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### DE FACTO PARENTS AND THE UNFULFILLED PROMISE OF THE NEW ALI PRINCIPLES\*

JULIE SHAPIRO\*\*

In recent years, courts have faced repeatedly a question that is simultaneously simple and difficult: "Who is a parent?" Many cases and commentators have suggested ways to answer this question. This Essay focuses on the approach of the American Law Institute (ALI) in its recently released *Principles*.<sup>1</sup> The question is of particular importance to parents in "non-traditional" families.<sup>2</sup> Too often these parents have found the law unsympathetic to their positions and insensitive to the needs of their children. The ALI promises better treatment through

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\* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2 (Tentative Draft No. 3, pt. I, ALI, Mar. 20, 1998).

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 3, pt. I, ALI, Mar. 20, 1998) [hereinafter PRINCIPLES].

2. While the term is problematic, it is often used to identify families that diverge from the supposedly "traditional" composition of legal mother, legal father, and children. As discussed below, the "nontraditional" families of particular interest for purposes of this Essay are stepfamilies and lesbian and gay families.

legal recognition of "de facto parents."<sup>3</sup> But in the end, the ALI's promise is largely unfulfilled, as the definition of "de facto parent" likely will exclude most nontraditional parents from the benefits provided.

Before turning to particulars of the *Principles*, it is important to place the question in context. In social and cultural terms, it is usually easy to identify a child's parent or parents. Parents are the adults responsible for rearing a child. Parents get up in the night when the child cries. Parents, if they can, stay home from work when the child is sick. Parents meet with the teacher when a child is in trouble at school. Parents are always there. They are the ones on whom the child, and we, as a society, rely. Many of us realize that the people in question technically may be stepparents, adoptive parents, surrogate parents, or foster parents. Additionally, the social and cultural definition of "parent" establishes an ideal that few can live up to at all times. Nevertheless, socially and culturally, it is rarely difficult to tell who a child's parents are.<sup>4</sup> As with so many things in this world, we usually know a parent when we see one, even if we cannot articulate a precise working definition.<sup>5</sup>

So it is that most people can readily identify the parents of the children with whom their children play, based on those persons' actual relationships to the child in question. How many of these "parents" are recognized as such by the law? Probably most of them, but surely not all of them.

The problem, of course, is that the law relies on narrow and specific definitions in order to categorize people precisely. These legal categorizations are of critical importance in real life. The law utilizes dualistic categories, such as "parent" versus "nonparent"—which, in law, may be the same as "stranger"—to identify those who hold legally recognized and enforceable rights

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3. See *PRINCIPLES*, *supra* note 1, § 203(1)(b). While legal recognition for a de facto parent may appear to be an oxymoron, it is not. "De facto" is the opposite of "de jure" and is often understood to mean "in fact," as opposed to "in law." What the ALI draft provides, then, is legal recognition for a person who is a parent in fact, but not a parent in the eyes of the law.

4. There are instances in which it may be difficult to identify, even in social and cultural terms, a child's parents. For many people, surrogacy presents such a case. Is the child's mother the woman who gave birth to a child or the woman who contracted with someone else to do so?

5. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

or obligations and to separate them from those who have no rights or obligations.<sup>6</sup>

Traditionally, the law has recognized only “natural parents”<sup>7</sup> and “adoptive parents”<sup>8</sup> as legal parents.<sup>9</sup> Many other adults who are presently raising children—that is, many other “parents” in the common usage of the term—are not legally recognized as parents. They may take their children to school or to after-school sports, comfort their children when they are hurt or sick, attend doctor appointments and parent/teacher conferences, supervise homework, prepare and share food, and oversee discipline. Nevertheless, in the eyes of the law they are not parents. Consequently, they fall within a category typically assigned neither obligations nor rights.<sup>10</sup> While the law sometimes calls

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6. See Katherine Bartlett, *Rethinking Parenthood as an Exclusive Statute: The Need for Legal Alternatives When the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984). See also Ruthann Robson, *Third Parties and the Third Sex: Child Custody and Lesbian Legal Theory*, 26 CONN. L. REV. 1377 (1994).

