitation rights to such parents due to the

---

child shall be the primary consideration. The race, color, national origin, political affiliation, sex, or sexual orientation of a party, in and of itself, shall not be a conclusive consideration.").

99. *See* Paczkowski v. Paczkowski, 10 N.Y.S.3d 270, 271 (N.Y. App. Div. 2015) (where petitioner who was neither a biological nor adoptive parent could not establish custody despite prior marriage to child's "gestational parent"); Matter of Q.M. v. B.C., 995 N.Y.S.2d 470, 474 ("[T]he Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives" and, "while the language of Domestic Relations Law § 10–a requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology.").

100. *See* Christopher YY v. Jessica ZZ, 159 A.D.3d 18, 27 (N.Y. App. Div. 2018) (where a child born to married, same-sex couple was entitled to legal status as the "product of the marriage" despite gender of parents).

101. *See* Kari J. Carter, Note, *The Best Interest Test and Child Custody: Why Transgender Should Not Be a Factor in Custody Determinations*, 16 HEALTH MATRIX 209, 235–36 (2006).

102. Christian v. Randall, 516 P.2d 132, 134 (Colo. App. 1973).

103. *See In re* Marriage of D.F.D, 862 P.2d 368, 375–77 (Mont. 1993) (finding no basis to believe that a child's mental health would be affected by the father's gender identity); *see also* Pierre v. Pierre, 898 So. 2d 419 (La. Ct. App. 2004) (holding that parent's sex confirmation surgery was not an issue relevant to the question of visitation rights)

104. J.L.S. v. D.K.S., 943 S.W.2d 766, 765 (Mo. Ct. App. 1997).

105. *Id.*

strong social and legal presumption that a parent has the right to visit with his or her child.[106] Generally, a court will only refuse to award visitation to a LGBT parent if the court determines that such visitation would harm the child.[107] Courts have defined "harm" as anything having a negative impact on the child's "safety, happiness, physical, mental, and moral welfare."[108]

3. Custody and Visitation Restrictions and Modifications

Courts have frequently recognized a parent's "coming out" as a changed circumstance for purposes of custody or visitation, and have sometimes enacted custody modifications and restrictions on visitation as a result.[109] Where LGBT parents are concerned, these restrictions have included disallowing overnight visits[110] and specifying who may be present during visitation.[111] Any restriction on

106. *See, e.g.*, *In re* R.E.W., 471 S.E.2d 6, 9 (Ga. Ct. App. 1996) ("[O]nly if it is shown that the child is exposed to the parent's undesirable conduct in such a way that it has or would likely adversely affect the child" can visitation be restricted).

107. *See, e.g.*, *id.*; Boswell v. Boswell, 721 A.2d 662, 679 (Md. 1998) (holding that overnight visitation with gay father, visitation in presence of father's lover, and visitation in presence of anyone having "homosexual tendencies" is permissible, because no factual findings presented evidence of actual harm to the children); Irish v. Irish, 300 N.W.2d 739, 740–42 (Mich. Ct. App. 1980) (upholding a visitation order prohibiting a lesbian mother from having sexual contact with her same-sex partner and prohibiting the same-sex partner from staying overnight, when a Friend of the Court Office suggested that exposure might be harmful to the children); Weigand v. Houghton, 730 So. 2d 581, 587–88 (Miss. 1999) (reversing visitation restriction upon gay father); J.A.D. v. F.J.D., 978 S.W.2d 336, 339–40 (Mo. 1998) (reversing restriction that prohibited children from being in presence of any person known by mother to be a lesbian and from being in the presence of any other female, unrelated by blood or marriage, with whom the mother may be living, as decision justified solely on mother's sexuality); A.C. v. C.B., 829 P.2d 660, 664 (N.M. Ct. App. 1992) (holding that sexual orientation alone may not be used to deny custody or visitation to biological mother's same-sex partner; instead court should look to effect on child); Kallas v. Kallas, 614 P.2d 641, 644 (Utah 1980) (permitting evidence of psychological impact of mother's sexual orientation on her children in an overnight visitation proceeding, even though sexual orientation alone would not suffice to deny parental rights); *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998) (reinstating restrictions on lesbian mother's visitation rights when children appeared to have been detrimentally affected by their mother's relationship and by contact with mother's sexual partner).

108. *In re* J.S. & C., 324 A.2d 90, 95 (N.J. Super. Ct. Ch. Div. 1974) (upholding restrictions on gay father's visitation in furtherance of children's best interests); *see also, e.g.*, Taylor v. Taylor, 47 S.W.3d 222, 223–24 (Ark. 2001) (allowing mother to maintain primary custody of children, contingent on ending cohabitation with mother's same-sex partner, based on best interests of the children). *But see In re* Dorworth, 33 P.3d 1260 (Colo. Ct. App. 2001) (striking down restrictions on presence of adult overnight guests during visitation and on bringing children to a predominantly gay church).

109. *See, e.g.*, Cook v. Cook, 970 So. 2d 960, 963 (La. 2007) (holding that exposing child to mother's same-sex partner, in violation of the joint custody agreement, was a change in circumstances warranting a change in domicile).

110. *See, e.g.*, Irish v. Irish, 300 N.W.2d 739, 741 (Mich. Ct. App. 1980) (holding that lesbian mother's children could not have an overnight visit with their mother when her lesbian partner was present).

111. These restrictions are typically aimed at same-sex partners of lesbian and gay parents. *See, e.g.*, *Ex parte* D.W.W., 717 So. 2d 793, 796 (Ala. 1998) (upholding visitation restrictions preventing either parent, regardless of sexual orientation, from having an adult overnight guest who is not a spouse when the child is present; Alabama did not allow same-sex couples to marry at the time and this restriction disadvantaged parents in same-sex relationships); Pennington v. Pennington, 596 N.E.2d 305, 305 (Ind. Ct. App. 1992) (holding that father's adult male "friend" could not be present during overnight

custody rights must be based on a finding that a parent's sexual orientation caused the child actual harm and not on the basis of the parent's sexual orientation alone (unless the parent lives in a jurisdiction employing the per se approach to custody disputes).[112]

---

visitation); S.E.G. v. R.A.G., 735 S.W.2d 164, 167 (Mo. Ct. App. 1987) (upholding restriction that no other female with whom mother resides can be in child's presence during visitation); *In re* Jane B., 380 N.Y.S.2d 848, 860–61 (N.Y. Sup. Ct. 1976) (upholding restriction on visitation by lesbian mother, such that child can neither be in presence of other LGBT individuals nor taken to place where there are "known homosexuals"); *see also* Burns v. Burns, 560 S.E.2d 47, 48–49 (Ga. Ct. App. 2002) (holding that mother's civil union does not bestow status of civil marriage and therefore children's overnight stays violate custody decree prohibiting overnight stays with a parent who is cohabiting with any adult to whom they are not legally married). *But see In re* Marriage of Diehl, 582 N.E.2d 281, 294 (Ill. App. Ct. 1991) (vacating order which prohibited mother's same-sex partner, or other female with whom mother resided, from being in child's presence during visits, applying the "serious endangerment standard"); Blew v. Verta, 617 A.2d 31, 31 (Pa. Super. Ct. 1992) (invalidating order prohibiting mother from visiting son in presence of female partner); Eldridge v. Eldridge, 42 S.W.3d 82, 90 (Tenn. 2001) (finding no abuse of discretion when court failed to prohibit daughter's overnight visitation while ex-wife's partner was present in the home).

112. *See Ex parte* J.M.F., 730 So. 2d 1190, 1194–96 (Ala. 1998) (upholding custody award modification after mother's discreet affair with a woman evolved into an open and permanent same-sex relationship); Larson v. Larson, 902 S.W.2d 254, 256–57 (Ark. Ct. App. 1995) (holding that best interest of child analysis required examination of mother's conduct, including "deviant sexual activity" in which she engaged while children were home, and warranted modification of custody from lesbian mother to heterosexual father); Thigpen v. Carpenter, 730 S.W.2d 510, 512–14 (Ark. Ct. App. 1987) (upholding sole custody to father despite his violation of a joint custody agreement because exposure to mother's lesbian lifestyle would not be in best interest of children); Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (citation omitted) ("[M]ere fact of homosexuality may not require a determination of moral unfitness" to deny joint custody, but "primary custody with the homosexual parent would rarely be held to be in the best interests of the child," mostly due to "embarrassment" of young children; thus, change of custody from lesbian mother to adulterous father affirmed); Pulliam v. Smith, 501 S.E.2d 898, 904 (N.C. 1998) (upholding custody modification when father "regularly engaged in homosexual acts" with his same-sex partner in home, while children were present in the house); Bottoms v. Bottoms, 457 S. E.2d 102, 108 (Va. 1995) (stating that lesbian and gay parents are not per se unfit, but that social condemnation constituted potential harm and required the removal of child from custody of lesbian mother). *But see* Christian v. Randall, 516 P.2d 132, 133–34 (Colo. Ct. App. 1973) (sustaining custody award to the former mother, who was going through a gender transition and was married to a woman, despite a challenge by the father, as there was no evidence of adverse effect on children); Gay v. Gay, 253 S.E.2d 846, 848 (Ga. Ct. App. 1979) (holding that allegations of homosexuality are insufficient to prove a mother is unfit for purposes of modifying her sole custody of children); *In re* Marriage of R.S., 677 N.E.2d 1297, 1298–1303 (Ill. App. Ct. 1995) (holding that potential for social condemnation resulting from bisexual mother's same-sex relationship, standing alone, "cannot justify a change in custody"; courts may modify custody only where clear and convincing evidence supports the claim that the custodial parent's conduct endangers the moral well-being of the children); *Weigand*, 730 So. 2d at 593 (Miss. 1999) ("[H]omosexuality being a moral block to effective child-rearing . . . [is] at least unreasoned and at most unconscionable."); Hassenstab v. Hassenstab, 570 N.W.2d 368, 372–73 (Neb. Ct. App. 1997) ("[S]exual activity by a parent, whether it is heterosexual or homosexual, is governed by the rule that to establish a material change in circumstances justifying a change in custody there must be a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity and that a change of custody is in the child or children's best interests."); M.P. v. S.P., 404 A.2d 1256, 1259–60 (N.J. Super. Ct. App. Div. 1979) (holding modification granting custody to father was improper when mother's sexual orientation had not caused demonstrable harm); M.A.B. v. R.B., 510 N.Y.S.2d 960, 969 (N.Y. Sup. Ct. 1986) (upholding modification granting custody to gay father when mother was moving out-of-state, father's sexual orientation did not have adverse effect on their son, and son's behavioral problems improved while

D. THIRD PARTY VISITATION AND CUSTODY

It is well established that the custody and visitation rights of third parties and step-parents are subordinate to those of biological and adoptive parents.[113] Except in cases where the biological parent is deemed unfit, most states find that granting custody to the biological or adoptive parent is in the child's best interests.[114] However, as with all custodial matters, judges are given wide latitude to determine whether a parent is fit and what is in the best interests of the child.[115] Some states recognize standing for de facto or psychological parents, including stepparents[116] and the same-sex partners of biological or adoptive parents[117] who are neither biologically nor legally related to the child.[118] Nearly every state

residing with father); Damron v. Damron, 670 N.W.2d 871, 876 (N.D. 2003) (reversing custody modification when basis for modification was a parent's same-sex relations and there was no evidence of harm to the child.); Inscoe v. Inscoe, 700 N.E.2d 70, 81–84 (Ohio Ct. App. 1997) (upholding denial of custody modification to mother because father's open homosexuality did not have direct adverse impact on the child); Fox v. Fox, 904 P.2d 66, 70 (Okla. 1995) (rejecting custody modification that favored father on appeal, as there was no evidence that mother's sexual orientation had direct adverse impact on child and societal disapproval could not constitute adverse impact); Stroman v. Williams, 353 S.E.2d 704, 705 (S.C. Ct. App. 1987) (upholding denial of custody modification when there was no evidence that mother's sexual orientation had adverse effect on the children); Rowsey v. Rowsey, 329 S.E.2d 57, 60–62 (W. Va. 1985) (rejecting modification granting father custody, as mother's cohabitation with her same-sex partner did not constitute material change in circumstances adversely affecting the children, and speculation of potential harm was insufficient).

113. *See, e.g.*, Burke v. King, 562 S.E.2d 271 (Ga. Ct. App. 2003) (holding the court erred in granting custody to aunt rather than father absent showing that father was unfit); Rodgers v. Rodgers, 274 So. 2d 671, 673–74 (Miss. 1973) (reversing lower court decision granting custody to child's paternal grandparents as opposed to child's fit biological mother).

114. *See, e.g.*, MO. ANN. STAT. § 452.375(5)(5)(a) (West 2019); WIS. STAT. ANN. § 767.41(3)(a) (West 2019); B.J. v. J.D., 950 P.2d 113, 119 (Alaska 1997) (upholding award of custody to mother's former boyfriend, concluding that, as biological parent did not adequately care for child, award of custody to nonparent is justified when the child requires it); *Bottoms*, 457 S.E.2d at 104 ("Although the presumption favoring a parent over a non-parent is strong, it is rebutted when certain factors, such as parental unfitness, are established by clear and convincing evidence."). *But see In re* Clifford K., 619 S.E.2d 138 (W. Va. 2005) (reversing trial court's grant of custody to maternal grandmother over non-biological de facto parent after death of child's biological mother).

