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Kelli Schmidt

Protecting the Sanctity of Family: An Argument for the Equitable Parent Doctrine

KELLI SCHMIDT*

* Juris Doctor Candidate, May 2015, and Research Editor of the *Northern Illinois University Law Review* Volume 35. I would first like to thank my family and friends, especially my mom, dad, and sister, for their endless support as I researched and wrote this Comment. In addition, I am grateful for the guidance of Professor Robert Jones, Professor Jeffrey Parness, and Noah Menold, Notes and Comments Editor, in helping me write a unique piece. Finally, I would like to thank the entire *Northern Illinois University Law Review* Board and Staff for their edits and helping to make this Comment something I am proud of.

I. INTRODUCTION

"America cannot continue to lead the family of nations around the world if we suffer the collapse of the family here at home."[1] When Mitt Romney sought the Republican nomination for the 2008 presidential election, this quote appeared on the home page of his website.[2] Although it is true that the nuclear family, meaning the familial unit comprised of a father, mother, and children, is no longer the norm in today's society, does this mean America's familial values are collapsing?[3] And if they are, what can be done to restore them, as so-called nontraditional families are becoming more traditional than the nuclear family?[4]

Romney is right about one thing: the nuclear family is not standard in America anymore.[5] Between January 2013 and April 24, 2013, there were 2,096,000 marriages in the United States.[6] Per one thousand people, there were 6.8 marriages.[7] Conversely, per one thousand people, there were 3.6 divorces, meaning essentially half of all marriages ended in divorce.[8] Due to the increase in divorces, family structures have undergone a major change. Grandparents are taking on parental roles, legal guardians are being appointed, and children have multiple stepparents. For example, in 2009, the United States Census Bureau reported 9,383,000 grandparents were responsible for the care of, or lived with, their grandchildren.[9] Additionally, in 2010, the United States Census Bureau reported 38,705,000 of all households in America were considered non-family, meaning "a household maintained by a person living alone or with non-relatives only."[10] This was a

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1. Candy Crowley, *Romney Kicks Off White House Bid*, CNN (Feb. 13, 2007, 2:38 PM), http://www.cnn.com/2007/POLITICS/02/13/romney.announce/index.html.

2. *Id.*

3. *Nuclear Family Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/nuclear%20family (last visited Oct. 12, 2013).

4. *See id.*

5. *See* Centers for Disease Control and Prevention, *FastStats: Marriage and Divorce* (Apr. 24, 2013), http://www.cdc.gov/nchs/fastats/marriage-divorce.htm.

6. Centers for Disease Control and Prevention, *FastStats: Marriage and Divorce* (Apr. 24, 2013), http://www.cdc.gov/nchs/fastats/marriage-divorce.htm.

7. *Id.*

8. *Id.*

9. United States Census Bureau, *Grandparents Living with Grandchildren by Race and Sex: 2009* (June 27, 2012), http://www.census.gov/compendia/statab/2012/tables/12s0070.pdf.

10. United States Census Bureau, *Nonfamily Households by Age and Sex of Householder: 2010* (June 27, 2012), http://www.census.gov/compendia/statab/2012/tables/12s0071.pdf; National

drastic increase from 1990, when only 27,257,000 of all households were considered non-family.[11]

Furthermore, not only are familial living arrangements changing, but the structure of the family has also undergone transformation.[12] For instance, the number of births to unmarried mothers has increased.[13] In 1990, 350,000 live births were to unmarried women fifteen to nineteen years old.[14] Yet, in 2008, 377,000 of live births were to unmarried women fifteen to nineteen years old.[15] If Romney's assertion was correct, then it is natural to inquire what can be done to protect children who are being born into non-traditional families to ensure they are receiving the care that is needed. Yet, for all intents and purposes, Romney is incorrect. We are not suffering the collapse of the family in America. The familial structure is undergoing a transformation, proving an ancient Igbo and Yoruba proverb to be correct: "It takes a whole village to raise a child."[16]

In Illinois, custody determinations are made based on the factors in the best interest of child standard.[17] Some of the factors courts consider in determining custody are whom the child's parents want the child to be placed with, the child's preferences as to his guardian, the interaction of the child with his parents, and the willingness of each parent to facilitate a relationship between the other parent and the child.[18] While this is a good standard to maintain, with the changes in the familial structure and an increase in the number of "potential parents," legislatures and courts need to do more in determining the custody placement of a child. Scholars argue that the best interest of the child standard is outdated because "it has been used to justify trends toward joint custody . . . twisting a standard for children to serve

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Telecommunications & Information Administration, *Glossary*, http://www.ntia.doc.gov/legacy/ntiahome/fttn99/glossary.html (last visited Oct. 21, 2014).

11. United States Census Bureau, *Nonfamily Households by Age and Sex of Householder: 2010* (June 27, 2012), http://www.census.gov/compendia/statab/2012/tables/12s0071.pdf.

12. *See* United States Census Bureau, *Births to Unmarried Women by Race, Hispanic Origin, and Age of Mother: 1990 to 2008* (June 27, 2012), http://www.census.gov/compendia/statab/2012/tables/12s0085.pdf.

13. *See id.*

14. United States Census Bureau, *Births to Unmarried Women by Race, Hispanic Origin, and Age of Mother: 1990 to 2008* (June 27, 2012), http://www.census.gov/compendia/statab/2012/tables/12s0085.pdf.

15. *Id.*

16. *African Proverbs, Sayings and Stories*, AFRIPROV.ORG (Nov. 1998), http://www.afriprov.org/index.php/african-proverb-of-the-month/23-1998proverbs/137-november-1998-proverb.html.

17. 750 ILL. COMP. STAT. 5/602 (2012).

18. *Id.*

adults."[19] Therefore, the equitable parent doctrine, also known as paternity by estoppel or de facto parentage, should be adopted to supplement the best interest of the child standard.[20]

Several states, including, but not limited to, Pennsylvania, Michigan, Rhode Island, New York, and Iowa, have adopted the equitable parent doctrine.[21] The statutes adopted by these states have varying impacts due to the fact that equitable parent legislation is codified with different language and intent. Therefore, in an effort to gain the best understanding of how jurisdictions have treated the equitable parent doctrine, this Comment will examine these states' statutes. The Illinois legislature is considering making changes to the Illinois Marriage and Dissolution of Marriage Act that might reflect legislation similar to an equitable parent doctrine, but no official action has been taken yet.[22] Essentially, the equitable parent doctrine examines what action should be taken when a non-biological parent seeks to establish parentage or gain visitation rights to a child.[23] For example, consider a scenario where the child's biological mother is married to a man who presumes he is the father.[24] However, the biological mother actually had an affair, and the biological father is a man that is not her husband.[25] In this case, at the child's birth, the mother, the biological father, and the biological mother's husband could all establish parentage.[26] Similarly, in a case where a gay or lesbian couple uses a surrogate, it could be argued the surrogate should have rights to the child, in order to provide the child with a father and a mother. However, this Comment will focus on the rights of a biological father versus a father who was married to the mother at the time of the child's birth.[27]

In relevant statutes, parental relationships are referred to in the singular. For example, the Illinois legislature has defined parental relationships as "the mother and child relationship and the father and child relationship."[28] So, it appears it was not the legislative intent for children to have more than one legal father or mother.[29] Yet, courts are liberalizing their

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19. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337 (2008).

20. *See id.*

21. 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES, IN THIRD PARTY CUSTODY AND VISITATION § 10.4 (2d ed. 2013).

22. H.B. 6192, 98th Gen. Assemb., 1st Reg. Sess. (Ill. 2013).

23. 2 HARALAMBIE, *supra* note 21.

24. *See, e.g.*, *In re* Parentage of J.W., 990 N.E.2d 698 (Ill. 2013). See *infra* Part IV.A for a full case discussion on *In re Parentage of J.W.*

25. *See, e.g.*, *id.*

26. *Id.*

27. *See infra* Part VI.

28. 750 ILL. COMP. STAT. 45/2 *et seq.* (2012).