7. The choice of the term “natural” is obviously problematic. Perhaps it once seemed clear and simple. The woman who gave birth to a child was “naturally” the mother of the child, and the law simply recognized what nature had decreed. The man who impregnated the woman was the natural father of the child, unless, of course, the woman was married to another man who might be conclusively presumed to be the father of the child without regard to biological connection. Although it might be difficult to identify the specific individual who was the natural father in a particular case, it was not difficult to describe the acts that lead to the recognition of parenthood. Further, every child must have two “natural” parents, one male and one female.

Modern reproductive technology and practice, including various forms of surrogacy and assisted insemination, have complicated matters. The “natural” father now might be the husband of the woman who is inseminated with another man’s sperm. And the “natural” mother might be the woman who donates genetic material, or it might be the woman who gave birth to the child (although she has no genetic link), or it might be neither of those two women and instead is the woman who contracted for the services of the first two women. Or perhaps it is two or even all three of these women. While not discussed here, the concept of parenthood has become complicated.

8. Adoptive parents are necessarily legal parents because they are essentially nonnatural parents who have completed whatever legal procedures are required to grant them recognition as legal parents.

9. Legal recognition as a parent brings with it both substantial obligations, such as the obligation to provide support, and significant rights, including the right to make decisions about the manner in which the child is raised.

10. In some instances, they are described as “strangers,” which is surely a triumph of form over substance and of considerable cost to the individuals at issue. See John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998).

individuals in the nonparent category "strangers"<sup>11</sup> or "legal strangers,"<sup>12</sup> this Essay uses "nonlegal parents" to refer to those social and cultural parents who are not legal parents.<sup>13</sup>

While the range of nonlegal parents is broad,<sup>14</sup> this Essay focuses on stepparents and lesbian and gay parents who are nonlegal parents.<sup>15</sup> Whatever their social roles as "parents," they are not generally recognized as parents in the eyes of the law. This lack of legal recognition can create serious problems for these parents and for their children.

Nonlegal stepparents and lesbian and gay nonlegal parents generally share a common dilemma. They are involved in raising a child with another adult who *is* the child's legal parent. A stepparent, by definition, is raising a child who is the legally recognized child of his or her spouse.<sup>16</sup> Similarly, lesbian and gay nonlegal parents are generally raising children who are the legal children, by virtue of birth or of adoption, of their lesbian and gay partners. In other words, nonlegal stepparents and lesbian and gay nonlegal parents are typically part of two-parent families that consist of one legal parent and one nonlegal parent.

In this regard, the situations of stepparents and lesbian and gay nonlegal parents are similar; however, important differences exist. In particular, stepparents usually are involved in raising a child who is a part of two separate households—that of the legal mother and that of the legal father—and who has at least three parents: legal mother, legal father, and stepparent. With stepparents, there is almost inevitably a third parent: the legal parent who is not the stepparent's spouse. In contrast, lesbian and gay nonlegal parents often raise children who are part of only one two-parent family. This Essay discusses the importance of this

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11. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991).

12. See Gregory, *supra* note 10.

13. See Julie Shapiro, *A Lesbian-Centered Critique of Second Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 n.27; see also Robson, *supra* note 6, at 1391-92.

14. Foster parents and surrogate parents may also be nonlegal parents, but their concerns are not the focus of this Essay.

15. Some stepparents have completed adoptions, in which case they become legal parents. Many lesbian and gay parents are biological parents and many others are adoptive parents. In either case, they are legal parents. Stepparents who have not completed adoptions and lesbian and gay parents not related to their children by birth or adoption are the nonlegal parents on which this Essay centers.

16. See, e.g., MO. ANN. STAT. § 453.015(4) (West 1999) (defining "stepparent" as "the spouse of a biological or adoptive parent").

difference later.