115. *See, e.g.*, King v. King, 50 P.3d 453, 459 (Idaho 2002) (holding the lower court did not abuse its discretion in choosing not to weigh the biological father's mental illness as a factor in determining parental fitness); Rutland v. Rutland, 415 So. 2d 555, 556 (La. Ct. App. 1982) ("The best interest of the child must be the primary concern of the courts in granting custody . . . . The trial court's discretion on the issue of the best interests of a child will not be disturbed on review in the absence of a clear showing of abuse thereof.").

116. *See, e.g.*, TENN. CODE ANN. § 36-6-303 (West 2019).

117. *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 974–76 (R.I. 2000) (legally recognizing de facto or "psychological parent" relationship between child and child's biological mother's former lesbian partner).

118. The de facto parents in these cases are usually the former same-sex partners of biological custodial parents at issue. *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999) (mother's former same-sex partner considered de facto parent and visitation granted where court found it was in child's best interests); T.B. v. L.R.M. 786 A.2d 913 (Pa. 2001) (mother's former same-sex partner had standing to petition for visitation of child when she had served as co-parent and lived in family unit with child prior to dissolution of the relationship).

grants grandparents standing to petition for visitation rights.[119] However, the Supreme Court's decision in *Troxel v. Granville*[120] reinforced the right of a custodial parent to limit the visitation rights of third parties, such as grandparents.[121]

In *Troxel v. Granville*, the Supreme Court held that a state court cannot force a fit custodial parent to expand the visitation rights of third parties even if the court finds that doing so would be in the "best interest of the child."[122] The children's mother, Tommie Granville, sought to limit the visitation privileges of the Troxels, the children's paternal grandparents.[123] The Troxels filed suit in state court, citing a Washington statute which permitted "any person" to petition for visitation rights "at any time," and which authorized the courts to grant the visitation privileges sought whenever such visitation serves the "best interest of the child."[124] The Troxels argued that granting their request for two weekends of overnight visitation per month and two weeks of visitation each summer was in the best interest of their grandchildren.[125] The trial court agreed, despite finding that Granville was a fit parent, and ordered Granville to comply.[126] The Washington State Supreme Court overturned the lower court's decision and invalidated the statute upon which the Troxels relied.[127] The United States Supreme Court's plurality decision affirmed,[128] holding that the Washington statute infringed on Granville's fundamental due process right as a fit parent to make decisions regarding the care of her children.[129]

State courts have applied the *Troxel* decision in different ways, citing it in decisions that deny custody and visitation to a third party along with those that enforce a right to visitation.[130] As the New Jersey Supreme Court noted, "the

---

119. *See* Gregory A. Loken, *The New "Extended Family" – "De Facto" Parenthood and Standing Under Chapter 2*, 2001 B.Y.U. L. REV. 1045, 1064–69 (2001) (most states allow grandparents standing to petition for visitation rights, but usually only when one of child's parents has died or child's parents are no longer living together for some other reason); *see also, e.g.*, HAW. REV. STAT. ANN. § 571-46(a)(7) (West 2019) ("Reasonable visitation rights shall be awarded to parents, grandparents, and any person interested in the welfare of the child in the discretion of the court, unless it is shown that rights of visitation are detrimental to the best interests of the child."); IND. CODE ANN. § 31-17-5-1 (West 2019) (establishing that grandparents may petition for visitation rights); TENN. CODE ANN. § 36-6-302 (West 2019).

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

121 *Id.* at 63.

122. *See id.* at 60–61.

123. *Id.* at 61.

124. *Id.* (citing WASH. REV. CODE ANN. § 26.10.160(3) (West, Westlaw through 2014) (Subsection 3 invalidated by *Troxel*)).

125. *Id.*

126. *Id.* at 61, 68.

127. *Id.* at 63.

128. *Id.*

129. *Id.* at 65.

130. *Compare In re* Jones, 2002 WL 940195, 2002-Ohio-2279 (Ohio Ct. App. May 10, 2002) (denying custody and visitation to a lesbian parent following the break-up of her relationship with child's biological mother), *with* T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001) (holding a lesbian co-parent is entitled to visitation with a child whose birth she planned with her former partner and with whom she lived in a parental role for the first three years of child's life). The court in *T.B.* distinguished *T.B.* from

possibilities are as varied as the factual scenarios presented."[131] "Third parties" is a broad term that can refer to anyone, from complete strangers who are not familiar to the child involved in a custody or visitation proceeding, to relatives of the child, including siblings and grandparents.[132] Since *Troxel*, state courts have severely limited the custody and visitation rights of third parties, particularly grandparents,[133] and some have invalidated statutes that created a presumption in favor of grandparent visitation rights without requiring a preliminary finding of parental unfitness,[134] in deference to parents' fundamental due process right to control the care of their children.[135]

Courts have found de facto parenthood where the biological or adoptive parent intended to create such a relationship[136] and a parent-child relationship exists between the child and the third party,[137] or other circumstances exist tending to indicate such a relationship.[138] A person will not be considered a de facto or psychological parent if the relationship between the adult and child was developed without the knowledge and consent of the legal parent.[139]

1. Child Custody and Marginalized Groups

As laid out above, courts consider a variety of factors when making the determination of what is in the best interest of the child. This balancing can become even more complicated when the parents are from marginalized groups. States across the country have considered the impact of parental incarceration on child

---

Troxel because, unlike the petitioner in *Troxel*, the petitioner in *T.B.* was not a grandparent, but rather a non-biological co-parent. *See T.B. v. L.R.M.*, 786 A.2d at 919.

131. Moriarty v. Bradt, 827 A.2d 203, 224 (N.J. 2003)

132. *See* Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 846 (1997) (citing Bowie v. Arder, 490 N.W.2d 568, 578 (Mich. 1992)).

133. *See, e.g.*, Seagrave v. Price, 79 S.W.3d 339, 345 (Ark. 2002) (finding the grandparent visitation statute unconstitutional where it failed to give weight to a custodial parent's wishes).

134. *See, e.g.*, Santi v. Santi, 633 N.W.2d 312, 320 (Iowa 2001); Lulay v. Lulay, 739 N.E.2d 521, 534 (Ill. 2000).

135. *See, e.g.*, Zasueta v. Zasueta, 126 Cal. Rptr. 2d 245, 255 (Cal. Ct. App. 2002) (holding that a statutory presumption in favor of a grandfather's visitation rights in disregard of the mother's objections violated her constitutionally protected "fundamental parenting rights"); Wickham v. Byrne, 769 N.E.2d 1, 8 (Ill. 2002) (invalidating statutory provisions granting visitation rights to grandparents as facially unconstitutional infringements on the parents' due process rights).

136. Mason v. Dwinnell, 660 S.E.2d 58, 68 (N.C. Ct. App. 2008).

137. *See, e.g.*, E.N.O. v. L.M.M., 711 N.E.2d 886, 891(Mass. 1999) (stating that a de facto parent "has no biological relation to the child, but has participated in the child's life as a member of the child's family . . . 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."); V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000) (requiring that "[t]he legal parent must consent to and foster the relationship between the third party and the child; the third party must have lived with the child . . . perform[ed] parental functions for the child to a significant degree, and most important, a parent-child relationship must be forged").

138. *See, e.g.*, Eliza B. v. Superior Ct., 117 P.3d 660 (Cal. 2005) (holding that the non-gestating mother's donation of an egg to her partner created a legally binding parental relationship between the child and both women).

139. *See, e.g.*, V.C. v. M.J.B., 748 A.2d at 552.

custody decisions. As noted above, multiple states have statutes saying that each parent's criminal record should be considered in making custody decisions.[140] Some states also enumerate specific convictions which create a rebuttable presumption of denial of custody.[141] The impact of a parent's felony conviction is covered more extensively later on in the article.

The law is uniform, however, in declaring that race cannot be used as a factor in determining the best interests of a child in a custody dispute. In *Palmore v. Sidoti*, the US Supreme Court declared that race could not be a factor considered as part of the best interests of the child.[142] The case arose from a custody dispute following the divorce of the Sidotis, who were both white. After the divorce, mother Linda Sidoti was granted custody of the couple's three-year-old daughter.[143] About a year later, father Anthony Sidoti sued for custody modification based on changed circumstances, as Linda Sidoti had moved in with an African American man whom she later married.[144] The Florida court granted the father's petition for custody, based on the societal prejudice of growing up in a household with a stepfather of a different race.[145] The Supreme Court found that this determination based on race was an equal protection violation.[146]

E. DETERMINING LEGAL PARENTAGE FOR CHILD CUSTODY AND VISITATION OF LGBTQ COUPLES POST-*OBERGEFELL*

This Section discusses the impact of the Supreme Court's decisions in *Obergefell v. Hodges*[147] and *Pavan v. Smith*[148] on custody and visitation rights of LGBT biological and de facto parents. Although the Supreme Court has recognized the fundamental right of same-sex couples to marry, many states still refuse to extend the marital presumption to nonbirth-non-genetic spouses in custody and visitation disputes. This section will discuss how failing to recognize the parental rights of non-biological parents in same-sex marriages may be contrary to the holding in *Obergefell*, which includes a strong presumption that marriage rights expanded the parental rights of LGBTQ individuals. Additionally, several post-*Obergefell* courts have not ruled on cases specifically involving custody and visitation rights for transgendered individuals. This section will also discuss the impact of *Obergefell* on custody and visitation issues for non-married LGBTQ couples.

---

140. *Supra* note 42. *See also* Sarah Katz, *Parental Criminal Convictions and the Best Interest of the Child*, 90 PA. B. ASS'N Q. 27 (2019).
141. Katz, *supra* note 140, at 28-29.
142. Palmore v. Sidoti, 466 U.S. 429 (1984).
143. *Id*. at 430.
144. *Id*.
145. *Id*. at 431.
146. *Id*. at 433.
147. Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
148. Pavan v. Smith, 137 S.Ct. 2075, 2076 (2017).

1. *Obergefell v. Hodges*

In *Obergefell v. Hodges*, the Supreme Court recognized marriage is a fundamental right protected under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment. *Obergefell* invalidated state bans on same sex marriage.[149] Groups of same-sex couples had sued their relevant state agencies in Ohio, Michigan, Kentucky, and Tennessee to challenge the constitutionality of those states' bans on same-sex marriage or refusal to recognize legal same-sex marriages that occurred in jurisdictions that provided for such marriages.[150] The plaintiffs argued that the states' statutes violated the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment.[151]

Justice Anthony M. Kennedy delivered the opinion, finding that the right to marry is one of the fundamental liberties protected by the Fourteenth Amendment, applying to same-sex couples in the same manner as it does to opposite-sex couples. The majority found that marriage is "inherent to the concept of individual autonomy," protecting an intimate association between two people. Importantly, the court also found that marriage "safeguards children and families by according legal recognition to building a home and raising children."[152] Because there are no differences between a same-sex union and an opposite-sex union with respect to these core principles, the Court found that the exclusion of same-sex couples from the right to marry violated the Due Process Clause.[153] The Court also found that the Equal Protection Clause also guarantees the right of same-sex couples to marry as the denial of that right would deny same-sex couples equal protection under the law.[154]

2. *Pavan v. Smith*

In *Pavan v. Smith*, the Supreme Court upheld the fundamental principles of *Obergefell*, holding that the Constitution entitled same-sex couples to civil marriage "on the same terms and conditions as opposite-sex couples."[155] Petitioners were two married same-sex couples who conceived children through anonymous sperm donation.[156] Each couple filled out paperwork listing both spouses as parents on the birth certificates. The Arkansas Department of Health issued certificates bearing only the birth mother's name, relying on a provision of the Arkansas code that deemed the mother to be the woman who gave birth to the child.[157] The statute also required that a married woman's husband appear on the child's birth certificate applies in cases where the couple conceived by means

149. *Obergefell*, 135 S.Ct. at 2584.
150. *Id.*
151. *Id.*
152. *Id.* at 2599.
153. *Id.*
154. *Id.* at 2603.
155. *Pavan*, 137 S.Ct. at 2076.
156. *Id.* at 2077.
157. *Id.*

of artificial insemination with the help of an anonymous sperm donor.[158] Petitioners argued that the Arkansas statute was inconsistent with *Obergefell* because it prohibited same sex spouses from listing the non-biological parent on the birth certificate, thereby "prohibi[ted] every same-sex married couple . . . from enjoying the same spousal benefits which are available to every opposite-sex married couple."[159]

The Supreme Court agreed with petitioners, finding that the statute denied married same-sex couples access to the "constellation of benefits that the Stat[e] ha[s] linked to marriage."[160] The Court reasoned that, by omitting a married same-sex spouse from a child's birth certificates, same-sex couples lacked legal rights Arkansas has tied to the institution of marriage.[161] The Court noted that birth certificates are often used for important transactions like making medical decisions for a child or enrolling a child in school. Arkansas argued that being named on the birth certificate was not a "benefit" attached to marriage, but was rather a device for recording biological parentage.[162] The Supreme Court rejected this argument, finding that Arkansas used the certificates to give married parents a type of legal recognition unavailable to unmarried parents.[163]

3. Determining Legal Parentage for Child Custody/Visitation and Child Support of LGBT Couples Post-*Obergefell*

Married heterosexuals who have children are automatically presumed to be the legal parents of their children[164] and, absent a termination due to unfitness, retain their rights upon divorce.[165] For LGBT couples, parental rights are less clear. However, the Supreme Court's decisions in *Obergefell* and *Pavan* suggest that the marital rights afforded to same-sex couples incorporate the same parental rights afforded to married heterosexual couples.