29. *See id.*

decisions regarding marriage, and since child rearing is an integral part of marriage, courts should consider how this liberalization will affect the upbringing of children.[30]

This Comment will argue that the Illinois General Assembly should adopt a type of equitable parent doctrine, specifically to help biological fathers who were not married to the mother of their child, when another man was presumed to be the child's father. To begin, this Comment will explore equitable parent legislation in other states and will propose legislation as it might be codified in Illinois.[31] Then, this Comment will apply the new legislation to other Illinois court decisions to determine the results of the cases if the proposed legislation had previously been adopted and whether the equitable parent doctrine produces the best result.[32] This Comment will specifically be exploring the following questions: (1) Does the equitable parent have standing to bring a lawsuit? (2) Is it in the child's best interest to have three parents? (3) When is acting like a parent enough, like in the case of an individual whose intent is not only to love and provide for the child, but also make the child a permanent part of the family? (4) What effect would the equitable parent doctrine have on child support obligations?

Illinois courts have recognized this is an important issue to consider. Recently, the Third District, while contemplating whether to award parental rights to the mother, biological father, and a man who believed he was the biological father, stated:

> The various issues tackled in this trial court . . . will continue to arise until the legislature modifies existing statutory presumptions of paternity. Perhaps, the lawmakers could require a [Voluntary Acknowledgement of Paternity] father to show proof of a genetic connection to the child before an unchallenged VAP creates a conclusive and nonrebuttable statutory presumption for a court to apply in a parentage action.[33]

Therefore, the equitable parent doctrine should be adopted in Illinois.[34]

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30. United States v. Windsor, 133 S. Ct. 2675, 2680 (2013) (overturning the Defense of Marriage Act); Brown v. Buhman, 947 F. Supp. 2d 1170 (D. Utah 2013) (overturning part of Utah's bigamy law prohibiting cohabitation among polygamous couples as unconstitutional).

31. *See infra* Parts III and V.

32. *See infra* Part VI.

33. *In re* Custody of C.C., 1 N.E.3d 1238 (Ill. App. Ct. 3d Dist. 2013) (internal citations omitted). *See* Part VI.D for a full case discussion on *In re Custody of C.C.*

34. *See id.*

II. WHAT IS THE EQUITABLE PARENT DOCTRINE?

The equitable parent doctrine accomplishes one of three things: (1) estops a man who has held himself out as the child's parent from later denying parentage; (2) helps a father who is not the biological father, but who has held himself out as the father, to establish parentage; or (3) helps a father who is the biological father, who did not, or has not, held himself out as the father, to establish parentage.[35] Essentially, this doctrine provides a non-biological parent the opportunity to bring a cause of action to establish parentage or gain custody of a child, or it helps an unknowing biological father establish a parent-child relationship.[36]

The equitable parent doctrine was first examined in *Atkinson v. Atkinson*, where a husband and wife were undergoing a divorce proceeding.[37] During litigation, it was determined the father was not the biological parent of the parties' son.[38] The court determined that an individual who is not the child's biological parent, but who desires to be recognized as such, who is willing to support the child, and who wants the right of visitation or custody, might be considered a parent.[39] In this case, the child was conceived and born during the marriage, and the non-biological father had a strong relationship with the child.[40] Additionally, the non-biological father supported the child, he was active in the child's life, and he wanted the rights typically given to the father in order to be responsible for the child.[41] Furthermore, the biological mother admitted that the child considered her husband to be his father.[42] Due to these factors, the Michigan Court of Appeals first acknowledged the equitable parent doctrine as an option for non-biological parents to establish a legal parent-child relationship.[43]

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35. Alan Stephens, Annotation, *Parental Rights of Man Who is Not Biological or Adoptive Father of Child But was Husband or Cohabitant of Mother When Child was Conceived or Born*, 84 A.L.R.4th 655 (originally published in 1991).
36. Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987).
37. *Id.* at 517.
38. *Id.*
39. *Id.*
40. *Id.* at 520.
41. Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987).
42. *Id.*
43. *Id.*

III. EQUITABLE PARENT LEGISLATION IN OTHER STATES

A. AMERICAN LAW INSTITUTE

No two states have adopted the same version of the equitable parent doctrine.[44] In fact, equitable parent doctrine legislation varies vastly from state to state.[45] The American Law Institute has written model legislation for the states to follow, which has:

> Endorsed the concept of parentage by estoppel for a person who lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as parent is in the child's best interests . . . .[46]

This statute would be difficult to satisfy in a situation where there are two potential fathers because it is impossible for two fathers to accept full and permanent responsibilities as a parent.[47] Arguably, however, it is also impossible for a mother and a father to accept *full* responsibilities as a parent, since the responsibilities would naturally have to be shared between the two.[48] Therefore, two fathers and a mother could all accept *full* responsibilities as parents.[49]

B. PENNSYLVANIA

Pennsylvania, on the other hand, has adopted a more lenient rule, which indicates, "[P]aternity by estoppel continues to pertain . . . but it will apply only where it can be shown, on a developed record, that it is in the best interests of the involved child."[50] This rule is particularly interesting

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44. *See* 2 HARALAMBIE, *supra* note 21.

45. *Id.*

46. *Id.* (internal quotations omitted) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(b) (Am. Law Inst.)).

47. *See id.*

48. *See id.*

49. *See* 2 HARALAMBIE, *supra* note 21.

50. K.E.M. v. P.C.S., 38 A.3d 798, 810 (Pa. 2012). Here, the mother sought to obtain support from the man she presumed was the child's biological father, even though she was married to another man at the time of the child's birth. *Id.* at 799. The biological father tried to rely on the marital presumption to prove he was not the biological father, but the court determined the mother could seek support from the biological father in spite of the marital presumption. *Id.* at 799, 811.

because the only requirement is having an equitable parent be in the best interest of the child, which is unlike the American Law Institute model statute that is filled with ambiguous requirements.[51] However, it could be argued that Pennsylvania's statute is too lenient, since it could effectively be granting parentage to three separate parents, based solely on the best interests of the child, and without considering the potential parent's involvement in the child's life.[52] Conversely, portions of the Pennsylvania rule are too strict.[53] For example, Pennsylvania does not allow a DNA test when a father has previously acknowledged he is the child's biological parent.[54] Rather, a DNA test is permitted only when paternity by estoppel does not apply, in order to advance the best interests of the child and promote the familial unit.[55] Disallowing DNA tests is an attempt by Pennsylvania courts to not disrupt families that have been established for several years.[56] However, the rule is too strict in certain situations, such as where the child needs to know who his biological father is for medical history purposes.[57]

C. MICHIGAN

Michigan established the equitable parent doctrine in *Atkinson*.[58] However, Michigan refused to extend the doctrine to an unmarried man, but does extend it to a man whose girlfriend gives birth to a child during their relationship.[59] Michigan's rule will not produce the best result in instances when two men are potentially the father of a child whose mother is married.[60]

D. RHODE ISLAND

The Rhode Island statute created a rebuttable presumption that a man is the father of a child is created when one of six requirements are met: (1) the child was born to a man and woman who are married or the marriage

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51. *See id.*
52. *See id.*
53. *See generally* Freedman v. McCandless, 654 A.2d 529 (Pa. 1995).
54. *Freedman*, 654 A.2d at 529.
55. *Id.*
56. *See id.*
57. *See id.*
58. Atkinson v. Atkinson, 408 N.W.2d 516, 520 (Mich. Ct. App. 1987).
59. Van v. Zahorik, 597 N.W.2d 15, 26 (Mich. 1999). The court chose to not extend the theory to unmarried individuals for several reasons: the court felt the legislature was better able to handle this problem, the Child Custody Act did not recognize the equitable parent doctrine outside marriage, and the court wanted to reinforce the institution and legitimacy of marriage. *Id.* at 20-22.
60. *See id.*

has been terminated within 300 days; (2) the man and woman attempted to marry prior to the child's birth; (3) after the child's birth, the man and woman attempted to marry; (4) the man acknowledges he is the father in a writing filed with the family law court clerk; (5) a blood test proved he is the father; or (6) both the mother and father sign a voluntary acknowledgment of paternity.[61] Rhode Island courts established that a "de facto parent-child relationship is . . . based on a finding of a 'parent-like relationship with the child that could be substantial enough to warrant legal recognition of certain parental rights and responsibilities' respecting the child."[62] This state's statute is interesting because it sets forth a requirement to establish parentage under the equitable parent doctrine, but it does not make it impossible for several parents to establish their rights.[63] One potential issue with this statute is that it gives deference to the court to decide who the parent is, since the relationship need only be substantial enough to warrant legal recognition.[64] Substantial is defined as "consisting of or relating to substance," which leaves a lot of room for judicial interpretation.[65] Arguably, this rule is less effective than Pennsylvania's, which established that the best interests of child standard still applies.[66]

E. NEW YORK

New York's rule presents a unique issue. In New York, "both civil union and adoption require the biological or adoptive parent's legal consent, as opposed to the indeterminate implied consent featured in the various tests proposed to establish de facto or functional parentage."[67] As a result, if a man is unsure whether he is the child's father, he can choose to commence a relationship with the child, or he can request a DNA test prior to acknowledging paternity.[68] So, an interesting problem is presented when the biological mother had an affair on her husband, and the man she had an affair with is the biological father.[69] According to New York law, the biological father would hold the power to grant the biological mother's hus-

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61. R.I. GEN. LAWS ANN. § 15-8-3 (West 2013).