The absence of legally recognized parental status has dramatic consequences for nonlegal stepparents and nonlegal lesbian and gay parents. Some are apparent during the day-to-day lives of the families in which the nonlegal parents function. For example, a nonlegal parent cannot effectively sign various consent forms. However, the most significant consequences arise if the relationship between the nonlegal and the legal parent ends. If this occurs, and if the legal parent seeks to terminate the nonlegal parent's relationship with the child, the nonlegal parent may be forced to resort to court. In court, the nonlegal parent is at a tremendous disadvantage vis-a-vis the legal parent. In most instances, the nonlegal parent will not even have standing to seek custody unless he or she can show that the legal parent is an unfit custodian.<sup>17</sup> It is often difficult for a nonlegal parent to obtain visitation rights.<sup>18</sup>

The problem of the nonlegal parent's legal status has arisen with increasing frequency over the last twenty years.<sup>19</sup> For the most part, courts have been unwilling to expand the category of "parent" beyond those recognized as legal parents by virtue of a biological relationship with the child or through legal adoption of the child.<sup>20</sup> This unwillingness has led to decisions that have been widely criticized as failing to recognize the best interests of the particular children or the complexities of modern life.<sup>21</sup> The problem is a difficult one.

To justify a narrow and limited definition of "parent," courts and commentators have repeatedly invoked the doctrine of family privacy and the associated freedom of parents to raise

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17. This is a difficult showing. See PRINCIPLES, *supra* note 1, § 2.04 Reporter's Note to cmt. d at 61; see also Bartlett, *supra* note 6, at 1389.

18. See generally Gregory, *supra* note 10.

19. The problem has arisen in a variety of situations. It occurs when stepparents or lesbian or gay co-parents contest custody of a child. Generally speaking, those recognized as parents have superior rights and can readily defeat custody or visitation claims made by those who do not share the status of legal parent. In addition, surrogacy cases present this issue, forcing courts to decide who is the mother of a child borne by one woman but genetically related to another. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993).

20. See *id.*

21. See, e.g., Nancy Polikoff, *This Child Does Have Two Mothers*, 78 GEO. L.J. 459 (1990); Paula Ettelbrook, *Who Is a Parent?*, 10 N.Y.L. SCH. J. HUM. RTS. 513 (1993); Bartlett, *supra* note 6. But see Gregory, *supra* note 10.

their children as they see fit. Courts often cite landmark Supreme Court cases that recognize rights of parental autonomy and family privacy, such as *Meyer v. Nebraska*<sup>22</sup> and *Pierce v. Society of Sisters*,<sup>23</sup> in support of severely limiting the number and qualifications of those who can claim parental rights.<sup>24</sup>

The habitual reliance on established and deeply embedded doctrines such as family privacy and parental autonomy make legal change difficult. And there are strong policy arguments in favor of retaining a narrow legal definition of a parent.<sup>25</sup> In order to ensure a reasonable measure of parental autonomy in child-rearing decisions, the number of people who can legally contest parental decisionmaking must be limited. Thus, even commentators who have advanced broader definitions of "parent" seek to maintain limits on who can enter the category.<sup>26</sup>

It is against this background that the drafters of the *Principles* have acted. Perhaps not surprisingly, they have chosen a middle ground that expands the definition of parent but still employs a sharp limitation.<sup>27</sup> Because the *Principles* have not been adopted as law in any jurisdiction, one can only speculate about its actual function. But a review of the critical provisions relating to nonlegal parents suggests that the ALI's improvements are largely illusory. In practice, and perhaps by design, very few nonlegal parents will benefit from the expanded definition. Thus, the *Principles* in the end do little to address the dilemma of nonlegal parents.

Three related provisions of the *Principles* govern the rights of nonlegal parents. First, and most crucially, section 2.03 of the *Principles* creates a special sub-category of parent—the "de facto parent."<sup>28</sup> The *Principles* state, "unless otherwise specified,

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22. 262 U.S. 390 (1923).

23. 268 U.S. 510 (1925).