Until *Obergefell*, these couples were denied the ability to marry in much of the country and so could not use any marital presumption to legally connect both parties to the child. Today it remains uncertain in many states to what extent marital presumptions apply to same-sex spouses.

Generally, if a same-sex couple chooses to marry and have children after marriage, state courts will view each parent as having visitation and custody rights to any children born during the marriage. Although most states have not yet addressed this issue directly, the few states that have considered this question in their highest court have held that the marital presumption and assisted

158. *Id.*
159. *Id.*
160. *Pavan*, 137 S.Ct. at 2078.
161. *Id.*
162. *Id.*
163. *Id.*
164. *See Legal Recognition of LGBT Families*, NAT'L CTR. FOR LESBIAN RTS. (2014), http://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf.
165. *Id.*

reproduction provisions apply equally to same-sex spouses,[166] or have amended their statutes to be gender-neutral.[167]

However, even post-*Obergefell*, some state courts have refused to extend the marital presumption to same sex nonbirth/nongenetic spouses. In *Paczkowski v. Paczkowski*, the non-gestational spouse in a same-sex marriage filed petition for joint custody of the couple's child in New York family court.[168] The appeals court affirmed the family court's decision to dismiss the petition, because the parent petitioning the court was not an adoptive or biological parent of the child.[169]

4. Custody and Visitation for Unmarried LGBTQ Parents

The Supreme Court's decision in *Obergefell* arguably has no legal effect on custody and visitation for unmarried LGBTQ parents. Many states recognize that, where a same-sex partner participated in the caretaking of the child and maintained a parent-like relationship with the child, he or she has standing to ask a court for visitation or custody. Such states have recognized this right to seek visitation or custody "parent by estoppel" theory.[170] Additionally, unmarried same sex couples are protected by statutes giving de facto parents right to seek visitation or custody.[171] However, there are some states that have said that a non-legal

166. *See* Roe v. Patton, 2015 WL 4476734, *3 (D. Utah 2015); McLaughlin v. Jones, 243 Ariz. 29 (2017) (holding that Arizona's gendered marital presumption had to be applied in a gender neutral manner); Strickland v. Day, 239 So.3d 486 (Miss. 2018); Hunter v. Rose, 463 Mass. 488 (2012); Barse v. Pasternak, 2015 WL 600973, at *1 (Conn. Super. Ct. Jan. 16, 2015). *But see* In the Interest of A.E., 2017 WL 1535101, *10 (Tex App. Beaumont 2017), petition for review filed, (July 12, 2017) (stating in dicta that "[t]he substitution of the word 'spouse' for the words 'husband' and 'wife' would amount to legislating from the bench, which is something that we decline to do.").

167. *See, e.g.*, ME. REV. STAT. TIT. 19-A, § 1881; WASH. REV. CODE ANN. § 26.26A.115 (West).

168. Paczkowski v. Paczkowski, 10 N.Y.S.3d 270 (N.Y. App. Div. 2015); *see also* Q.M. v. B.C., 995 N.Y.S.2d 470 (N.Y. Farn. Ct. 2014); Shineovich v. Shineovich, 214 P.3d 29 (Or. Ct. App. 2009).

169. *Paczkowski*, 10 N.Y.S.3d at 969.

170. Bethany v. Jones, 2011 WL 553923 (Ark., Feb 17, 2011); Thomas v. Thomas, 203 Ariz. 34, 49 P.3d 306 (Ariz. App. Div. 1, 2002); In the Interest of E.L.M.C., 100 P.3d 546 (Colo. Ct. App. 2004), *cert. denied*, 2004 WL 2377164 (Colo. 2004), *cert. denied sub nom*, Clark v. McLeod, 545 U.S. 1111 (2005); King v. S.B., 837 N.E.2d 965 (Ind. 2005); Pickelsimmer v. Mullins, 317 S.W.3d 569 (Ky. 2010); C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); Soohoo v. Johnson, 731 N.W.2d 815 (Minn. 2007); K.M.M. v. K.E.W., 539 S.W.3d 722 (Mo. Ct. App. 2017); Kulstad v. Maniaci, 352 Mont. 513 (Mt. 2009); Latham v. Schwerdtfeger, 282 Neb. 121, 802 N.W.2d 66 (Neb. 2011); Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002); V.C. v. J.M.B., 748 A.2d 539 (N.J. 2000); (N.M. Ct. App. 1992); Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008) (awardeing joint custody to same-sex co-parents because the legal mother "acted in a manner inconsistent with her constitutionally protected paramount interest"); *but see* Estroff v. Chatterjee, 660 S.E.2d 73 (N.C. Ct. App. 2008) (denying lesbian non-legal mother custody because the facts did not support a finding that the legal mother "acted in a manner inconsistent with . . . her constitutionally-protected status as a parent"); McAllister v. McAllister, 779 N.W.2d 652, 656 (N.D. 2010); *In re* Mullen, 129 Ohio St. 3d 417, 953 N.E.2d 302 (2011); Eldredge v. Taylor, 339 P.3d 888 (Okla. 2014); T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001); J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996); L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002); Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000); *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005); *In re* Clifford K., 619 S.E.2d 138 (W. Va. 2005).

171. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 25-402, 25-409 (West, Westlaw through 2019 1st Reg. Sess.) (finding that a person who stands in loco parentis to a child to seek custody or visitation under

parent has no ability to seek custody or visitation with the child of his or her former partner.[172] It is not yet clear whether the Supreme Court's reliance on marriage in preserving the parental rights of LGBTQ couples will have negative consequences for unmarried LGBTQ parents.

III. TERMINATION OF PARENTAL RIGHTS

Termination of parental rights is one of the most severe forms of state interference into the parent-child relationship.[173] Although such action may be required in certain circumstances, the natural rights which parents have in their children undeniably warrant deference and, absent a powerful countervailing interest,

---

certain circumstances); COLO. REV. STAT. ANN. § 14-10-123(1)(c) (West, Westlaw through 2019 Reg. Sess.) (establishing standing to seek custody or visitation "[b]y a person other than a parent who has had the physical care of a child for a period of one hundred eighty-two days or more, if such action is commenced within one hundred eighty-two days after the termination of such physical care"); CONN. GEN. STAT. ANN. §§ 46b-56 & 46b-59 (West, Westlaw through 2019 Jan. Reg. Sess & Jul.Sp. Sess.) (providing that, in a dissolution proceeding, a court may grant reasonable visitation or custody to a person who is not a parent); DEL. CODE ANN. Tit 13, § 8-201, 2302 (West, Westlaw through ch. 219 of 2019-2020 150th General Assembly) (providing that a legal parent includes a "de facto parent" who has a "parent-like relationship" established with the support and consent of the legal parent, has "exercised parental responsibilities," and 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"); D.C. CODE §16-831.01 et seq. (West, Westlaw through Dec. 24, 2019) (providing that a "de facto parent" has standing to seek custody or visitation); IND. CODE ANN. § 31-9-2-35.5 (West, Westlaw through 2019 1st Reg. Sess. of 121st General Assembly) (establishing standing to seek custody or visitation by a "de facto custodian" who "has been the primary caregiver for, and financial support of, a child" for specified periods depending on age of child); KY. REV. STAT. ANN. § 403.270(1) (West, Westlaw through 2019 Reg. Sess. & 1st Ex. Sess.) (establishing standing to seek custody or visitation by a "de facto custodian" who "has been the primary caregiver for, and financial support of, a child" for specified periods depending on age of child); ME. REV. STAT. ANN. tit. 19-A, § 1653(2) (West, Westlaw through 2019 1st. Reg. Sess. & ch. 531 of 1st Sp. Sess. of 129th Leg.) (finding the court may grant reasonable visitation to a third party); MINN. STAT. ANN. § 257C.01 et seq. (West, Westlaw through 2019 1st Reg. & 1st Sp. Sess.) (permitting "de facto custodian" or "interested third party" as defined by statute to seek custody or visitation under specified circumstances); MT. CODE ANN. §§ 40-4-211(4)(b), 40-4-228 (West, Westlaw through 2019 Sess.) (permitting a non-legal parent can seek custody or visitation if it is established by clear and convincing evidence that he or she has a "child-parent" relationship and the legal parent has "engaged in conduct contrary to the child-parent relationship"); NEV. REV. STAT. § 125C.050 (West, Westlaw through 2019 80th Reg. Sess.) (permitting a person who has lived with the child and established a "meaningful relationship" may seek reasonable visitation if a parent has unreasonably restricted visits); OR. REV. STAT. ANN. § 109.119 (West, Westlaw through 2018 Reg. Sess. & 2018 Sp. Sess. of 79th General Assembly) (establishing standing to seek custody or visitation by a person who, within the previous six months, had physical custody of the child or lived with the child and provided parental care for the child); S.C. CODE ANN. § 63-15-60 (West, Westlaw through 2019 Sess.) (establishing standing to seek custody or visitation to a "de facto custodian" who has been a child's primary caregiver and financial supporter for a specified period of time based on the child's age); TEX. FAM. CODE ANN. § 102.003 (9) (West, Westlaw through 2019 Reg. Sess. of 86th Leg) (establishing standing to seek custody or visitation by "a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition").

172. *See, e.g.*, Jones v. Barlow, 154 P.3d 808 (Utah 2007); White v. White, 293 S.W. 3d 1(Mo. 2009).

173. *See* Santosky v. Kramer, 455 U.S. 745, 759 (1982) ("Few forms of state action are both so severe and so irreversible.").

protection.[174] Termination of parental rights permanently ends the legal parent-child relationship.[175] After parental rights have been terminated, a child may be adopted without parental consent.[176] Termination may be voluntary, based on the informed consent of the parent,[177] or involuntary, following court proceedings brought against the parent.[178] Parental rights are constitutionally protected and may not be terminated without due process of law.[179] As a result, parental rights may be terminated only when there is clear and convincing evidence that termination is necessary to ensure safe and permanent homes for the children at issue.[180] A new challenge, thus far overlooked in state and federal statutory law, involves the antecedent question of who possesses parental rights at childbirth. Section A of this Part provides an overview of the federal and state laws that govern involuntary termination of parental rights. Section B details the legal standards affiliated with such proceedings: burden of proof and right to counsel. Section C discusses the laws that provide for voluntary termination of parental rights. Section D tackles the increasingly pertinent question of who possesses parental rights.

A. INVOLUNTARY TERMINATION OF PARENTAL RIGHTS

1. Federal Guidelines

Both federal and state statutes govern termination of parental rights. On the federal level, the primary law is the Adoption and Safe Families Act of 1997 (ASFA).[181] ASFA amended the Adoption Assistance and Child Welfare Act (AACWA)[182] by modifying the reasonable efforts requirement, which required states to make "reasonable efforts" to prevent permanent removal of a child from the home, and by setting strict deadlines for implementing placement plans for children.[183] Spurred by a series of child abuse and neglect cases that garnered national media attention,[184] ASFA's push for greater efficiency marked the first

174. Carter v. Lindgren, 502 F.3d 26, 32 (1st Cir. 2007).

175. *See Santosky*, 455 U.S. at 759. However, a court may order a parent to pay child support even after his or her parental rights have been terminated. *See In re* Stephen Tyler R., 584 S.E.2d 581, 598 (W. Va. 2003).

176. *See Santosky*, 455 U.S. at 783.

177. *See* discussion *infra* III.C.

178. *See* discussion *infra* III.A.1.

179. *See Santosky*, 455 U.S. at 75 .

180. *See* discussion *infra* III.B.1

181. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) [hereinafter *ASFA*].

182. 42 U.S.C.A. §§ 621-628b, 670-679b (West, Westlaw through Pub. L. No. 113-185). The AACWA is a federal spending statute that provides financial assistance to states. Sections 620 through 628b are codified in Part B of the Social Security Act (SSA) and sections 670 through 679b are codified in Part E of the SSA.

183. *See* Thomas Wade Young & Jae M. Lee, *Responding to the Lament of Invisible Children: Achieving Meaningful Permanency for Foster Children*, 72 J. KAN. B.A. 46 (2003).