62. Resendes v. Brown, 966 A.2d 1249, 1254 (R.I. 2009), *referring to* Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000).

63. *See id.*; R.I. GEN. LAWS ANN. § 15-8-3 (West 2013).

64. *See Brown*, 966 A.2d at 1254, *referring to Rubano*, 759 A.2d 959.

65. *Substantial Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/substantial (last visited Oct. 12, 2013).

66. *See id.*

67. Debra H. v. Janice R., 930 N.E.2d 184, 196 (N.Y. 2010).

68. N.Y. FAM. CT. ACT § 418 (McKinney 2014).

69. *See id.*

band de facto parentage.[70] However, if there is tension between the biological father and mother, or if the biological father did not know the biological mother was married, then the child could be used by the biological father as a pawn because he might withhold granting de facto parentage in order to retaliate against the biological mother.[71] Therefore, this statute is not written most effectively.

F. IOWA

Iowa has an especially intriguing equitable parent doctrine. Iowa rejects equitable parentage in cases when a man lived with the mother and the child, but never married the mother.[72] However, Iowa applies the doctrine where the man is married to the mother at the time of the child's birth, but learns, at dissolution of marriage, that he was not the genetic father.[73] On its face, this doctrine seems like it could be challenged under the Equal Protection Clause of the Fourteenth Amendment.[74] Iowa appears to grant more rights to a married father who learned of his lack of parentage at divorce, as opposed to an unmarried father who actually lived with the mother and child.[75]

G. SUPREME COURT OF KENTUCKY

Unlike Iowa, the Supreme Court of Kentucky has considered certain factors that might be examined in order to find an individual is a de facto parent. The factors the court considered in its decision include: (1) misrepresentation or concealment of material facts; (2) estopped party is aware of the material facts; (3) the other party does not know about these material facts; (4) the estopped party acts expecting that his conduct will be acted upon; and (5) the other party changed positions to its detriment based on

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70. *See generally* N.Y. FAM. CT. ACT § 418 (McKinney 2014); *Debra H.*, 930 N.E.2d 184.

71. *See generally* N.Y. Fam. Ct. Act § 418 (McKinney 2014); *Debra H.*, 930 N.E.2d 184.

72. Petition of Ash, 507 N.W.2d 400 (Iowa 1993). Here, the putative father held himself out as the child's father by bathing and feeding the child, and providing emotional, financial, and psychological support. *Id.* at 401. Additionally, the putative father continuously supported the child by paying for preschool, toys, and dance lessons. *Id.* at 402. However, the court refused to find the putative father was an equitable parent because he had no legal basis to establish parentage since he was not the biological father, adoptive father, foster parent, etc. *Id.* at 404.

73. *Id.* at 403-04.

74. *See id.* The doctrine might be challenged under the Equal Protection Clause of the Fourteenth Amendment because it creates a disparate impact between married fathers and unmarried fathers. *See* U.S. Const. amend. XIV.

75. *Petition of Ash*, 507 N.W.2d 400.

this conduct.[76] In addition to providing for a child alongside the natural parent, the de facto parent must stand in the place of the natural parent.[77] These factors set forth a bright line standard in order to help parties determine exactly what constitutes de facto parenting and what will not qualify.[78] However, one of the factors potentially raises a variety of issues: the estopped party must act with the expectation her conduct will be relied upon.[79] For example, consider a situation where the biological mother has a one time affair with another man, she does not expect a child to be conceived, and she continues a sexual relationship with her husband. A child is actually conceived during the affair, but she presumes the biological father is her husband. By presuming this, the biological mother does not act in a malicious way, nor does she expect the biological father or her husband to rely to their detriment on her actions. This is problematic because the two potential fathers could argue the mother acted with the expectation her conduct would be relied upon. Yet, it would be difficult for her to prove what assumption she proceeded under in choosing her course of conduct. Additionally, the *Hinshaw* court's holding effectively eliminates the possibility that two separate men could have parental rights to the same child by saying a de facto parent cannot provide for a child alongside the natural parent, but must stand in the actual parent's shoes because it is impossible for two people to stand in the actual parent's shoes.[80] However, a response to this argument might be similar to the response to criticisms of the American Law Institute's model legislation: if two parents can ordinarily be actual parents, then three parents can be actual parents. Therefore, while this holding sets forth good factors to follow, Kentucky's rule is not free from potential problems.

H. WEST VIRGINIA

The doctrine regarding de facto guardians has also been examined in the context of adoption.[81] West Virginia, for example, declined to take the view that an express or implied contract to adopt was absolutely necessary to establish that an equitable adoption had taken place where a person has

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76. Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007) (citing J. Branham Erecting & Steel Serv. Co. v. Ky. Unemployment Ins. Comm'n, 880 S.W.2d 896, 898 (Ky. Ct. App. 1994)). In *Hinshaw*, the court determined equitable estoppel is applicable to custody cases. *Hinshaw*, 237 S.W.3d at 174-75. The court looked at the factors that Kentucky courts typically consider when determining equitable estoppel cases. *Id.* at 173.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See* Wheeling Dollar Sav. & Trust v. Singer, 250 S.E.2d 369 (W. Va. 1978).

"stood from an age of tender years in a position *exactly* equivalent to a formally adopted child."[82] In essence, West Virginia has established that no formal process needs to be followed in a situation where a child has not been officially adopted, but has been held out as an adopted child for many years.[83] The West Virginia court's line of reasoning can be extended to the question regarding two potential fathers, because the sole requirement is that the child is held out as a formally adopted child. Similarly, perhaps the standard to establish a man is a de facto parent could be a man who has held himself out as the child's father since the child's tender years.[84]

I. CALIFORNIA

In California, there must be a direct expression of intent to adopt the claimant in order to prove an equitable adoption.[85] This might also be a good standard to consider when determining de facto parentage in Illinois.[86] For example, basic fairness indicates that a father who has expressed a direct intent to act as the father, even though he is not the presumed father, should be granted rights of some kind so long as there is testimony he is fit to be a parent.[87]

It is important to note that all courts place great emphasis on the Fourteenth Amendment in making determinations regarding the equitable parent doctrine.[88] "[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[89]

IV. INDICATION OF HOW ILLINOIS COURTS MIGHT TREAT EQUITABLE PARENTS

A. *DEHART V. DEHART*

Whether a child can have a legal mother and two legal fathers is a case of first impression in Illinois.[90] As a result, Illinois has not adopted the equi-

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82. *Id.*
83. *See id.*
84. *See id.*
85. *In re* Estate of Ford v. Ford, 82 P.3d 747, 749 (Cal. 2004).
86. *See id.*
87. *See id.*
88. U.S. Const. amend. XIV, § 1; *see, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000).
89. *Troxel*, 530 U.S. at 65-66 (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). The Supreme Court refused to force a mother who was unwilling to give the paternal grandparents as much visitation as they were asking. *Id.* at 102.
90. *In re* Custody of C.C., 1 N.E.3d 1238, 1254 (Ill. App. Ct. 3rd Dist. 2013).

table parent doctrine.[91] However, there are court opinions that indicate how Illinois might treat equitable parents.[92] First of all, there have been scenarios in Illinois where a biological parent's rights have been terminated, and two non-biological parents adopted the child.[93] In these situations, the court has held a child can have two mothers or fathers based on the termination of parental rights and subsequent adoption.[94] Second, consider a recent Illinois Supreme Court decision, *DeHart v. DeHart*.[95] In this case, a stepfather did everything he could to adopt his stepson, including telling the community he was the biological father and forging a birth certificate so the stepson would not know he was not the biological son.[96] However, the stepfather never executed a statutory adoption contract.[97] Ultimately, the stepson learned the stepfather was not his biological parent, but the stepfather continued to hold the stepson out as his son by listing him as his son in his funeral arrangements, paying for a trip for the stepson's family, and executing a will leaving bequests to the stepson.[98] Once the stepfather died, the stepson sought to claim his inheritance, but learned his stepfather wrote him out of the will at a time when he lacked testamentary capacity.[99] The stepson then tried to establish he should still have rights to what was in the original will because his stepfather held him out as his son.[100]

The *DeHart* court indicated in certain situations where a contract to adopt does not exist, circumstantial evidence can support the equitable adoption.[101] Therefore, in cases where it can be proven by clear and convincing evidence that a parent consistently and publicly treated the child as his own blood relative, and so long as the child believed he was the parent's biological child, the child should not be denied his inheritance because his parents failed to comply with statutory provisions.[102] Therefore, the court effectively adopted a version of equitable adoption.[103]

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91. 17 ILL. PRAC., ESTATE PLANNING & ADMIN. § 32:6 (4th ed.).