24. For a discussion of the Court's response, see sources cited note *supra* 21.

25. *Traxel v. Granville* is currently pending before the U.S. Supreme Court. While the facts of the case concern grandparent visitation, the statute at issue, Revised Code of Washington (RCW) section 16.10.040, permits "any person" to seek visitation at "any time." The Washington State Supreme Court held that this statute violates parental autonomy rights protected by the U.S. Constitution. In re Smith, 969 P.2d 21 (Wa. 1998).

26. See sources cited *supra* note 21.

27. See PRINCIPLES, *supra* note 1, § 2.03(1).

28. *Id.*

a parent is either a legal parent or a de facto parent.”<sup>29</sup> While this Essay considers this specific definition shortly, it is critical to note that de facto parents are necessarily nonlegal parents. And, “unless otherwise specified,” the *Principles* treat de facto—that is, nonlegal—parents and legal parents identically. Thus, the *Principles* recognize nonlegal parents as the legal equivalent of legal parents, at least where it is not “otherwise specified.”<sup>30</sup>

The second provision of importance to nonlegal parents is section 2.09 of the *Principles*.<sup>31</sup> This provision governs the allocation of custodial responsibility for children when their parents separate.<sup>32</sup> In this section, the *Principles* adopt an approximation scheme.<sup>33</sup> The time the child spends with each parent after the separation should approximate the amount of time that parent spent caring for the child before the parents’ separation.<sup>34</sup> Notably, section 2.09 speaks of “parents” rather than “legal parents,” which allows de facto parents as well as legal parents to share in post-separation custody of a child. Because section 2.09 does not specify differential treatment for legal parents and de facto parents, and because it speaks only of “parents,” it envisions a scheme in which legal and de facto parents will be treated identically under the law.<sup>35</sup>

Section 2.21 of the *Principles*, however, largely undercuts the equality of treatment promised by section 2.09.<sup>36</sup> This provision explicitly addresses “allocation of responsibility to persons other than legal parents” and limits the circumstances under which de facto parents can benefit from their inclusion in section

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29. *Id.* § 2.03(1).

30. *See, e.g., id.* § 2.10 (addressing the allocation of decisionmaking responsibility and presuming joint decisionmaking authority for *legal* parents as well as granting access to children’s records to *legal*, but not de facto, parents).

31. *Id.* § 2.09.

32. The *Principles* eschew the use of the terms “custody” and “visitation,” speaking instead of “allocation of custodial responsibility” and “allocation of decisionmaking authority.” *See* PRINCIPLES, *supra* note 1, § 2.09(1).

33. The first to advocate an approximate scheme was Elizabeth Scott. Elizabeth Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615 (1992).

34. *See* PRINCIPLES, *supra* note 1, § 2.09(1).

35. By contrast, section 2.10 of the *Principles*, which governs allocation of decisionmaking responsibility, incorporates provisions that favor legal parents over nonlegal parents. *See id.* § 2.10(2) (presumption in favor of joint decisionmaking for legal parents but not for de facto parents).

36. *Id.* § 2.21.



2.09. This Essay returns to the provisions of section 2.21 later.

Despite the limitations of section 2.21, the ALI scheme appears to be a major advance for nonlegal parents. To the extent that nonlegal parents are de facto parents, the *Principles* offer them recognition and standing to claim a continuing relationship with their child. It also provides them a measure of formal, if not real, equality.

A close examination of the definition of “de facto parent” contained in section 2.03 reveals, however, that very few nonlegal parents will be able to take advantage of the apparently generous scope of section 2.09.<sup>37</sup> The narrow definition in section 2.03 leaves the ALI’s promise for nonlegal parents largely unfulfilled.

### Section 2.03—The Definition of De Facto Parent

The key to understanding the ALI’s treatment of nonlegal parents lies in the analysis of section 2.03(1) of the *Principles*. This section sets forth a definition of parent that includes both legal and nonlegal parents.<sup>38</sup> Subsequent provisions grant “parents,” as defined in section 2.03(1), legal rights. Paradoxically,

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37. This is not an unintended consequence. The drafters of the ALI, concerned about issues of parental autonomy, deliberately drafted a narrow definition of de facto parent in order to limit the number of individuals who could qualify for consideration under section 2.09 of the *Principles*. See *id.* § 2.03(1).