184. *See* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Welfare Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 273-75 (2003). Because the federal reasonable efforts requirement was so confusing, case workers and state agencies overseeing

major change in federal requirements for child protection services since 1980.[185] States must comply with ASFA guidelines in order to receive federal funding.[186] As a result, the federal requirements outlined in ASFA have been adopted by all fifty states.[187]

The purpose of the ASFA was to decrease the amount of time that children spend in the foster care system and make placements with adoptive parents or in a comparable permanent placement more efficient.[188] Under the law, states must hold a permanency hearing within twelve months of a child entering the foster care system.[189] After a state files a petition to terminate parental rights, it must "concurrently begin to identify, recruit, process, and approve a qualified adoptive family for the child."[190] This requirement allows the process of finalizing an alternative permanency plan to occur concurrently with reasonable efforts to reunify the child and family.[191] Permanency goals for foster children under the ASFA are prioritized as follows: (1) reunification, (2) adoption, (3) legal guardianship, (4) permanent placement with a fit and willing relative, and (5) "another planned permanent living arrangement."[192]

The ASFA requires state agencies to seek termination of the parent-child relationship when: (1) a child has been in foster care for fifteen of the most recent twenty-two months; or (2) a court has determined that a child is an abandoned infant, or that the parent has committed murder or voluntary manslaughter of another child of the parent, "aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter," or committed "a felony assault that has resulted in 'serious bodily injury to the child or to another child of

---

these cases claimed that they did a disservice to children and failed to protect them from harm. *See id*. However, these unfortunate circumstances are often attributable to caseworkers' negligence, as well as states' inability to provide families lacking resources with the services they needed to create a healthy and safe environment for their children. *See id*. *But see* Christine H. Kim, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 287-91 (1999) (arguing that the AACWA emphasized reunification, rather than the health and safety of the child, which caused states to misinterpret the law, and that states believed that the law mandated that they take great pains to return children to their parents and rehabilitate every parent with whom they came in contact).

185. *See* Crossley, *supra* note 184, at 278 (providing an account of the evolution of federal child welfare legislation).

186. *See ASFA, supra* note 181.

187. *See id*.

188. *See* Kim, *supra* note 184, at 309-10.

189. *See* 42 U.S.C.A. § 675(5)(C) (West, Westlaw though Pub. L. No. 116-108); 45 C.F.R. § 1356.2l (b)(2)(i) (2006) (stating that a permanency hearing must be held within twelve months, and "at least once every twelve months thereafter while the child is in foster care").

190. 45 C.F.R. § 1356.2l(i)(3).

191. *Id*. § 1356.2l(b)(4).

192. *See* 42 U.S.C.A. § 675(5)(C) (a child may be placed in "another planned permanent living arrangement" only if there is a documented "compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, or be placed for adoption, with a fit and willing relative, or with a legal guardian").

the parent.'"[193] Exceptions to this requirement are permitted if there is documented proof that: (a) the state has placed the child with a relative; (b) there are compelling reasons not to terminate, which include a finding that adoption is not an appropriate option, there are no grounds for termination, the child is an unaccompanied refugee minor, or there are compelling foreign policy reasons or international law obligations; or (c) the state has not provided the reunification efforts that it had deemed were necessary.[194]

While reasonable efforts to preserve and reunify families are required under the ASFA, the law places priority upon a child's health and safety.[195] As a result, the ASFA mandates that reasonable efforts to preserve the family are not required when: (1) the parent has subjected the child to aggravated circumstances, as defined by state law;[196] (2) the parent has murdered one of his or her children;[197] (3) the parent has aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter;[198] (4) the parent has committed a felony assault that results in serious bodily injury to the child or another child of the parent;[199] or (5) the parental rights of the parent to a sibling have been terminated involuntarily.[200]

2. State Guidelines

Each state has enacted laws that implement ASFA's requirements for the termination of parental rights,[201] but these laws differ greatly. Some statutes provide

193. 42 U.S.C.A. § 675(5)(E).

194. *See id*.; 45 C.F.R. § 1356.2l(i)(2)(i)-(iii).

195. 42 U.S.C.A. § 67l(a)(l5)(A).

196. These "aggravated circumstances" include cases in which a parent has been convicted of murdering another child in the household, severe and aggravated sexual abuse, or single instances of abuse when the abuse is severe enough to be charged as aggravated assault, or when there is serious injury to the child. *See id*. at § 671(a)(15)(D)(1).

197. *Id*.

198. *Id*.

199. *Id*.

200. *Id*.

201. *See* ALA. CODE § 12-15-319 (West, Westlaw through 2019); ALASKA STAT. ANN.§§ 25.23.180 (a), 25.23.180(c), 47.10.011, 47.10.080(c)(3), 47.10.080(0), 47.10.088(a)-(k) (West, Westlaw through 2019 1st Reg. Sess.); ARIZ. REV. STAT. ANN. §§ 8-533, 8-846(D) (West, Westlaw through 2019 1st Reg. Sess.); ARK. CODE ANN. §§ 9-27-341 (West, Westlaw through 2019 Reg. Sess.); CAL. WELF. & INST. CODE§§ 361.5(b), (h), (i), 366.26(c)(l) (West, Westlaw through 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 19-3-604 (West, Westlaw through 2019 Reg. Sess.); CONN. GEN. STAT. ANN. §§ 17a-112(g)-(k), 45a-717 (West, Westlaw through 2019 Jan. Reg. Sess. & 2019 Jul. Sp. Sess.); DEL. CODE ANN. tit. 13 §1103 (West, Westlaw through 2019-2020 150th Gen. Assembly ch. 219); D.C. CODE ANN. §§ 16-2353, 16-2354(b) (West, Westlaw through Dec. 24, 2019); FLA. STAT. ANN. § 39.806 (West, Westlaw through 2019 1st Reg. Sess.); GA. CODE ANN.§ 15-11-310 (West, Westlaw through 2019 Reg. Sess.); HAW. REV. STAT. ANN. § 571-61 (West, Westlaw through 2019 Reg. Sess.); IDAHO CODE ANN. § 16-2005 (West, Westlaw through 2019 1st Reg. Sess.); 750 ILL. COMP. STAT. ANN. 50/1 et. seq. (West, Westlaw through 2019 Reg. Sess., P.A. 101-612; IND. CODE ANN. §§ 31-35-2-4.5, 31-35-3-4, 31-35-3-8 (West, Westlaw through 2019 1st Reg. Sess.); IOWA CODE ANN. §§ 232.111, 232.116 (West, Westlaw through 2019 Reg. Sess.); KAN. STAT. ANN. §§ 38-2255, 38-2335 (West, Westlaw through 2019 Reg. Sess.); KY. REV. STAT. ANN. §§ 600.020(2), 610.127, 625.090 (West, Westlaw through 2019 Reg. & 1st Ex. Sess.); ME.

limited grounds for revocation of parental rights.[202] Such statutes may act as a barrier to securing permanent and safe homes for abused and neglected children; however, they go the furthest in safeguarding fundamental parental rights and limiting state intervention. Where statutory grounds for the termination of parental rights are overly narrow or unclear, agencies sometimes do not seek termination and judges do not grant it even when it is clear that a child should be adopted.[203] However, some commentators believe that narrowly-defined grounds for termination of parental rights are necessary to ensure that parents' rights are severed only after all other options have been exhausted.[204]

Generally, state statutes allow termination of parental rights for harmful conduct directed toward the child and personally destructive behavior that indirectly results in harm to the child, including: failure to correct circumstances that initially brought the child before the court,[205] abuse or neglect of the

---

REV. STAT. ANN. tit. 22 §§ 4055 (West, Westlaw through 2019 1st Reg. Sess.); MD. CODE ANN., FAM. LAW § 5-525.l(b)(l) (West, Westlaw through 2019 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 119, § 26(b)(4), ch. 210, §3(c) (West, Westlaw through 2019 1st Ann. Sess., ch. 134); MICH. COMP. LAWS ANN. §§ 712A.19b(l), (3), (6) (West, Westlaw through 2019 Reg. Sess., P.A. 2019, No. 178); MINN. STAT. ANN. § 260C.301 (West, Westlaw through 2019 Reg. & 1st Sp. Sess.); MISS. CODE ANN. § 93-15-103 (West, Westlaw through 2019 Reg. Sess.); MO. ANN. STAT. §§ 211.183(6)-(7), 211.447(2)-(7) (West, Westlaw through 2019 1st Reg. & 1st Ex. Sess.); MONT. CODE ANN. §§ 41-3-609, 41-3-423(2)-(3) (West, Westlaw through 2019); NEB. REV. STAT. §§ 43-292, 43-292.02 (West, Westlaw through 2019 1st Reg. Sess.); NEV. REV. STAT. ANN. §§ 128.105 (West, Westlaw through 2019 Reg. Sess.); N.H. REV. STAT. ANN. §§ 169-C:24-a,170-C:5 (West, Westlaw through end of 2019 Reg. Sess. ch. 346); N.J. STAT. ANN. §§ 30:4C-15, 30:4C-15.l, 9:2-19, 30:4C-ll.2 (West, Westlaw through 2019, ch. 270); N.M. STAT. ANN. §§ 32A-4-28(B)-(E), 32A-4-2(C)-(D), 32A-4-29(K) (West, Westlaw through 2019 1st Reg. Sess.); N.Y. SOC. SERV. LAW § 384-b, 358-a(3)(b) (McKinney, Westlaw through 2019 chs.752); N.C. GEN. STAT. ANN. §§ 7B-101(2), 7B-llll (West, Westlaw through 2019 Reg. Sess.); N.D. CENT. CODE ANN. § 27-20-44 (West, Westlaw through 2020); OHIO REV. CODE ANN. § 2151.414 (West, Westlaw through file 21 of 133rd Gen. Assembly); OKLA. STAT. ANN. tit. 10a, § 1-4-904 (West, Westlaw through 2019 1st Reg. Sess.); OR. REV. STAT. ANN. §§ 419B.500, 419B.502, 419B.504, 419B.506, 419B.508 (West, Westlaw through 2020); 42 PA. CONS. STAT. ANN. § 6302 (West, Westlaw through 2019 Reg. Sess. act 114); R.I. GEN. LAWS §§ 15-7-7(a)-(c)(West, Westlaw through 2019 Reg. Sess., ch. 310); S.C. CODE ANN. §§ 63-7-2570 (West, Westlaw through 2019); S.D. CODIFIED LAWS §§ 26-8A-21.1, 26-8A-26, 26-8A-26.l, 26-8A-27 (West, Westlaw through 2019); TENN. CODE ANN.§§ 36-l-113(g)-(h), 37-1-166(g)(4) (West, Westlaw through 2019 1st Ex. Sess.); TEX. FAM. CODE ANN. § 262.2015 (Vernon, Westlaw through 2019 Reg. Sess.); UTAH CODE ANN. §§ 78A-6-312(2)-(4), 78A-6-503(2), 78A-6-502(2), 78A-6-507, 78A-6-508 (West, Westlaw through 2019 1st. Sess.); VT. STAT. ANN. tit. 15A, § 3-504(a), (b), (d) (West, Westlaw through 2019 Reg. Sess.); VA. CODE ANN. § 16.1-283(A), (B)-(E), (G) (West, Westlaw through 2019 Reg. Sess.); WASH. REV. CODE ANN.§§ 13.34.180, 13.34.190, 13.34.132 (West, Westlaw through 2019 Reg. Sess.); W. VA. CODE ANN. §§ 49-4-602 (West, Westlaw through 2019 2d Ex. Sess.); WIS. STAT ANN. §§ 48.415, 48.355(2)(d) (West, Westlaw through 2019, Act 21); WYO. STAT. ANN. § 14-2-308, 14-2-309 (West, Westlaw through 2019 Gen. Sess.).

202. *See, e.g.*, TEX. FAM. CODE ANN. §§ 161.001, 161.003(a) (Vernon, Westlaw through 2019 Reg. 3d Sess.).

203. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT STATE STATUTE SERIES (2018), www.acf.hhs.gov/programs/cb/focus-areas/child-abuse-neglect.

204. *See* Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 263 (2003-2004).

205. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 50/l(D)(m)(i) (West, Westlaw through 2019 Reg. Sess., P. A. 101-621).

child,[206] abandonment of the child,[207] failure to treat a substance abuse problem,[208] or a severe mental illness or deficiency[209] that prevents the parent from properly caring for the child. The best interests of the child are taken into consideration when deciding matters involving termination of parental rights.[210]

3. Criminal Conviction and Termination of Parental Rights

There is long-established Fourteenth Amendment doctrine protecting family integrity and the ability to care for one's children. That fundamental liberty interest does not disappear simply because an individual is convicted of a crime. Criminal activity and resultant incarceration are not sufficient to support the termination of parental rights in most jurisdictions.[211] The statutory grounds for terminating parental rights due to criminal conviction arise when a child cannot be returned safely home for fear the parent will harm the child or that the parent cannot provide for the child's basic needs.[212] Each state is responsible for

206. *See, e.g.*, WIS. STAT. ANN. § 48.415(5) (West, Westlaw through 2019 Act 21) (discussing child abuse).

207. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 17a-112(G)(3)(A) (West, Westlaw through 2019 Jan. Reg. Sess. & July Sp. Sess.); GA. CODE ANN. § 15-ll-310(a)(4) (West, Westlaw through 2019 Sess.); WIS. STAT. ANN. § 48.415(1) (West, Westlaw through 2019 Act 21).