92. *See, e.g.*, DeHart v. DeHart, 986 N.E.2d 85 (Ill. 2013).

93. *See In re* Petition of K.M., 653 N.E.2d 888, 899 (Ill. App. Ct. 1st Dist. 1995) (holding unmarried same-sex cohabitants have standing to petition to adopt a child); Connor v. Velinda C., 826 N.E.2d 1265, 1273 (Ill. App. Ct. 5th Dist. 2005) (holding adoptive mothers of a previous same-sex marriage can seek to establish custody with their child).

94. *See Petition of K.M.*, 653 N.E.2d at 899; *Connor*, 826 N.E.2d at 1273.

95. *DeHart*, 986 N.E.2d at 85.

96. *Id.* at 90.

97. *Id.*

98. *Id.*

99. *Id.* at 91.

100. DeHart v. DeHart, 986 N.E.2d 85, 91 (Ill. 2013).

101. *Id.* at 103.

102. *Id.* at 103-04.

103. *Id.*

After the *DeHart* case, there is good reason to believe Illinois could be moving toward adopting the equitable parent doctrine.[104] However, the *DeHart* ruling seems strict, especially in situations where the biological fathers did not know, nor did they have reason to know they were the child's father.[105] In that case, courts should examine whether it is in the child's best interest to deny him a relationship with a loving individual who wants to be part of the child's life.

B. *KOELLE V. ZWIREN*

Consider *Koelle v. Zwiren*, where the mother of a child lied to a man she had a brief sexual relationship with and told him he was the biological father of her daughter, even though she was certain he was not.[106] For eight years, the purported father became very involved in the child's life.[107] He babysat, assisted in her extracurricular activities, took her to various outings, and accompanied the child and biological mother on a family vacation.[108] However, he ultimately conducted a paternity test, which determined he was not the father of the child.[109] In its opinion, the court said awarding visitation to a nonparent over a parent's objections is permissible if it is in the best interest of the child.[110] Therefore, the court held that visitation is possible for an unwed, non-biological father who parented for eight years while the biological mother misrepresented his genetic ties.[111] Therefore, Illinois courts have recognized visitation rights for nonparents, which indicates Illinois might recognize a type of equitable parent.[112]

C. *IN RE MARRIAGE OF ROBERTS*

Another case that indicates how Illinois courts might treat equitable parents is *In re Marriage of Roberts*.[113] In that case, a husband filed for divorce against his wife, and during the proceedings, he learned he was not the biological father of the child born during their marriage.[114] The court determined "that the superior right of natural parents is not absolute" in determining parentage, and therefore, custody to a non-biological father

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104. *See id.*
105. DeHart v. DeHart, 986 N.E.2d 85, 103 (Ill. 2013).
106. Koelle v. Zwiren, 672 N.E.2d 868, 870 (Ill. App. Ct. 1st Dist. 1996).
107. *Id.* at 871.
108. *Id.*
109. *Id.*
110. *Id.* at 872.
111. Koelle v. Zwiren, 672 N.E.2d 868, 873 (Ill. App. Ct. 1st Dist. 1996).
112. *See id.*
113. *In re* Marriage of Roberts, 649 N.E.2d 1344, 1345 (Ill. App. Ct. 4th Dist. 1995).
114. *Id.*

was possible where the child was born to his wife during their marriage.[115] As a result, the court essentially granted the father de facto parenting rights.[116]

V. POTENTIAL LEGISLATION

Some courts have treated single parents poorly. Consider *In the Interest of Ice*.[117] In this case, a single father, who knew about the minor child, neglected to be part of the child's life for three years.[118] The court found the father to be an unfit parent and held that because the father failed to provide any kind of support to the child, he had "bastardized" the child.[119] In its holding, the court said "[this] conduct consisted not only of a denial of paternity and lack of support, but an inexcusable lack of interest, concern, and responsibility for his son's welfare."[120] In a case where a parent purposefully neglects their child for several years, perhaps this is a reasonable response from the court.[121] However, this is not a fair standard in a case where the biological father was not aware he has a child.[122] Therefore, the court should consider the equitable parent doctrine when making custody determinations regarding a biological father who was unaware he was the father.[123]

Although Illinois has not adopted any equitable parent legislation, this Comment will suggest legislation as it might be adopted in Illinois. The trial court should be given broad discretion in making a determination. In other words, the appellate court should review the trial court's decision only for an abuse of discretion. Additionally, the trial court should examine the totality of the circumstances in making its decision, because the court would essentially be granting a stranger legal visitation rights. Therefore, in addition to the best interests of the child standard, the equitable parent's criminal background, work history, and financial status should be scrutinized by the court in order to determine whether the person should be granted rights to the child.

Kentucky's equitable parent doctrine is most likely to produce a just result, since it considers a variety of factors which set forth a bright-line

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115. *Id.* at 1350-51.
116. *See id.*
117. In the Interest of Ice, 342 N.E.2d 460 (Ill. App. Ct. 3d Dist. 1976).
118. *Id.* at 463.
119. *Id.* at 462.
120. *Id.*
121. *See id.*
122. *See* In the Interest of Ice, 342 N.E.2d 460, 462 (Ill. App. Ct. 3d Dist. 1976).
123. *See id.*

standard.[124] Therefore, Illinois should use Kentucky's equitable parent doctrine as a model.[125] Primarily, the legislation should discriminate between individuals who have standing to seek to establish parentage and those who do not.[126] Those who have standing to seek to establish parentage include men who, for the first two years of the child's life, resided in a household with the child and openly held the child out as his own during that time.[127] On the other hand, a biological father, who has not held himself out to be the child's father, would have standing to seek to establish parentage if five different factors are met.[128] First, the biological mother's conduct, including acts, language, or silence, must amount to a misrepresentation or concealment of material facts.[129] Second, the mother must be aware of these facts.[130] Third, the biological father must be unaware of these facts.[131] Fourth, the mother must act with the intention or expectation that her representation or concealment of material facts will be acted upon.[132] Fifth, the biological father must rely on the biological mother's conduct to his detriment.[133]

In addition, the legislation should establish a limitation on the amount of time a person has to bring a cause of action to establish parentage.[134] In the first scenario, where a man is aware he is the father and has held himself out as the child's father for the first two years of the child's life, the statute of limitations to bring the cause of action to establish parentage should be one year after he moves out of the home where the child lives.[135] The justification for a shorter timeframe is to avoid allowing fathers to statutorily enter the child's life whenever he pleases or deems convenient for him.[136] However, for a father who does not know he is the child's biological parent, the statute of limitations should be more ambiguous.[137] Once the father knew or reasonably should have known he was the child's father, he has one year to bring a cause of action to determine whether he is fit to establish parentage.[138] The policy consideration surrounding a more ambiguous

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124. Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
125. *See id.*
126. *See id.*
127. *See id.*
128. *See id.*
129. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.*
134. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
135. *See id.*
136. *See id.*
137. *See id.*
138. *See id.*

statute is that the father did not try to establish parentage at an earlier time because he did not know he was the child's father due to the biological mother's misrepresentations.[139] However, he should still have only one year after he knows or reasonably should have known he is the child's father because at that point, he is in an equal position as a father who did know he was or was not the biological parent since he held himself out as one.[140] A father is deemed to reasonably have known he was the child's father based on the objective reasonable person standard.[141] An example of this is seeing a picture of a child whom looks similar to him on a woman's social media website, who the potential father previously had a sexual relationship with.[142]

However, it should be duly noted that this is not an attempt to grant biological fathers the absolute right to parent.[143] Under no circumstances is the statute to be construed as giving fathers the ability to ignore the child until he is older and more fun.[144] In other words, the father should not rely on the biological mother to rear the child until the child is more self-sufficient.[145] In *J.S.A. v. M.H.*, the court held "the right of a biological father to establish paternity to a child born to a marriage does not also mean that the legal rights flowing from the parent and child relationship are automatically conferred."[146] Therefore, the father must show an honest intent to want to be part of the child's life.[147] But, the fact that a man is a child's biological father does not mean he has automatic rights to parenthood.[148]

VI. APPLYING THE LEGISLATION IN ILLINOIS

A. *IN RE PARENTAGE OF J.W.*

First, consider the recent case of *In re Parentage of J.W.*[149] Here, a woman named Amy was dating a man named Jason.[150] During the course of their relationship, Amy had a one-time affair with Steve.[151] Amy subse-

139. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
140. *See id.*
141. *See id.*
142. *See id.*
143. *See id.*
144. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
145. *See id.*
146. J.S.A. v. M.H., 863 N.E.2d 236, 253 (Ill. 2007) (citing *In re* Parentage of John M., 817 N.E.2d 500, 506-07 (Ill. 2004)).
147. *See J.S.A.*, 836 N.E.2d at 253.
148. *See id.*
149. *In re* Parentage of J.W., 990 N.E.2d 698 (Ill. 2013).
150. *Id.* at 700.
151. *Id.*

quently became pregnant, and she assumed Jason was the father of the baby.[152] Jason and Amy married, and they lived happily as a couple, with Jason holding himself out as the father of the baby, J.W.[153] Amy and Jason ultimately divorced, and at the dissolution of the marriage, Jason was listed as the father of J.W., had visitation rights, and child support obligations.[154] Seven years later, Steve saw a picture of J.W. on Amy's social media website.[155] He noticed a striking resemblance between his baby pictures and J.W., which is when he realized J.W. might be his daughter.[156] Jason requested a DNA test, and it was conclusively confirmed that Steve was J.W.'s father.[157] Steve then filed a petition to establish paternity in an attempt to obtain visitation rights with J.W.[158] In response to Steve's petition, Jason sought a hearing on whether it was in J.W.'s best interest to have visitation with Steve.[159]

In relying upon the opinion of a psychiatrist, who never observed J.W. interact with Steve, and the guardian ad litem's (GAL) recommendation, the court determined it was not in J.W.'s best interest to have visitation with him because of the potential adverse effect it could have on J.W.'s cognitive development.[160] However, at trial, a different clinical psychologist testified it was in J.W.'s best interest to continue to build a relationship with Steve, especially since he was able to show her love and affection.[161] Additionally, even though Steve was not allowed to visit J.W., due to a court imposed no-contact order while the action was being litigated, Steve had continued to provide financial support to J.W., and the clinical psychologist believed a permanent and stable relationship, like the one Steve was trying to build, would be good for J.W.'s cognitive development.[162] In the footnotes, the court said:

> At the outset, we note that Jason has never challenged Steve's standing to establish the existence of a parent-child relationship, and no attempt has been made or order entered disavowing Jason's parental rights either under the Parentage Act or under the judgment of dissolution. Accordingly . . . we make no determination with regard to either party's

152. *Id.*
153. *Id.*
154. *In re* Parentage of J.W., 990 N.E.2d 698, 700 (Ill. 2013).
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *In re* Parentage of J.W., 990 N.E.2d 698, 706 (Ill. 2013).
160. *Id.* at 711.
161. *Id.* at 701.
162. *In re Parentage of J.W.*, 990 N.E.2d at 706.

> standing, or as to Jason's continued legal status as a parent.[163]

Essentially, Steve was penalized for not knowing he could potentially be J.W.'s father, and he was stripped of an opportunity to develop a lasting relationship with his daughter.[164]

Under this Comment's proposed legislation, a different result might be warranted.[165] First, it is important to consider whether Steve even had standing to bring the lawsuit.[166] Under the new legislation, recall the five separate factors that must be satisfied in order for Steve to have standing to bring the cause of action.[167] Pursuant to the legislation, Steve would have standing to bring a suit to establish parentage.[168] First, Amy concealed material facts by not notifying Steve that he could potentially be J.W.'s father.[169] Second, Amy was aware of these facts because she knew she had a sexual relationship with two men within a short period of time, and even though she knew this, she did not conduct a DNA test to determine who the child's biological father was.[170] Instead, she chose to guess.[171] Third, Steve was unaware of these facts because he probably did not know that the sexual encounter resulted in a pregnancy, since the facts of the case indicate Amy and Steve had a one-time sexual relationship.[172] Fourth, Amy expected the concealment of material facts would be relied upon, because if Steve did not know about J.W., he never would have brought a paternity action, and Amy would have avoided disruption of her relationship with Jason.[173] Lastly, Steve relied upon this concealment, which resulted in a detrimental change in his position.[174]

The second thing to consider is whether allowing Steve to have visitation with J.W. is in the child's best interest.[175] It is always important to consider the best interest of the child standard.[176] The best interest of the child standard is the mechanism under which parentage is currently deter-

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163. *Id.*
164. *See id.* at 711.
165. *See id.*
166. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
167. *See id.*
168. *See id.*
169. *See id.*; *In re Parentage of J.W.*, 990 N.E.2d at 706.
170. *See Hinshaw*, 237 S.W.3d at 173; *In re Parentage of J.W.*, 990 N.E.2d at 706.
171. *See In re Parentage of J.W.*, 990 N.E.2d at 700.
172. *See Hinshaw*, 237 S.W.3d at 173; *In re Parentage of J.W.*, 990 N.E.2d at 700.
173. *See Hinshaw*, 237 S.W.3d at 173; *In re Parentage of J.W.*, 990 N.E.2d at 700-01.
174. *See Hinshaw*, 237 S.W.3d at 173; *In re Parentage of J.W.*, 990 N.E.2d at 706.
175. *See Hinshaw*, 237 S.W.3d at 173.
176. 750 ILL. COMP. STAT. 5/602 (2012).

mined.[177] Some of the factors that are considered include who the parents wish to have custody of the child, who the child wants his primary parent to be, the interaction of the child with his parents, the mental and physical status of "all individuals involved," and whether the parents are willing to facilitate a healthy relationship with other parents.[178] It is clear from these provisions that the statute is not limited to consider only two parents.[179] In fact, these factors insinuate that they could apply to more than two parents when they indicate the mental and physical health of "all those involved" should be considered, and "the interaction and interrelationship of the child with his parent or . . . any other person who may significantly affect the child's best interest."[180] Therefore, the best interest of the child standard can apply to a situation where there are more than two parents.[181] Courts have even applied the best interest of the child standard in situations where grandparents seek custody.[182]

In addition to the best interest of the child standard, the court should examine whether the biological father expresses interest, concern, and responsibility for the child's welfare.[183] In considering these three factors, the court should apply a high standard because the court would be permitting a man who has been absent from the child's life, potentially for several years, to bring a cause of action to have legal visitation with the child.[184] Some potential questions the court might ask include: Does he have a job? Can he support the child? What is his reputation in the community? Does he have an education? and/or Should he have considered the possibility of the child's existence prior to when he actually did?[185]

Based upon these considerations, in *In re Parentage of J.W.*, the court could have found it was in the child's best interest to have visitation with Steve.[186] It is not fair to unwed biological fathers to deny them parental rights, just because they were not the presumed father.[187] Further, the court should consider the potential harm to the child that could result from denying visitation from the biological father who has demonstrated interest,

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177. *Id.*
178. *Id.*
179. *See id.*
180. *Id.*
181. *See* 750 ILL. COMP. STAT. 5/602 (2012).
182. Lyons v. Lyons, 591 N.E.2d 1006, 1008 (Ill. App. Ct. 5th Dist. 1992).
183. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
184. *See id.*
185. *See id.*
186. *See id.* at 173. *But see In re* Parentage of J.W., 990 N.E.2d 698, 710-11 (Ill. 2013).
187. *See Hinshaw*, 237 S.W.3d at 173. *But see In re Parentage of J.W.*, 990 N.E.2d at 710-11.