208. *See, e.g.*, TEX. FAM. CODE ANN. § 161.001(l)(P) (Vernon, Westlaw through 2019 Reg. Sess) (The court may order termination of the parent-child relationship if the court finds that the parent "used a controlled substance . . . in a manner that endangered the health or safety of the child, and: (i) failed to complete a court-ordered substance abuse treatment program; or (ii) after completion of a court-ordered substance abuse treatment program, continued to abuse a controlled substance").

209. *See, e.g.*, N.Y. SOC. SERV. LAW § 384-b(6)(a) (McKinney, Westlaw L.2019, ch. 752); WIS. STAT. ANN. § 48.415(3) (West, Westlaw through 2013, Act 380) (parental rights may be terminated on the basis of "continuing parental disability" if: (1) the parent is currently institutionalized for mental illness or has been for two out of the five years prior to this proceeding, (2) it is likely that this condition will continue indefinitely, and (3) the child is not being adequately cared for by person who currently has custody of them).

210. *See Santosky*, 455 U.S. at 747-48 (a child's best interests are a priority providing that there is clear and convincing evidence of child abuse or neglect). *Cf. in re* Valerie D., 613 A.2d 748, 758–59 (Conn. 1992) ("The determination of the child's best interests comes into play only *after* statutory grounds for termination of parental rights have been established by clear and convincing evidence.") (emphasis in original).

211. A parent can also lose their parental rights after being convicted of certain felonies, namely crimes of violence. If a parent commits a crime of violence against their child or another family member, the court has the option to remove their rights and terminate the child-parent relationship. Also, if a parent is required to be imprisoned for a length of time that requires the child to enter foster care because there are no alternatives, the parent can lose parental rights. *See* DEP'T OF HEALTH AND HUMAN SERVS. GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2016), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf (last visited Jan. 15, 2020).

212. ALA. CODE 1975 § 12-15-319 (Westlaw, West through 2019 Reg. Sess.); ALASKA STAT. § 47.10.088 (Westlaw, West through 2019 Reg. Sess.); ARIZ. REV. STAT. § 8-533 (Westlaw, West through 2019 Reg. Sess.); ARK. CODE ANN. § 9-27-341 (Westlaw, West through 2019 Reg. Sess.); CAL. WELF. & INST. CODE § 366.26 (Westlaw, West through 2019 Reg. Sess.); COLO. REV. STAT. ANN. § 19-3-604 (2018); CONN. GEN. STAT. ANN. § 45a-717 (Westlaw, West through 2019 Reg. Sess.); DEL. CODE ANN. tit. 13, § 1103 (Westlaw, West through 2019 Reg. Sess.); D.C. CODE § 16-2353 (Westlaw, West through 2019 Reg. Sess.); FLA. STAT. ANN. § 39.806 (Westlaw, West through 2019 Reg. Sess.); GA. CODE ANN. § 15-11-260 (Westlaw, West through 2019 Reg. Sess.); HAW. REV. STAT. ANN. § 587A-7 (Westlaw, West through 2019 Reg. Sess.); IDAHO CODE ANN. § 16-2005 (Westlaw, West through 2019

establishing its own statutory grounds.[213] When addressing whether parental rights should be involuntarily terminated due to criminal conviction, most states require courts to: 1) determine by clear and convincing evidence that the parent is unfit[214] and 2) determine whether severing the parent-child relationship is in the child's best interests.

A conviction of a crime of violence against a child or another family member constitutes grounds for termination of parental rights in every state in the United States, the District of Columbia, the Virgin Islands and Puerto Rico.[215] In thirty states and Puerto Rico, parental rights can be terminated when a parent is convicted of sexual abuse or some other sexual offense.[216] If a parent is convicted of soliciting children for sexual exploits or having child pornography, their parental rights could be terminated in fourteen states and Puerto Rico.[217] In six states, a human trafficking conviction of any kind could be grounds for termination.[218]

Reg. Sess.); 20 ILL. COMP. STAT. ANN. 505/35.2 (Westlaw, West through 2019 Reg. Sess.); IND. CODE ANN. § 31-34-21-5.6 (Westlaw, West through 2019 Reg. Sess.); IOWA CODE ANN. § 232.116 (Westlaw, West through 2019 Reg. Sess.); KAN. STAT. ANN. § 38-2269 (2018); KY. REV. STAT. ANN. § 625.090 (Westlaw, West through 2019 Reg. Sess.); LA. CHILD. CODE ANN. art. 1015 (2018); ME. REV. STAT. ANN. tit. 22, § 4055 (Westlaw, West through 2019 Reg. Sess.); MD. CODE ANN., FAM. LAW § 5-323(d) (Westlaw, West through 2019 Reg. Sess.); MASS. GEN. LAWS ANN. Ch. 210, § 3 (Westlaw, West through 2019 Reg. Sess.); MD. SPEC. P. MCR § 3.977 (Westlaw, West through 2019 Reg. Sess.); MINN. STAT. ANN. § 260C.301 (2013); MISS. CODE ANN. § 93-15-121 (2017); MO. ANN. STAT. § 211.447 (2018); MONT. CODE ANN. § 41-3-609 (Westlaw, West through 2019 Reg. Sess.); NEB. REV. STAT. ANN. § 43-292 (Westlaw, West through 2019 Reg. Sess.); NEV. REV. STAT. ANN. § 128.105 (2017); N.H. REV. STAT. ANN. § 170-C:5 (Westlaw, West through 2019 Reg. Sess.); N.J. STAT. ANN. § 30:4C-15.1 (2015); N.M. STAT. ANN. § 32A-4-28 (Westlaw, West through 2019 Reg. Sess.); N.Y. SOC. SERV. LAW § 384-b (Westlaw, West through 2019 Reg. Sess.); N.C. GEN. STAT. ANN. § 7B-1111 (2018); N.D. CENT. CODE § 27-20-44 (2020); OHIO REV. CODE ANN. § 2151.05 (Westlaw, West through 2019 Reg. Sess.); OKLA. STAT. ANN. tit. 10A, § 1-4-904 (Westlaw, West through 2019 Reg. Sess.); OR. REV. STAT. ANN. § 419B.502 (2018); 23 PA. CONS. STAT. ANN. § 2511 (2018); R.I. GEN. LAWS § 15-7-7 (Westlaw, West through 2019 Reg. Sess.); S.C. CODE ANN. § 63-7-2570 (2017); S.D. CODIFIED LAWS § 26-8A-26.1 (Westlaw, West through 2019 Reg. Sess.); TENN. CODE ANN. § 36-1-113 (Westlaw, West through 2019 Reg. Sess.); TEX. FAM. CODE ANN. § 161.001 (2017); UTAH CODE ANN. § 78A-6-507 (Westlaw, West through 2019 Reg. Sess.); VT. STAT. ANN. tit. 15A, § 3-504 (2018); VA. CODE ANN. § 16.1-283 (Westlaw, West through 2019 Reg. Sess.); WASH. REV. CODE ANN. § 13.34.180 (2018); W.VA. CODE ANN. § 49-4-605 (2018); WIS. STAT. ANN. § 48.415 (2018); WYO. STAT. ANN. § 14-2-309 (Westlaw, West through 2019 Reg. Sess. Reg. Sess.).

213. *See* GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS, *supra* note 211.

214. *See Santosky*, 454 U.S. at 474-48; *see also* U.S. DEP'T OF HEALTH AND HUMAN SERVS. CONSENT TO ADOPTION (2017), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/consent/ (last visited January 15, 2020).

215. *See id.*

216. *See supra* note 212. The states that provide for termination of rights upon criminal conviction for a sexual offense include Alaska, California, Connecticut, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wisconsin.

217. *See id.* The states that terminate parental rights for possession of child pornography include Arkansas, California, Connecticut, Kentucky, Louisiana, Maine, Mississippi, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, and Utah.

218. *Id.* The states that terminate parental rights for human trafficking convictions include Indiana, Louisiana, Maine, Tennessee, Texas, and Wisconsin.

The collateral consequences of a conviction and incarceration create circumstances in which the state, under the ASFA, must initiate the termination process.[219] Indeed, in order to comply with the federal standards on permanency, states must file for termination of parental rights (TPR) "once children have been in foster care for 15 of the most recent 22 months, except in certain allowable circumstances, and encourage[s] States to expedite TPR in specific situations of severe harm inflicted on children."[220] In twenty-seven states, a conviction which includes a sentence necessitating a child to be placed in foster care for lack of living arrangement alternatives may be grounds for the termination of parental rights.[221] In about 1 in 8 cases, incarcerated parents lose their parental rights, regardless of the seriousness of their offenses, according to the analysis of records maintained by the U.S. Department of Health and Human Services between 2006 and 2016.[222] That rate has held steady over time.

Notwithstanding efforts to safeguard a parent's inherent liberty interest, the ASFA mandates that "reasonable efforts" to preserve the family are not required when: (1) the parent has subjected the child to aggravated circumstances, as defined by state law;[223] (2) the parent has murdered one of his or her children;[224] (3) the parent has aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter;[225] (4) the parent has committed a felony assault that results in serious bodily injury to the child or another child of the parent;[226] or (5) the parental rights of the parent to a sibling have been terminated involuntarily.[227] The ASFA clarifies what reasonable efforts means, emphasizing that the safety of the child is the paramount concern throughout the entire child custody case.[228] Despite this seemingly hardline standard, thirty-four states, D.C., and the Virgin Islands all provide exceptions to the rule.[229]

---

219. *See* Martha L. Raimon, *Barriers to Achieving Justice for Incarcerated Parents*, 70 FORDHAM L. REV. 421, 424 (2001).

220. DEP'T OF HEALTH AND HUMAN SERVICES, ADOPTION AND SAFE FAMILIES ACT (ASFA) INFO. PORTAL, https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2999 (last visited January 15, 2020) [hereinafter ASFA INFO. PORTAL]

221. *See supra* note 212. Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, and Wyoming).

222. Anna Flagg & Elis Hager, *How Incarcerated Parents are Losing Their Children Forever*, WASH. POST (Dec. 2, 2018), https://www.washingtonpost.com/national/parenthood-lost-how-incarcerated-parents-are-losing-their-children-forever/2018/12/02/e97ebcfe-dc83-11e8-b3f0-62607289efee_story.html.

223. These "aggravated circumstances" include cases in which a parent has been convicted of murdering another child in the household, severe and aggravated sexual abuse, or single instances of abuse when the abuse is severe enough to be charged as aggravated assault, or when there is serious injury to the child. See 42 U.S.C. § 67l(a)(l5)(D)(i).

224. 42 U.S.C. § 67l(a)(l5)(D).

225. *Id.*

226. *Id.*

227. *Id.*

228. *See* ASFA INFO. PORTAL, *supra* note 220.

229. *See Grounds for Involuntary Termination of Parental Rights*, *supra* note 211.

Reasonable efforts to preserve the family often are often equated with reasonable efforts to preserve the legally recognized family. Yet, despite society's increasing acceptance of nontraditional families, the law has not kept up. The percentage of births to unmarried mothers has increased from 4 percent of total U.S. births in 1950 to more than 40 percent each year since 2008.[230] In order to have a legally recognized relationship with their fathers, these children must have their paternity established. Paternity, or parentage, is the establishment of a legal relationship between a father and children to provide basic emotional, social, and economic ties.[231] Historically, the only way to do this was for the unmarried mother to file a paternity suit.[232] There are now two other options codified in federal law.[233] First, either parent can file a paternity suit with paternity being established or refuted via genetic testing. If paternity is proven, the court will order the birth certificate to be amended[234] and impose child-support payments. Second, both parents can voluntarily acknowledge paternity. [235] These federal provisions are not mandatory; however, in order to receive federal funds for their state child support enforcement programs and their welfare programs, states must adopt these laws. Consequently, every state now has paternity laws that incorporate these federal requirements.[236]

In many states, there is a third way to establish paternity: conduct.[237] Looking to conduct to establish paternity was first outlined in the Uniform Parentage Act (U.P.A.) of 1973. States that adopted the Act have the authority to presume that a man who receives a child into his home and openly holds out the child as his natural child is the child's father.[238] In 1972, the United States Supreme Court determined that an unmarried, non-custodial father, upon the death or incarceration of his children's mother, is entitled to a hearing on his parental fitness before his children are taken from him and put up for adoption.[239] There are a variety of factors that are taken into consideration when determining "fitness," with most being the same as outlined above when considering involuntary termination of parental rights. However, in twelve states, "if a mother is accused of abuse or neglect but the father is not, and he is not married to her, he must prove that he is a parent in

230. JOYCE A. MARTIN ET AL., DEATHS: FINAL DATA FOR 2017, 68 NATIONAL VITAL STATISTICS REPORT 9 (2017).

231. *Establishing Paternity*, CHILDREN'S RIGHTS COUNCIL, https://www.crckids.org/child-support/establishing-paternity/ (last visited November 15, 2019).