concern, and responsibility.[188] A child can be protected from a father who is not serious about establishing parentage because the best interest of the child standard applies, and the court has to apply a high standard in determining whether the biological father truly has the best interests of the child at heart.[189] Lastly, the court should rely on the testimony of a clinical psychologist, similar to *In re Parentage of J.W.*[190] In the *In re Parentage of J.W.* case, the clinical psychologist testified that Steve did not present risk factors that would be dangerous to J.W.'s development, but rather, the transition could easily be achieved with counseling.[191] Therefore, under this Comment's proposed legislation, Steve should be granted visitation rights with J.W.[192]

This Comment does not ignore the criticisms to the argument that three people could act as parents. Traditionally, courts have frowned upon the idea that three individuals could act as parents.[193] For example, the Supreme Court, in applying California law, stated, "California law, like nature itself, makes no provision for dual fatherhood."[194] However, especially with the recent overturn of the Defense of Marriage Act, courts have been liberalizing their views on what a traditional family is.[195] Perhaps courts might consider establishing two categories of parents: residential parent(s) and parent(s) with visitation. These categories are quite similar to what is already established, and they can be likened to a situation where stepparents are married, and the children have visitation with their biological parents.[196]

Another criticism of this viewpoint is that having three parents with rights causes an issue regarding visitation where two of the parents do not have joint custody. If there is one residential parent and two parents with visitation, it is possible that visitation will be unfair.[197] For example, if children only spend time with the parents that have weekend visitation, it is possible the children would not live at the same house for any consecutive weekend.[198] Therefore, situations such as these will require strict restrictions imposed by the court. However, this issue is beyond the scope of this Comment.

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188. *See Hinshaw*, 237 S.W.3d at 173; *In re Parentage of J.W.*, 990 N.E.2d at 702.
189. *See* 750 ILL. COMP. STAT. 5/602 (2012); *Hinshaw*, 237 S.W.3d at 173.
190. *In re Parentage of J.W.*, 990 N.E.2d at 702.
191. *Id.*
192. *See Hinshaw*, 237 S.W.3d at 173; *In re Parentage of J.W.*, 990 N.E.2d at 702.
193. *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989).
194. *Id.* at 118.
195. United States v. Windsor, 133 S. Ct. 2675 (2013); Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996).
196. 750 ILL. COMP. STAT. 5/607 (2012).
197. *See id.*
198. *See id.*

B. *J.S.A. V. M.H.*

This case poses a different sort of problem because the marital presumption of paternity comes into play.[199] J.S.A. and M.H. were married to separate individuals.[200] While they were both separately married, they engaged in an extramarital sexual affair with each other.[201] M.H. became pregnant and gave birth to T.H.[202] On the child's birth certificate, W.H. was listed as the biological father because he was married to M.H. when T.H. was born.[203] Ultimately, it was discovered, via a DNA test, that J.S.A. was the biological father of T.H.; but W.H. continued to raise the child as his own son.[204] J.S.A. subsequently filed a petition to determine the existence of a father-child relationship with T.H.[205] After J.S.A. filed his petition, M.H. and W.H. filed a petition to adopt T.H.[206] The court held as a matter of law that J.S.A. had standing to bring the cause of action because he did so prior to the adoption petition being filed.[207] However, there was a presumption that W.H. was the father because he was married to the mother when T.H. was born.[208] Yet, the marital presumption of fatherhood is rebuttable.[209] Therefore, by establishing he was the father through a DNA test, J.S.A. overcame the marital presumption of fatherhood.[210] As a result, a man who wants to establish parentage is charged with the burden of overcoming any existing presumptions.[211]

The proposed legislation would have a different effect on *J.S.A. v. M.H.*[212] In this case, J.S.A. continued to have an affair with M.H. for three years after the child was born.[213] Only after the affair ended did J.S.A. attempt to establish parentage.[214] The proposed equitable parentage legislation should not be used as a tool to anger the other biological parent or as

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199. J.S.A. v. M.H., 893 N.E.2d 682, 689 (Ill. App. Ct. 3d Dist. 2008).
200. *Id.* at 685.
201. *Id.*
202. *Id.*
203. *Id.*
204. J.S.A. v. M.H., 893 N.E.2d 682, 685 (Ill. App. Ct. 3d Dist. 2008).
205. *Id.*
206. *Id.*
207. *Id.* at 687.
208. *Id.* at 689.
209. *In re* Paternity of an Unknown Minor, 951 N.E.2d 1220, 1223 (Ill. App. Ct. 1st Dist. 2011).
210. *J.S.A.*, 893 N.E.2d at 689.
211. *See id.*
212. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007); *J.S.A.*, 893 N.E.2d at 682.
213. *J.S.A.*, 893 N.E.2d at 685.
214. *Id.* at 685-86.

leverage to get revenge.[215] Because the court held J.S.A. had standing to bring the suit since he filed prior to the adoption petition being filed, this Comment will also assume J.S.A. had standing under the proposed legislation.[216] However, under the proposed legislation, J.S.A. would not be able to bring this cause of action because M.H. did not conceal material facts.[217] J.S.A. was fully aware about W.H.'s existence, so he must have known it was possible that he was the father.[218] He should not be able to establish parentage after his relationship with M.H. ended, which was three years into the child's life.[219]

C. *IN RE PARENTAGE OF G.E.M.*

G.E.M. was born to Renee, a woman who acknowledged relationships with three men at the time of the child's conception and birth.[220] Two of the men were at the hospital when the child was born, and Richard acknowledged he was the father of G.E.M.[221] However, it was ultimately established that Richard was not the child's father.[222] When G.E.M. was six years old, Renee filed a petition to determine the existence of the father-child relationship with Louis, one of the other men whom with she had a sexual relationship.[223] Renee also sought to extinguish Richard's status as G.E.M.'s father.[224] However, Louis did not want to be part of G.E.M.'s life, and he did not want to establish paternity.[225] The court held voluntary acknowledgment of paternity must be rescinded within the statutory timeframe of sixty days.[226] If the voluntary acknowledgment is not rescinded within sixty days, then it is permanent.[227] Additionally, parties cannot vacate this voluntary acknowledgment by agreeing to disregard it.[228]

This case raises a particularly interesting issue because the biological father did not want to be part of the child's life.[229] So, *In re Parentage of*

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215. *See Hinshaw*, 237 S.W.3d at 173; *J.S.A.*, 893 N.E.2d at 685-86.
216. *See Hinshaw*, 237 S.W.3d at 173; *J.S.A.*, 893 N.E.2d at 687.
217. *See Hinshaw*, 237 S.W.3d at 173; *J.S.A.*, 893 N.E.2d at 685-86.
218. *See Hinshaw*, 237 S.W.3d at 173; *J.S.A.*, 893 N.E.2d at 685-86.
219. *See Hinshaw*, 237 S.W.3d at 173; *J.S.A.*, 893 N.E.2d at 685-86.
220. *In re* Parentage of G.E.M., 890 N.E.2d 944, 949 (Ill. App. Ct. 3d. Dist. 2008).
221. *Id.* at 949-50.
222. *Id.* at 950.
223. *Id.* at 952.
224. *Id.* at 950-51.
225. *In re* Parentage of G.E.M., 890 N.E.2d 944, 949-51 (Ill. App. Ct. 3d. Dist. 2008).
226. *Id.* at 955.
227. *Id.*
228. *Id.*
229. *Id.* at 949-51.

G.E.M. raises the question of whether the equitable parent doctrine can estop a man from denying parentage.[230]

As it stands now, the law indicates if voluntary acknowledgment is not rescinded within sixty days, then it is permanent and can never be revoked.[231] The policy consideration behind this is to ensure fathers are certain, when they acknowledge paternity, that they are the parent.[232] In other words, the court is trying to avoid a father acknowledging paternity without seriously considering whether he is, in fact, the father.[233] As a result, one would be inclined to ask: does the fact that a man voluntarily acknowledged he was the father, and failed to rescind the acknowledgment within sixty days, mean that the biological father is relieved of all duties?[234] As the law stands now, the answer to this question is yes.[235] But, is this fair? Certainly, it will encourage a father to get a DNA test before voluntarily acknowledging parentage if he is unsure whether he is the father.[236] Yet, it seems as though the court should not be encouraging husbands to be suspicious of their wives, nor should courts be encouraging men to deny paternity until it is conclusively established.[237]

Consider a scenario where Louis wanted to bring an action to establish paternity with G.E.M.[238] It is arguable that he would not have standing to bring the action.[239] First of all, Renee did not misrepresent any facts.[240] She was candid with the three men that she was unsure who the father was, and, the fact that two different men were at the hospital when G.E.M. was born indicated they were aware of this fact.[241] Therefore, it is likely that Louis would not have standing to bring this action, even if he wanted to.[242] However, under the facts of this case, it is probably in the best interests of the child not to force the biological father to take part in the child's life, especially when there is a man who has willingly held himself out as the father.[243] Essentially, the court indicated that Renee cannot force Louis to

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230. *See In re* Parentage of G.E.M., 890 N.E.2d 944, 949-51 (Ill. App. Ct. 3d. Dist. 2008).
231. 750 ILL. COMP. STAT. 45/5(b) (2012).
232. *See id.*
233. *See id.*
234. *See id.*
235. *Id.*
236. 750 ILL. COMP. STAT. 45/5(b) (2012).
237. *See id.*
238. *But see In re* Parentage of G.E.M., 890 N.E.2d 944, 949-51 (Ill. App. Ct. 3d. Dist. 2008).
239. *Id.*
240. *Parentage of G.E.M.*, 890 N.E.2d at 949-50.
241. *Id.*
242. *See id.*
243. *See In re* Parentage of G.E.M., 890 N.E.2d 944, 949-51 (Ill. App. Ct. 3d. Dist. 2008).

submit to a DNA test.[244] This result might seem unfair to Richard with regard to child support, but it has not been conclusively established that Louis is the father.[245]

D. *IN RE CUSTODY OF C.C.*

In re Custody of C.C. poses another interesting problem because the biological father was aware of the child's existence, and he had some inclination that the child may have been his.[246] Additionally, the GAL recommended that all three parents be involved in the child's life.[247] In this case, a woman, Erica, had a sexual relationship with two men, David and Klay, and she subsequently became pregnant.[248] Initially, Erica told Klay he was probably the father of the unborn child.[249] However, Erica told Klay, one week later, that a doctor said it was "highly unlikely" he was the father of the child, and when C.C. was born in October 2007, David signed a voluntary acknowledgment of paternity and identified himself as the biological father.[250] Erica and David ended their relationship, and a trial court entered an order finding Erica and David to be C.C.'s parents.[251] Erica was awarded sole custody, and David was given visitation rights, subject to payment of child support.[252] In 2009, Erica and Klay began dating, and Klay again became suspicious that he was the biological father of C.C.[253] As a result, Klay brought a cause of action in June 2009, but it was dismissed.[254] Ultimately, Klay filed three pleadings in July 2009, attempting to gain rights to the child.[255] In the first pleading, Klay asserted Erica and David, fraudulently or due to a material mistake of fact, signed the voluntary acknowledgment of paternity.[256] In the second pleading, Klay petitioned the court to order a DNA test to prove he was the biological father of C.C., name Erica the residential parent with reasonable visitation given to Klay, and fix his child support obligations at twenty percent of his income.[257] In the third pleading, Klay requested the court vacate any order relating to David being

244. *Id.* at 955.
245. *Id.*
246. *In re* Custody of C.C., 1 N.E.3d 1238, 1241 (Ill. App. Ct. 3d Dist. 2013).
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *In re* Custody of C.C., 1 N.E.3d 1238, 1241 (Ill. App. Ct. 3d Dist. 2013).
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. *In re* Custody of C.C., 1 N.E.3d 1238, 1241 (Ill. App. Ct. 3d Dist. 2013).
257. *Id.*

C.C.'s father, because Erica did not contact Klay before David signed the voluntary acknowledgment of paternity, or before filing the paternity action against David.[258] Initially, the court denied Klay's petition to intervene because it found Klay knew that Erica was pregnant and because David was conclusively found to be C.C.'s parent.[259] However, since David's obligation to pay child support had been rescinded by the court once he and Erica moved in together and both contributed to C.C.'s care, Klay asked the court to reconsider his petition to intervene.[260] Subsequently, the court granted the petition, and Klay was allowed to proceed on his petition to establish the existence of a parent-child relationship.[261] The court ultimately received verification from a DNA test that Klay was the biological father of C.C.[262]

A GAL was appointed in this case to represent C.C.'s interests, and he recommended that all three parents be involved in the child's life for three reasons.[263] First, C.C., her mother, and David had developed a close relationship while they were living together.[264] Second, since David was the only father figure that three year old C.C. knew, he should continue to be involved in her life.[265] Third, since Klay truly cared for and desired to care for C.C., then he should have parental rights as her biological father.[266] The trial court issued an order finding the biological father of C.C. to be Klay, required Klay to pay child support, awarded bi-weekly visitation, but denied Klay's request to change C.C.'s last name.[267]

Klay requested his child support be downward deviated to ten percent instead of the statutorily required twenty percent because David was also C.C.'s legal father, and he also had an obligation to help Erica provide for C.C.[268] The court denied Klay's appeal because it was not filed within thirty days of the trial court's resolution of the final issue.[269] However, the court pointed out that it is unsure under current law, in a situation where a child has a legal and conclusively presumed father, whether a biological father could be forced to pay child support.[270] Additionally, the court indicated it was unclear whether Klay had standing to bring this cause of action.[271]

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258. *Id.*
259. *Id.*
260. *Id.*
261. *In re* Custody of C.C., 1 N.E.3d 1238, 1242 (Ill. App. Ct. 3d Dist. 2013).
262. *Id.* at 1243.
263. *Id.*
264. *Id.*
265. *Id.*
266. *In re* Custody of C.C., 1 N.E.3d 1238, 1243 (Ill. App. Ct. 3d Dist. 2013).
267. *Id.*
268. *Id.* at 1248.
269. *Id.* at 1247.
270. *Id.* at 1250.
271. *In re* Custody of C.C., 1 N.E.3d 1238, 1250 (Ill. App. Ct. 3d Dist. 2013).

Yet, one of the most interesting aspects of this decision is the dissent.[272] The dissent opines that once the trial court determined a parent-child relationship existed between Klay and C.C., the presumption that David was C.C.'s father was terminated.[273] Therefore, even though David never requested his parental rights be rescinded, an establishment of a parental relationship between Klay and C.C would have effectively terminated David's parental status.[274] The dissent cited other Illinois court decisions, such as *In re G.M.*, which stated, "Obviously, a declaration that one person is a child's father necessarily implies that all others are not the child's father."[275] However, the dissent also stated that this does not mean David cannot be involved in the child's life.[276] Rather, a best interest hearing should be conducted to determine whether David should have visitation with C.C.[277] So, even if David's rights were terminated, the dissent agrees that two men can have legal rights to visitation with a child.[278]

In re Custody of C.C. presents a special challenge when the proposed legislation is applied.[279] First, the biological mother's conduct must be a misrepresentation of material facts.[280] In this case, Erica was upfront with Klay about the fact that he could be the father of the unborn child.[281] However, a week later, she told Klay that a doctor said it was highly unlikely Klay was the father.[282] Therefore, the first criterion is not satisfied because even though Erica and the doctor were both wrong, Erica did not knowingly make a material misrepresentation and, for example, hide her pregnancy.[283] Should the court find there was a knowing material misrepresentation, though, neither the second nor third criterion are met.[284] The second criterion, which requires the mother be aware of the material misrepresentation of the facts, is not met because Erica reasonably relied upon her doctor's advice.[285] Additionally, the third criterion indicates the biological father has to be unaware that he is the potential father.[286] However, in this case, Klay

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272. *See id.* at 1251-57.
273. *C.C.*, 1 N.E.3d at 1256.
274. *Id.*
275. *In re* G.M., 977 N.E.2d 791, 794 (Ill. App. Ct. 2d Dist. 2012).
276. *C.C.*, 1 N.E.3d at 1256.
277. *Id.*
278. *See id.*
279. *See id.* at 1241-51.
280. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
281. *C.C.*, 1 N.E.3d at 1241.
282. *Id.*
283. *See Hinshaw*, 237 S.W.3d at 173; *C.C.*, 1 N.E.3d at 1241.
284. *See C.C.*, 1 N.E.3d at 1241.
285. *See id.*
286. *See Hinshaw*, 237 S.W.3d at 173.

knew he could be the biological father of C.C.[287] Therefore, although the doctor told Erica it was highly unlikely the father was Klay, he was not eliminated entirely as the biological father.[288] It cannot be said Klay was unaware that he could be the father of C.C., so the third criteria is not satisfied.[289] As a result, Erica did not know her concealment would be acted upon, and Klay did not rely upon Erica's concealment to his detriment, so the fourth and fifth criterion were not satisfied.[290] Therefore, in this case, the proposed legislation would actually produce the opposite result from the trial court's holding.[291]

However, this case does recognize one of the most fundamental issues with the equitable parent doctrine: How should child support be determined in a case where two men have legal visitation with a child?[292] According to 750 ILCS 5/505, if child support is being determined based on the existence of one child to be supported, twenty percent of the supporting party's net income shall be paid to the custodial parent.[293] The statute also indicates the court has discretion to follow the guideline, or it can deviate if it finds any relevant factor to support its decision.[294] So, should each father be responsible for ten percent of the statutorily required twenty percent?[295] Or, should other factors be considered?