232. With very limited exceptions, the husband is considered to be the legal father if the mother and father were married when the children was born. If the parents are not married to each other when the child is born, the man is not presumed the legal father, even if the parents are living together. *See id.*

233. 42 U.S.C. § 654(20) (2018).

234. 42 U.S.C. §666(a)(5)(B)(i) (2018).

235. 42 U.S.C. §666(a)(5)(C)(i) (2018).

236. Paula Roberts, *Truth and Consequences: Part 1 Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L. Q. 35, 54 n. 2 (2003).

237. *See id.* at 36.

238. *See id.* (citing Jack Sampson, *Uniform Parentage ACT (2000) with Prefatory Notes and Comments*, 35 FAM. L. Q. 86, 92 (2001)).

239. Stanley v. Illinois, 405 U.S. 645, 1209-1210 (1972).

his own right—otherwise he will not have a say in whether the child is put up for adoption. In most of those states. . . proof means paying child support—not to the mother but to the government agency that has taken the child."[240] If the presumption goes unchallenged, the man is understood to be the child's father. This presumption-of-parentage rule was a major innovation in family law. However, this conduct based analysis was only statutorily guaranteed in the nineteen states that adopted the U.P.A., which was later edited in 2000 to remove conduct as a way of establishing paternity in favor of genetic testing.[241]

For unwed, non-custodial fathers, establishing parentage is necessary in order to qualify for full parental rights. Indeed, in the eyes of many courts, unwed fathers are presumed to be less than fathers without an established legal relationship.[242] In 1972, the United States Supreme Court determined that an unmarried, non-custodial father, upon the death or incarceration of his children's mother, is entitled to a hearing on his parental fitness before his children are taken from him and put up for adoption.[243] There are a variety of factors that are taken into consideration when determining "fitness," with most being the same as outlined above when considering involuntary termination of parental rights. However, in twelve states, "if a mother is accused of abuse or neglect but the father is not, and he is not married to her, he must prove that he is a parent in his own right—otherwise he will not have a say in whether the child is put up for adoption. In most of those states . . . proof means paying child support—not to the mother but to the government agency that has taken the child."[244] So, for example, if an unmarried, non-custodial father provided regular childcare, fed, dressed, played with, and read to his child[dren], but did not pay child support to the government, he would be deemed unfit.[245] Martin Guggenheim, a law professor at New York University, describes the child support-based fitness laws as "just blatant discrimination on stale gender stereotypes—that the only way to be a father is to have a wedding ceremony or else to be a kind of rote financial provider."[246]

Gendered calculations of fitness manifest in a variety of ways when determining whether or not to terminate parental rights. For example, female prisoners have their parental rights terminated more often than men despite the fact that most incarcerated women are in prison for nonviolent crimes,[247] suggesting that they pose a far lesser risk, if any at all, to their children and to society at large. In fact, roughly 84% of women are incarcerated for nonviolent crimes, a majority of which are drug-related. Mothers of drug-exposed babies are routinely separated

240. Eli Hager, *He Didn't Abuse His Daughter. The State Took Her Anyway*, N.Y. TIMES (Sept. 25, 2019).
241. Michael Morgan, *The New Uniform Parentage Act*, FAM. ADVOC., Fall 2002 at 11-13.
242. *See* Hager, *supra* note 240.
243. Stanley v. Illinois, 405 U.S. 645 (1972).
244. *See* Hager, *supra* note 240.
245. *Id.*
246. *Id.*
247. Sharona Coutts & Zoe Greenberg, *Women, Incarcerated*, PRISON LEGAL NEWS (June 3, 2015).

from and, in some cases, permanently lose custody of their children because the "unfitness to parent was based on a single, unconfirmed positive drug test rather than a thoughtful evaluation of whether drug use or any other factor has rendered someone incapable of parenting."[248] Additionally, because mothers overwhelmingly comprise the majority of custodial parents, when they are incarcerated, their children are five times more likely than those of male inmates to end up in foster care.[249]

4. Immigrant Parents and Asylum-Seekers

The parental rights of undocumented migrants have long been threatened by the disharmonious body of U.S. law. They, as much as U.S. citizens and legal immigrants, enjoy a fundamental, constitutional right to the care and control of their children.[250] U.S. immigration law, recognizing this right, has been developed with the assumption that parents will retain custody of their children and that family separation is therefore an unlikely result of deportation.[251] Stemming from this assumption, parents are unable to fight deportation on the grounds that it could result in familial separation without significant proof that it will occur. In state family and juvenile courts, however, illegal immigration status has been used as an indicator that the parent is "unfit" and as a justification for the termination of parental rights. An inability of the parent to speak English or merely a belief that the child will be "disadvantaged" by life in her country of origin can be enough to justify termination as well.[252] These practices are indicative of the biased notion that a child will be better off merely by incidence of being raised in an American household. This unfortunate, if well-intentioned, determination in state courts to prevent child deportation clashes devastatingly with federal policies aimed aggressively at pushing and keeping their parents out, leaving families hewn apart.

At the border, recent efforts to reduce illegal immigration have similarly conflicted with policies aimed at protecting the best interest of immigrant children, again resulting in the separation of vulnerable families–this time in vast numbers. Today, reunification of these families continues to be elusive while immigration policy remains in flux, posing an ongoing potential threat to newly crossing families.

a. History of Child Immigration Policy Issues. In 1985, the immigrant rights defenders filed a class action lawsuit against the Immigration and Naturalization

248. JEANNE FLAVIN, OUR BODIES, OUR CRIMES: THE POLICING OF WOMEN'S REPRODUCTION IN AMERICA, 116 (2009).

249. *See* Flagg & Hager, *supra* note 222.

250. Marcia Zug, *Undocumented Parenting: Immigration Status as a Proxy for Parental Fitness*, AMERICAN BAR ASSOCIATION (July 14, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/undocumented-parenting-immigration-status-proxy-for-parental-fitness/.

251. *Id.*

252. *Id.*

Service (Now ICE) regarding the rights of immigrant children.[253] Years of litigation, reaching up to the Supreme Court, resulted an agreement in 1997 known as the Flores Settlement Agreement (FSA).[254] The FSA mandated that the government "release children from immigration detention without unnecessary delay to, in order of preference, parents, other adult relatives, or licensed programs willing to accept custody." Where a placement is not immediately available, the government is obligated to place children in the "least restrictive" setting appropriate according to their age and other individual factors.[255]

In 2003, the Office of Refugee Resettlement (ORR) took over the Unaccompanied Alien Children program.[256] The program provides unaccompanied alien children (UACs) with health care, education, and other necessities, as well as care through various care providers while the children await their immigration proceedings.[257] Its activities are subject to the FSA.[258] When a child is apprehended at the border, he is screened by Customs and Border Patrol (CBP) and classified either as part of a "family unit" or a UAC. A minor is considered to be a UAC when he meets the criteria of A) having no lawful immigration status in the United States; (B) being under 18 years of age; and (C) either (i) having no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States available to provide care and physical custody.[259] Once children are determined to be UACs, they must be referred to ORR custody within 72 hours.[260]

The FSA largely prevents classification of a child as part of a "family unit" where his parent or family member is held at a DHS detention center.[261] The severe conditions of these centers violate the "least restrictive setting appropriate" requirement of the agreement.[262] Some purportedly less restrictive facilities were designed and equipped specifically to serve as family detention centers.

---

253. Carmen Monico, et al., *Forced Labor-Family Separations in the Southwestern U.S. Border Under the "Zero Tolerance" Policy: Preventing Humans Rights Violations and Child Abduction into Adoption (Part 1)*, 4 J. HUM. RIGHTS SOC. WORK 164, 173 (2019).

254. *Id.*

255. *Id.*

256. *Unaccompanied Alien Children*, OFF. OF REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/orr/programs/ucs (last visited Nov.16 2019).

257. *Id.*

258. *Id.*

259. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *U.S. Dep't of Homeland Security, Instruction Sheet for an Unaccompanied Alien Child in Immigration Court to Submit A Form I-589 Asylum Application to U.S. Citizen and Immigration* (July 2014). https://www.nationalservice.gov/sites/default/files/resource/UAC_Instruction_Sheet_Handout.pdf

260. *Trafficking Victims Protection Reauthorization Act Safeguards Children*, National Immigration Forum (May 23, 2018), https://immigrationforum.org/article/trafficking-victims-protection-reauthorization-act-safeguards-children/.

261. Flores v. Johnson, 212 F. Supp. 3d 864, 880 (C.D. Cal.), clarified on denial of reconsideration sub nom. Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016), and *aff'd in part, rev'd in part and remanded*, 828 F.3d 898 (9th Cir. 2016)

262. *Id.*

Nonetheless, the FSA has been held in federal court to bar DHS from detaining children even under these conditions for more than about twenty days.[263] Previous policy complied with these requirements by releasing parents into the community to await proceedings, or by detaining mothers and children together for no more than twenty-one days in family detention centers before their release.[264] Children crossing the border with a family member could therefore be classified as part of a "family unit."

b. Implementation of "Zero-Tolerance" and Family Separation. In April of 2018, in response to massive increases in border crossings and public criticism of what was dubbed "catch-and release" practices at the border, the Department of Justice announced a "zero-tolerance" policy.[265] Where most first-time border crossings had previously been dealt with as civil matters in immigration courts, the new policy entailed criminally prosecuting all those suspected of illegally crossing the border.

Parents, instead of being released while awaiting process, were kept indefinitely in detention centers. Children immigrating with family were separated for screening. Defense lawyers working with immigrants during this period relate that in some cases border agents represented to parents that these separations would be brief, and that the children would only be asked some questions or given a bath before returning to them.[266] The policy of parental detention, however, together with the restrictions of the FSA, prevented these children from being classified as part of a family unit and returned to their parents. Unable to be housed in the detention centers with their parents, they were classified as UACs and placed into ORR custody.

Once the ORR gains custody of a child, it attempts to place him with a sponsor. The agency grants first preference to placement with parents, and second to placement with other family members. Where neither option is feasible, the child may be placed with a non-familial sponsor.[267]

Parents detained during the "zero-tolerance" policy could only assume the role of sponsor of a UAC after having been released from a detention center, either through release into the United States or deportation. Parents were frequently told that the fastest way to see their children again would be to waive asylum

263. *Id.*

264. Lori Robertson, *Did the Obama Administration Separate Families?*, FACTCHECK.ORG (June 20, 2018), https://www.factcheck.org/2018/06/did-the-obama-administration-separate-families/.

265. Attorney General Jeff Sessions, Memorandum for Federal Prosecutors along the Southwestern Border (April 6, 2018).

266. Dara Lind, *The Trump administration's separation of families at the border, explained*, VOX (Aug. 14, 2018), https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents.

267. Office of Refugee Resettlement, ORR Guide: Children Entering the United States Unaccompanied (2015). https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.

claims.[268] Those determined to pursue their claims were deprived of virtually all contact with their children during the lengthy time period those proceedings often take.[269] Even upon deportation, some parents were coerced into signing documents waiving their right to reunification with their children.[270]

Where a UAC has a family member within the United States who is not held within a detention center, that relation may also sponsor the child if he meets the qualifications for sponsorship.[271] Since the implementation of the zero-tolerance policy, however, family members already living in the United States are hesitant to step forward for sponsorship, wary of the impact it may have on their own immigration status.[272]

In the event a familial sponsor cannot be found for a UAC, the ORR may find him a nonfamilial sponsor. Where a viable sponsor is altogether unavailable, he may be placed in a group home or foster care in one of any of the state-run child welfare systems across the country.[273] Although foster parents are instructed that they may not apply for adoption of a UAC, with only extreme exceptions, the federal-state handling of these cases is often disjointed and cases are not always handled according to ORR protocol.[274]

c. Repeal of "Zero-Tolerance". On June 20, 2018, President Trump issued Executive Order 13841, ending family separation at the border.[275] The Order directed the attorney general to file a request in the Central District of California to modify the FSA.[276] The proposed modification would have allowed for migrant families to be detained together throughout criminal or other immigration proceedings.[277] The Order also directed DHS Secretary Kirstjen Nielsen to maintain custody of detained families while their cases are adjudicated, Attorney General Jeff Sessions to prioritize these cases, and the heads of various agencies to find and construct additional family detention centers.[278]

---

268. Katie Sheperd, *Government Uses Separated Children as Leverage to Coerce Parents Into Signing for Deportation*, IMMIGRATION IMPACT (July 19, 2018), http://immigrationimpact.com/2018/07/19/children-coerce-parents-signing-deportation/#.XaNrI25Fw2w.

269. American Immigration Lawyers Association & American Immigration Council, *Policy Brief: Protect Children By Ending Family Detention and Separation*, AILA Doc. No. 18080371 (2018).

270. Ms. L., et al., v. U.S. Immigr. and Cust. Enf't, et al., 2018 WL 4144366 (S.D.Cal.).

271. Office of Refugee Resettlement, ORR Guide: Children Entering the United States Unaccompanied (2015).

272. Monico et al., *supra* note 253, at 175.

273. Garance Burke & Martha Mendoza, *AP Investigation: Deported Parents May Lose Kids to Adoption*, AP NEWS (October 9, 2018), https://apnews.com/97b06cede0c149c492bf25a48cb6c26f.

274. Brian Ross & Angela M. Hill, *Tug of Love: Immigrant Mom Loses Effort to Regain Son Given to U.S. Parents*, ABC NEWS (July 18, 2012), https://abcnews.go.com/Blotter/immigrant-mom-loses-effort-regain-son-us-parents/story?id=16803067; Kathryn Joyce, *The Threat of International Adoption for Migrant Children Separated from Their Families*, THE INTERCEPT (July 1, 2018, 8:37 A.M.), https://theintercept.com/2018/07/01/separated-children-adoption-immigration/.

275. Exec. Order No. 13,841, 83 Fed. Reg. 29435 (July 22, 2018).

276. *Id.*

277. *Id.*

278. *Id.*

On June 25, 2018, the ACLU requested in an amended complaint that the lawsuit *Ms. L v. United States Customs and Enforcement* be extended to include all families separated on the United States' southwestern border.[279] In that case, a preliminary injunction and reunification order had mandated that a certified class of hundreds of separated families be reunited within 30 days, children under five within fourteen days, that all parents have the ability to speak to their children within ten days, and that no parent be deported without their child without a knowing waiver.[280] The ACLU was granted the extended injunction, which required the reunification of all children affected by the "zero-tolerance" policy within the stated timeframe.[281]

d. Reunification of Separated Families. Despite assurances that the various deadlines would be reached, it is unclear how successful efforts to reunify UACs with their families have been. The disjointed coordination and documentation of the multiple agencies within the UAC system frustrated this process. Members of the same family were meant to be given the same "alien number" but in many cases were separated before one was assigned.[282] Additionally, the scale of the reunification project is massive, with about two thousand children in HHS custody thought to have been separated from their parents at the time of the reunification order.[283] Furthermore, in hundreds of cases, parents had already been deported without their children,[284] making reunification even more difficult.

It has since become clear that there are likely several thousand more who were released to sponsors prior to the ruling in *Ms. L v. ICE*. The ACLU has sought for the order in that case to apply to these children. HHS, however, has argued that it should focus on reunifying those children in its custody, rather than those already released to sponsors.[285] A project to find and reunify all children separated placed with a sponsor would be massive: between October 2017 and August 2019, a reported 103,896 UACs were released to sponsors across all fifty states.

---

279. Second Amended Complaint for Declaratory and Injunctive Relief, Ms. L. v. U.S. Immigr. and Cust. Enf't, 2018 WL 3575383 (S.D. Cal July 3, 2018).

280. Ms. L. v. U.S. Immigr. and Cust. Enf't 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018), *modified*, 330 F.R.D. 284 (S.D. Cal. 2019).

281. Ms. L. v. U.S Immigr. and Cust. Enf't., 330 F.R.D. 284, 292 (S.D. Cal. 2019).

282. Jacob Soboroff, *Emails Show Trump Admin Had "No Way to Link" Separated Migrant Children to Parents*, NBC NEWS (May 1, 2019, 6:29 PM), https://www.nbcnews.com/politics/immigration/emails-show-trump-admin-had-no-way-link-separated-migrant-n1000746.

283. Ted Hesson & Dan Diamond, *As Deadline Looms, Trump Officials Struggle to Reunite Migrant Families*, POLITICO (July 2, 2018, 5:57 PM), https://www.politico.com/story/2018/07/02/separated-families-border-children-reunite-664674.

284. *Policy Brief: Protect Children by Ending Family Detention and* Separation, AM. IMMIGR. LAWYERS ASSOC., https://www.aila.org/infonet/policy-brief-on-family-separation-and-detention (last visited Mar. 1, 2020).

285. Elliot Spagat, *US Sees Limitations of Reuniting Migrant Families*, AP NEWS (Feb. 2, 2019), https://apnews.com/48210bbf243e423ea151ff04e4878ce6.

e. Detention of New Families. In January of 2019, DHS announced its plan to implement Migrant Protection Protocols (MPPs).[286] Under the MPPs, "certain foreign individuals entering or seeking admission to the U.S from Mexico- illegally or without proper documentation- may be returned to Mexico and wait outside of the U.S. for the duration of their immigration proceedings."[287] The MPPs do not allow for UACs and other vulnerable populations to be returned to Mexico, but children who travel across the border with their families may be and have been returned.[288] While awaiting immigration proceedings, DHS claims that Mexico "provides them with all appropriate humanitarian protections."[289]

f. Proposed Changes to Immigration Policy. On September 7, 2018 a proposed regulation, "Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children" was published in the Federal Register.[290] An aim of these proposed regulations is to have the twenty-day detention limit be lifted from those children who came with family, and only apply to UACs.[291] Although this proposal would allow families to stay together and within the United States rather than in Mexico, critics argue that it might undermine law granting due process and other protections to immigrant children.[292] In August 2019, then-Acting Secretary of Homeland Security Kevin McAleenan announced a rule that would terminate the FSA in 60 days.[293] Its goal was to replace terms of the agreement with a new standard of care for immigrant children that would allow them to be detained together with their families in humane conditions.[294] In late September, a federal judge struck down the rule and held that the Flores Settlement Agreement was still in effect and not terminated.[295]

IV. DUE PROCESS STANDARDS

The Supreme Court has recognized that "freedom of personal choice in matters of . . . family life is one of the liberties protected by the Due Process Clause of the

286. *Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SECURITY (January 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols.

287. *Id.*

288. Kristina Cooke, Micah Rosenburg & Reade Levinson, *Exclusive: U.S. Migrant Policy Sends Thousands of Children, Including Babies, Back to Mexico*, THOMPSON REUTERS (October 11, 2019, 6:18 AM), https://www.reuters.com/article/us-usa-immigration-babies-exclusive-idUSKBN1WQ1H1.

289. *Migrant Protection Protocols*, *supra* note 286.

290. Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392, 44392 (Aug. 23, 2019) (to be codified at 8 CFR pt. 212; 8 CFR pt. 236; 45 CFR pt. 410).

291. *Id.*

292. Monico, *supra* note 253, at 173.

293. *Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement*, U.S. DEP'T OF HOMELAND SECURITY (Aug. 21, 2019), https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement.

294. *Id.*

295. Kristina Cooke, *U.S. Judge Blocks Trump Rule of Migrant Child Detention*, REUTERS (Sept. 27, 2019), https://www.reuters.com/article/us-usa-immigration/us-judge-blocks-trump-rule-on-migrant-child-detention-idUSKBN1WC2ED.

Fourteenth Amendment."[296] This reflects the Court's acknowledgement of a parent's right and "high duty . . . to recognize and prepare" children for the obligations of citizenry.[297] In *Santosky v. Kramer*, the Court ruled that due process required that an intermediate standard of proof, "clear and convincing evidence," be used in termination of parental rights proceedings.[298] A standard of proof higher than mere "preponderance of the evidence" is required for several reasons. First, a parents' interest in the care, custody and management of their children is protected by the Fourteenth amendment; second, parents have a fundamental liberty interest in the shielding themselves and their families from state intrusion; third, a high due process reflects a social preference in the preservation of a family over the state's interest in terminating rights; fourth, there is a proportionately higher risk of an erroneous decision under the preponderance standard than under a more searching standard; and finally, no strong countervailing state interests require a lower standard.[299] Some states have given retroactive effect to this new standard of proof.[300]

In *M.L.B. v. S. L. J.*,[301] the Court further recognized the importance of assuring appropriate review in these "severe," "grave," "irretrievably destructive," and "irreversible" proceedings.[302] Because of the "considerable" risk that a court will erroneously determine that a parent is unfit, involuntary termination of parental rights works a "unique kind of deprivation" that makes it among the "most severe forms of state action."[303] Current standards require a showing of specific harm to the child rather than the more open-ended best interests standard typically used in

296. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639 (1974).

297. Pierce v. Soc'ty of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 535 (1925).

298. Santosky v. Kramer, 455 U.S. 745, 768–69 (1982) (stating that a mere "fair preponderance of the evidence"' standard violated the Due Process Clause of the Fourteenth Amendment because it created a significant risk of erroneous termination and did not strike a proper "balance between the rights of the natural parents and the State's legitimate concerns"). The Court explained that "clear and convincing" is an intermediate standard between the high standard of "beyond a reasonable doubt" and a "preponderance of the evidence." *Id.* at 755-56. Courts might deviate from the "clear and convincing evidence" standard in custody disputes where the state itself has not initiated termination proceedings. *See* Hagberg v. New Jersey, 751 Fed.Appx. 281 (3rd Cir. 2018) (adopting a "preponderance of the evidence" standard in a custody dispute between two parents).

299. *Santosky*, 455 U.S. at 755.

300. *See, e.g., In re* Rose Marie M., 455 N.Y.S.2d 664, 665 (N.Y. App. Div. 1983). *But see In re* C.A. K., 652 P.2d 603,607 (Colo. 1982) (refused to retroactively apply clear and convincing standard).

301. M.L.B. v. S.L.J., 519 U.S. 102 (1996) (citing *Santosky*, 455 U.S. at, 759).

302. *Id.* at 118–121 (holding that the state may not deny the right to appeal a termination of parental rights based on an appellee's inability to pay); Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989) (describing the gravity of parental termination proceedings as "tantamount to imposition of a civil death penalty").

303. *See M.L.B.*, 519 U.S. at 128 (citing Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 27 (1981)). *But cf.* Doe v. Louisiana 2 F.3d 1412 (5th Cir. 1993) (holding that state social services officers are entitled to qualified immunity in §1983 suits brought by parents where the state erroneously initiates temporary custody proceedings).

custody proceedings.[304] Some commentators believe that the serious consequences of termination warrant the highest standard available: strict scrutiny.[305]

Other commentators, recognizing that the court has yet to articulate a single standard of review in cases regarding the care, custody, and control of a child writ large, have promulgated a "sliding scale" approach to judicial review.[306] Under this model, the standard of review would shift based on the proximity of the case to the "core of parenthood."[307] Given the proximity of issues of custody and parental termination to the essence of parenthood, proponents of this model have recognized that strict scrutiny remains the standard of review for cases involving termination and custody, while recognizing that issues regarding more attenuated from the core of parenthood–including choice in education–could remain subject to rational basis review.[308]

A. RIGHT TO COUNSEL

In *Santosky*, the Court explained that "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."[309] The Court has found that appointed counsel is not necessary to ensure a fair adjudication.[310] Several states provide a statutory right to counsel for indigent parents involved in termination proceedings.[311]

The procedural safeguards provided by such laws differ widely.[312] For example, the availability of such a statutory right does not mean that counsel will always be appointed before termination proceedings are initiated.[313] Other states,

---

304. *See* Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (holding that a best interest showing is not enough for the state to intervene, absent a finding that the parent is unfit); *see also* Emily Buss, *Adrift in the Middle: Parental Rights after Troxel v. Granville*, 2000 SUP. CT. REV. 279, 282 (2000).

305. *See* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1742 (2000).

306. Margaret Ryznar, *A Curious Parental* Right, 71 SMU L. REV. 127, 148 (April 2017).

307. *Id*.

308. *Id*. at 149.

309. Santosky v. Kramer, 455 U.S. 753–54 (1982).

310. *See* Lassiter v. Dep't. of Soc. Servs., 452 U.S. 18, 31-32 (1981). *But see* Indian Child Welfare Act of 1978 25 U.S.C. § 1912 (mandating the appointment of counsel for indigent Native Americans in termination proceedings).

311. *See, e.g*., TEX. FAM. CODE ANN.§ 107.013(a)(l) (Vernon, Westlaw through 2019 3d Called Sess.) ("[T]he court shall appoint an attorney ad litem to represent the interests of *[inter alia]* an indigent parent of the child who responds in opposition to the termination."); *see also* Katherine C. Pearson, *Cooperate or We'll Take Your Child: The Parents' Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 872 (1998).

312. *See* Patricia C. Kussmann, *Right of Indigent Parent to Appointed Counsel in Proceeding for Involuntary Termination of Parental Rights*, 92 A.LR.5th 379 (2001).

313. *See In re* M.J.M.L., 31 S.W.3d 347, 354 (Tex. Ct. App. 2000) ("Complete failure of a trial court to appoint counsel for indigent parents constitutes reversible error . . . [but because the] [l]egislature did not set forth any time frame or procedure by which trial courts must appoint counsel" in TEX. FAM. CODE ANN. § 107.013(a)(l) (Vernon, Westlaw through 2019 3d Called Sess.), it would not be a violation of the statute to appoint counsel *after* the termination proceeding had been initiated.). *But see* ARK. CODE ANN. § 9-27-316(h)(4)(A) (West, Westlaw through 2019 2d Ex. Sess.) (providing some minimum guidelines for an adequate timeframe: "Appointment of counsel shall be made at a time sufficiently in

however, might only provide indigent parents in termination proceedings with counsel under certain conditions, including whether children have already been placed in out-of-home care, or if the state has already recommended that the child be placed in out-of-home care.[314] In addition (1) minors may be required to be represented by counsel,[315] (2) parents may not be entitled to court-appointed representation unless it is requested,[316] and (3) the statutory right to self-representation may be conditioned on the approval of the court.[317] Finally, the scope of representation may not include the dependency hearings that precede the adjudication of parental rights.[318]

Procedural safeguards meant to facilitate a right to counsel are particularly weak for immigrants in removal proceedings, who otherwise might be granted a right to counsel under procedural safeguards aimed at indigent parents.[319] The need for counsel is exacerbated in these circumstances given the diverse ways that courts address the intersection between family law and immigration law.[320] In some cases, immigrant parents might lose custody of their children immediately upon deportation; however, in other contexts, courts may uphold the custody rights of parents who have already been deported, absent a finding of parental unfitness.[321] Since these parental rights may be terminated when a parent

---

advance of the court appearance to allow adequate preparation by appointed counsel and adequate consultation between the appointed counsel and the client").