VII. CHILD SUPPORT

This Comment will consider a case from Massachusetts to determine a solution to each father's responsibility with regard to child support.[296] Because this is a case of first impression in Illinois, outside sources must be considered.[297] In *Department of Revenue v. Ryan R.*, Susan was married to Sheldon.[298] Susan had an extramarital affair with a man named Ryan.[299] When Susan became pregnant, she informed Sheldon he was not the father, and she told Ryan he was the biological father of the child.[300] Ultimately, Sheldon signed a voluntary acknowledgment of paternity when the child

287. *C.C.*, 1 N.E.3d 1238.
288. *Id.*
289. *See Hinshaw*, 237 S.W.3d at 173; *C.C.*, 1 N.E.3d at 1241.
290. *See id.*
291. *See id.*
292. *See, e.g.*, *C.C.*, 1 N.E.3d 1238.
293. 750 ILL. COMP. STAT. 5/505 (2012).
294. *Id.*
295. *See id.*
296. Department of Revenue v. Ryan R., 816 N.E.2d 1020 (Mass. App. Ct. 2004).
297. *See Ryan R.*, 816 N.E.2d at 1022.
298. *Ryan R.*, 816 N.E.2d at 1022.
299. *Id.*
300. *Id.*

was born, but Ryan was not involved in the child's life.[301] The child suffered from a variety of ailments, and a great deal of stress was put on Susan and Sheldon's marriage, which eventually ended in divorce.[302] During the divorce proceedings, the court found that even though Sheldon was not the child's biological father, he was the only father the child knew, and because of this, Sheldon was the child's de facto parent.[303] Therefore, Sheldon was given reasonable visitation, in addition to a child support obligation of seventy-five dollars per week.[304] However, the court also indicated that the ordered child support was not in compliance with statutory guidelines, so Susan was entitled to additional child support from the biological father.[305]

On Susan's behalf, the Department of Revenue filed a complaint to establish that Ryan was the biological father of the child, in an effort to assist her in obtaining child support.[306] The Probate Court examined several factors before determining what child support Ryan would owe.[307] These factors include what alimony Susan was receiving, the other child support payment, and the fifteen thousand dollars annual income that was attributed to Susan.[308] After considering this, the Probate Court determined Ryan's yearly income was seventy thousand dollars, and based on that, he would owe Susan $285 per week in child support.[309] Further, he would be responsible for paying the child's medical expenses.[310] The court affirmed this judgment on review, holding that the Probate Court was correct in making this determination based on joint federal tax returns Ryan and his wife filed.[311] The court indicated that it would have also been appropriate for the Probate Court to consider whether Ryan's wife's salary made more of Ryan's income available to pay additional child support.[312] Ironically, although the judgment of this court meant Susan was receiving child support from two different men, only Sheldon was granted visitation rights.[313]Ryan's claims for custody and visitation were bifurcated from the

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301. *Id.*
302. *Id.*
303. Department of Revenue v. Ryan R., 816 N.E.2d 1020, 1022 (Mass. App. Ct. 2004).
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 1026.
308. Department of Revenue v. Ryan R., 816 N.E.2d 1020, 1026 (Mass. App. Ct. 2004).
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.* at 1027.
313. Department of Revenue v. Ryan R., 816 N.E.2d 1020, 1026 (Mass. App. Ct. 2004).

child support hearing, so although he paid child support, he was not given more legal rights to the child.[314]

The *Ryan R.* case is particularly relevant to the proposed legislation because it contemplates a fix for the child support obligation problem.[315] For example, reconsider *In re Custody of C.C.*[316] Had that case turned out differently, both Klay and David could have been responsible for child support for C.C.[317] However, Klay's proposition that each man pay ten percent of the statutory guideline will likely fail.[318] Rather, courts are more likely to follow the *Ryan R.* line of reasoning.[319] Arguably, justice is better served where, instead of splitting the child support payments down the middle, the payments are equitably determined, for example, based on the child's needs, what each parent has provided for the child during the child's lifetime, and each parents' income.[320]

VIII. CONCLUSION

For the foregoing reasons, the Illinois General Assembly should adopt the equitable parent doctrine, specifically to help biological fathers establish parentage if another man is presumed to be the child's father. Illinois courts have already recognized de facto adoption.[321] The *DeHart* court indicated where a contract to adopt does not exist, circumstantial evidence can support an equitable adoption.[322] Additionally, Illinois courts have indicated they are open to supporting de facto parentage.[323] The *Koelle* court awarded visitation to an unwed, non-biological father who held himself out as the child's father while the biological mother misrepresented the father's genetic ties because it was in the child's best interests.[324] Further, an Illinois court granted custody to a non-biological father because the child was born to his wife during their marriage, so there was a presumption he was the biological father.[325]

In determining what legislation to codify in Illinois, it is important to consider an array of statutes adopted in other jurisdictions to determine which will produce the most equitable result in the multitude of scenarios

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314. *Id.* at 1023 n.6.
315. *See id.* at 1022-26.
316. *In re* Custody of C.C., 1 N.E.3d 1238 (Ill. App. Ct. 3d Dist. 2013).
317. *See id.*
318. *See id.* at 1241.
319. *See Ryan R.*, 816 N.E.2d at 1020.
320. *See C.C.*, 1 N.E.3d at 1241; *Ryan R.*, 816 N.E.2d at 1022.
321. *See supra* Part IV.A.
322. DeHart v. DeHart, 986 N.E.2d 85, 103 (Ill. 2013).
323. *See supra* Part IV.B.
324. Koelle v. Zwiren, 672 N.E.2d 868, 872 (Ill. App. Ct. 1st. Dist. 1996).
325. *In re* Marriage of Roberts, 649 N.E.2d 1344, 1345 (Ill. App. Ct. 4th Dist. 1995).

that arise in family court. Due to its bright-line test and consideration of many factors, the Kentucky Supreme Court has established the best equitable parent doctrine.[326] Under this consideration, the court considers many factors, including: (1) misrepresentation or concealment of material facts; (2) estopped party is aware of the material facts; (3) the other party does not know about these material facts; (4) the estopped party acts expecting that his conduct will be acted upon; and (5) the other party changed positions to its detriment based on this conduct.[327]

The equitable parent doctrine should be adopted in Illinois because rather than blindly following the marital presumption, courts are forced to ask questions about the father, such as: Does he have a job? Can he support the child? What is his reputation in the community? Does he have an education?[328] Therefore, while courts are currently relying on factors that seemingly have nothing to do with the child's best interest, like which clinical psychologist testified better or who was married to the biological mother at the time the child was born, after the equitable parent doctrine is adopted, courts will be considering factors like the father's involvement in the child's life, the father's intent to act as a parent, and the best interests of the child.[329] Therefore, the equitable parent doctrine should be codified in Illinois, in order to promote the best interests of the child.

Although the nuclear family is no longer the standard in America, was Romney correct in saying America's families are collapsing?[330] Probably not. Families are certainly transforming, but instead of claiming they are collapsing, legislatures should be asking what they can do to ease the transition. The United States Supreme Court has stated, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[331] In an effort to protect all families, both traditional and nontraditional, the equitable parent doctrine should be adopted as a legislative fix in Illinois that will not burden the courts, will protect fathers' rights, and will provide a just solution for the new, traditional American family.

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326. *See* Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007).
327. *Id.*
328. *See id.*
329. *See In re* Parentage of J.W., 990 N.E.2d 698, 710-11 (Ill. 2013).
330. Crowley, *supra* note 1.
331. Moore v. East Cleveland, 431 U.S. 494, 503-04 (1977).