314. CAL. WEL. & INST. CODE § 317(a)(1) & (b).

315. *See, e.g.*, WIS. STAT. ANN. § 48.23(2) (West, Westlaw through 2019 Act 380) (minor parent must be represented by counsel and may not waive this right), GA. CODE ANN. §15-11-262(i) (West, Westlaw through 2019 Reg. Sess.) (counsel will be appointed "[i]f the parent or parents of the child desire to be represented by counsel").

316. *See, e.g., In re* O.J., 570 S.E.2d 79, 83 (Ga. Ct. App. 2002) ("The mother never requested an attorney, and therefore there was no error in failing to appoint her counsel."). *But see* WIS. STAT. ANN. § 48.23(2) (West, Westlaw through 2019 Act 380) ("In a proceeding involving. . .the involuntary termination of parental rights, any parent 18 years old or older who appears before the court *shall* be represented by counsel; but the parent may waive counsel provided the court is satisfied such waiver is knowingly and voluntarily made.") (emphasis added).

317. *See, e.g.*, CAL. WELF. & INST. CODE §366.26(f)(2) (West, Westlaw through 2019 Reg. Sess.) ("If a parent appears without counsel and is unable to afford counsel the court shall appoint counsel for the parent, unless this representation is knowingly and intelligently waived."); *In re* Angel, 113 Cal. Rptr. 2d 659, 669 (Cal. Ct. App. 2001) ("[T]he right of self-representation in a dependency proceeding is statutory rather than constitutional"' and because "it does not appear reasonably probable that a result more favorable to appellant would have been reached had she represented herself," the trial court's erroneous denial of mother's request to represent herself was harmless.).

318. *See In re* Nash, 419 N.W.2d 1, 4-5 (Mich. Ct. App. 1987) (there is no right to counsel for dependency or neglect proceedings which do not involve the termination of parental rights). *But see* ARK. CODE ANN. § 9-27-316(h)(l) (West, Westlaw through 2019 2d Ex. Sess.) ("In all proceedings to remove custody from a parent . . . the parent [has] . . . the right to be represented by counsel *at all stages* of the proceedings and the right to appointed counsel if indigent.") (emphasis added).

319. S. Adam Gerguson, *Note*, *Not Without My Daughter: Deportation and the Termination of Parental Rights*, 22 GEO. IMMIGR. L.J. 85, 96 (2007).

320. *Id.*

321. *See* Fairfax County Dep't of Family Servs. v. Ibrahim, No. 0821-00-4, 2000 WL 1847638, at 2 (Va. Ct. App. Dec. 19, 2000).

is deported, a removal hearing may function as a de-facto termination hearing.[322] As a result, since counsel is not provided at the government's expense during removal hearings, parents are not provided with the protection that comes from statutes mandating the appointment of counsel for parental termination hearings.[323] In these contexts, detained immigrants often rely on information from ICE official and government officials in place of formal legal advice from a barred attorney.[324]

B. DUE PROCESS STANDARDS FOR CHILDREN IN CUSTODY DISPUTES

The Supreme Court has held that the protections of the Bill of Rights and the Fourteenth Amendment extend to children.[325] The Court has applied this principle matters in cases involving the right to free speech[326] and reproductive rights.[327] However, the Court has not uniformly applied procedural due process protections to children. For example, the Court has granted children the right to notice and summons in matters related to institutional commitment[328] and before expulsion from school[329]. However, a child's right to counsel varies by factual circumstance and across jurisdictions.[330] Though the Supreme Court has held that students are guaranteed the right to an attorney in delinquency proceedings,[331] the Court has not uniformly extended that right in all factual circumstances, including in family matters.[332] Under the Uniform Marriage and Dissolution Act, the right to counsel in custody disputes has been considered within the broader "best interest of the child" standard.[333] Under this framework, however, one court might chose grant a child a traditional attorney in a custody dispute, while others might provide guardians ad litem or non-attorney advocates.

Commentators have posited that a guardian ad litem or other non-attorney advocate could fall short of a child's ability to assert his or herself due process protections, particularly in situations where the court denies a child standing in a custody dispute or refuses to allow a child to testify as a witness.[334] Furthermore, in cases where a child is granted an attorney in custody disputes, there is little

322. *See* CHILDREN'S RIGHTS COUNCIL, *supra* note 231, at 98.

323. *Id.*

324. Katie Shepard, *Government Uses Separated Children as Leverage to Coerce Parents into Signing for Deportation*, IMMIGR. IMPACT (Oct 12. 2010), http://immigrationimpact.com/2018/07/19/children-coerce-parents-signing-deportation/#.XaHxmedKh1N.

325. *In re* Gault, 387 U.S. 1, 1 (1967); *see also* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

326. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (students do not shed their "constitutional rights to freedom of speech or expression at the *schoolhouse* gate.").

327. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

328. Parham v. J.R., 442 U.S. 584, 585–86 (1979).

329. Goss v. Lopez, 419 U.S. 565, 565 (1975).

330. *See generally* Amy Halbrook, *Custody: Kids, Counsel and the Constitution*, 12 DUKE J. CONST. L. & PUB. POL'Y 179 (2017). *See also* Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

331. *In re* Gault, 387 U.S. 1, 1 (1967).

332. Halbrook, *supra* note 332.

333. UNIFORM MARRIAGE & DIVORCE ACT (AM. BAR ASS'N, amended 1973) § 402.

334. Halbrook, *supra* note 332.

guidance for attorneys on whether the child's lawyer is bound by the child's desired outcome, or, alternatively, whether the attorney should be guided by the best interest of the child framework.[335] Though the Court has ruled that children are considered persons under the Bill of Rights and the Fourteenth Amendment,[336] and has moved away from the assumption that the parent or state is best equipped to protect a child's right, it has yet to fully and uniformly extend procedural safeguards—such as the right to an attorney—to children in all circumstances, including custody decisions.

C. VOLUNTARY TERMINATION OF PARENTAL RIGHTS

As a necessary prelude to adoption, parents may voluntarily terminate their parental rights by filing a petition with a court that has jurisdiction to act in termination and adoption cases.[337] The court will weigh both the voluntary nature of the action and the best interests of the child when considering such a petition.[338]

Notification of the termination of parental rights hearing must be provided to all other essential parties, including the other birth parent and any agency with custody or placement responsibilities.[339] Individual state statutes delineate the specific time requirements for providing adequate notice of the proceedings; it is crucial that the notice requirements are strictly followed.[340] Failure to provide adequate notice will usually result in the reversal of a trial court decision by an appellate court.[341]

After the court has found that the notice requirements have been satisfied, it will determine whether the parent entering into a relinquishment or termination agreement is aware of his or her rights in the particular proceeding.[342] The first issue that is addressed is usually legal representation.[343] The requirement for the appointment of counsel in a voluntary relinquishment or termination of parental

335. *Id*.

336. *In re Gault*, 387 U.S. at 1.

337. Some states allow parents to file for termination even before the birth of the child. *See* TEX. FAM. CODE ANN. §161.102.

338. *See, e.g*., MINN. STAT. ANN. § 260C.301(l)(a) (West, Westlaw through 2019 Reg. Sess. & 1st Spec. Sess.) (Parental rights may be terminated voluntarily with the written consent of a parent who, for good cause, desires termination.); *see id*. (Even if both parents are in agreement that parental rights should be terminated, the court must address whether the termination is occurring for good cause.) *Id*. ("Good cause" is not defined in the statute.) *Id*.

339. *See* CECILIA FIERMONTE & JENNIFER L. RENNE, ABA CENTER ON CHILDREN AND THE LAW, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN 28 (2002).

340. *Id*. at 121.

341. *See In re* Veronica G., 68 Cal. Rptr. 3d 465, 472 (Cal. Ct. App. 2007) ("Applying this legal reasoning and following the majority of the cases, the only order which would be subject to reversal for failure to give notice would be an order terminating parental rights.").

342. *See* Schmacher v. Sexton, 455 S.E.2d 348, 350 (Ga. Ct. App. 1995).

343. *See, e.g*., TEX. FAM. CODE ANN. § 161.005 (Vernon, Westlaw through 2019 3d Called Sess.).

rights varies among jurisdictions.[344] Courts will usually allow an adult parent to waive their right to be represented by a lawyer.[345]

Generally, a parent can only withdraw his or her consent to termination of his or her parental rights if fraud was committed prior to an adoption decree.[346] However, if a parent's rights are protected by the Indian Child Welfare Act,[347] then the parent may withdraw his or her consent "for any reason at any time prior to the entry of a final decree of termination or adoption . . . and [have] the child . . . returned to [her or him]."[348] Once the proceedings have been concluded, the termination of parental rights is complete, final, and irrevocable.[349]

The Trump Administration's family separation policy has raised questions regarding immigrant parents' alleged voluntary termination of parental rights. Some advocates have claimed that voluntary termination agreements were signed under duress and with limited information.[350] Recent filings by the Department of Homeland security cited 450 migrant parents who were deported without their children, allegedly 130 of whom voluntarily agreed to leave their children in the United States.[351] Legal service providers allege that immigrants who voluntary sign termination do so under coercion, including threats that failure to sign documents relinquishing custody will lead to adverse consequences, such as prolonged detention. If immigrant parents contest the enforceability of voluntary termination agreements, courts will have to assess whether the agreements are legally valid in the face of hostility and duress from the government.

V. CONCLUSION

The types of family relationships that courts recognize have evolved continuously over time. Historically, LGBT parents faced the threat of not being allowed to petition for custody or visitation rights as de facto or psychological parents, prompting state courts to recognize the custodial and visitation rights of LGBT de facto parents[352] However, some state courts continue to erect barriers to equitable determinations of child custody, including by refusing to extend the marital presumption to non-birth, non-genetic spouses in custody among same sex couples. Protections for transgender parents and caretakers in custody disputes

344. *Compare In re* Adoption of D.M.M., 955 P.2d 618, 620 (Kan. Ct. App. 1997), *with In re* O.J., 570 S.E.2d 79, 83 (Ga. Ct. App. 2002).

345. *See, e.g., In re* S.R., 554 N.W.2d 277, 279 (Iowa Ct. App. 1996); *In re* Justin L., 233 Cal. Rptr. 632, 636 (Cal. Ct. App. 1987).

346. *See, e.g.*, N.M. STAT. ANN. § 32A-5-21(1) (West, Westlaw through 2019 2d Reg. Sess.).

347. 25 U.S.C.A. §§ 1901-1963 (Westlaw through Pub. L. No. 116-108).

348. *Id.*

349. *See, e.g.*, LA. CIV. CODE. art. 1020 (West, Westlaw through 2013 Reg. Sess.).

350. *Protect Children by Ending Family Detention and Separation*. ACLU (2018) https://www.aila.org/infonet/policy-brief-on-family-separation-and-detention.

351. ROBERTS, *supra* note 236.

352. *See* discussion *supra* Part I D.

remain particularly legally underdeveloped under the gender neutral "best interests of the child" standard.[353]

The shifts from civil to criminal prosecution of those suspected of illegal border crossing have further exacerbated barriers to immigrant parents' custody over their children. Though the Trump Administration's family separation policy has officially ended, many children remain separated from their parents: duplicitous efforts to get parents to sign away custody, prolonged detention of parents in federal jail, and re-designation of immigrant children as unaccompanied minors have created both legal and administrative barriers to reuniting immigrant parents with their children.[354] The criminal prosecution of those charged with illegal border crossings compounds existing laws where conviction of a criminal felony can be determinative of a parent's custody rights.[355]

Courts have a responsibility both to protect the fundamental rights of parents to maintain control over the care of their children and to enforce the state's legitimate interest in ensuring the safety and well-being of children. Although some commentators maintain that the implementation of the ASFA undercuts the rights of biological parents, others contend that, through the ASFA, the federal government has acted to ensure that children are efficiently placed in stable, appropriate environments.[356] Continuing changes in family structures will challenge the federal government, as well as state governments, to balance these competing interests in new ways, particularly with regard to LGBT de facto and estoppel parents.

353. *See* discussion *supra* Part I.B-C.
354. *See* discussion *supra* Part. III.A.4.
355. *See* discussion *supra* Part. III.A.4.
356. *See* discussion *supra* Part II.A.