38. That section states:

(1) Unless otherwise specified, a parent is either a legal parent or a de facto parent.

(a) A *legal parent* is an individual defined as a parent under other state law, on the basis of biological relationship, presumed biological relationship, legal adoption, or other recognized grounds.

(b) A *de facto parent* is an adult, not the child’s legal parent, who for a period that is significant in light of the child’s age, developmental level, and other circumstances

(i) has resided with the child, and

(ii) for reasons primarily other than financial compensation, and with the consent of a legal parent to the formation of a de facto parent relationship or as a result of a complete failure or inability of any legal parent to perform caretaking functions, regularly has performed

(i) a majority of the caretaking functions for the child, or

(ii) a share of caretaking functions at least as great as that of the parent with whom the child primarily has lived.

PRINCIPLES, *supra* note 1, § 2.03(1).

the ALI draft gives some nonlegal parents legally recognized parental rights and obligations, even though it does not make them legal parents.

The nonlegal parents who can take advantage of the provisions of the *Principles* are those who can satisfy the definition of de facto parents. According to section 2.03(1)(b) of the *Principles*, which sets forth the definition, a de facto parent must (1) be a nonlegal parent (2) "who for a period of time that is significant, given the child's age, developmental level, and other circumstances," (3) "has resided with the child for reasons primarily other than . . . compensation," (4) and who, "with the consent of a legal parent," (5) "regularly has performed . . . a majority of the caretaking functions for the child, or . . . a share of the caretaking functions at least as great as that of the parent with whom the child primarily has lived."<sup>39</sup>

The first four qualifications do little to exclude most nonlegal parents from the category of de facto parents. Most nonlegal parents in the categories on which this Essay focuses have played their role in a child's life for a significant period of time, have lived with the child, have acted for reasons other than financial compensation, and have acted with the consent of a legal parent. If they did not meet these criteria, we would not consider them "parents" in a social/cultural sense. The difficulty lies in the final requirement. An understanding of this difficulty requires an even closer examination of the definitional provisions.

Raising a child is, of course, an infinitely complex task that requires performance of a wide range of functions. These functions range from paying the mortgage or rent, to grocery shopping, laundry, and house cleaning, to stroking a tired child's hair. The *Principles* label the range of required tasks "parenting functions."<sup>40</sup> Parenting functions are "tasks that serve the needs of

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39. *Id.* § 2.03(1)(b).

40. See PRINCIPLES, *supra* note 1, § 2.03(7). That section states:

(7) Parenting functions are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined in Paragraph (6). Parenting functions also include functions that are not caretaking functions under Paragraph (6), including

(a) provision of economic support

(b) participation in decisionmaking regarding the child's welfare;

(c) maintenance or improvement of the family residence, home or furniture repair, home-improvement projects, yard work, and house cleaning;

the child.”<sup>41</sup>

The *Principles* identify a critical sub-category of tasks among parenting functions that are called “caretaking functions.” “Caretaking functions” are “tasks which involve interaction with the child or direct the interaction or care provided by another.”<sup>42</sup> These include feeding, bedtime and wake-up routines, discipline, arrangements for the child’s education, etc.<sup>43</sup> Notably, some parenting functions, such as provision of economic support, maintenance and improvement of the home, and financial planning, are *not* caretaking functions.<sup>44</sup>

The distinction between caretaking functions and parenting functions is critical because de facto parenthood is determined

(d) financial planning and organization, care repair and maintenance, food and clothing purchasing, cleaning and maintenance of clothing, and other tasks supporting the consumption and savings needs of the family; and

(e) other functions usually performed by a parent or guardian that are important to the child’s welfare and development.

*Id.*

41. *Id.*

42. *Id.* According to the definition, caretaking functions include

(a) feeding, bedtime and wake-up routines, care of the child when sick or hurt, bathing, grooming, personal hygiene, dressing, recreation and play, physical safety, transportation, and other functions that meet the daily physical needs of the child;

(b) direction of the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) discipline, instruction in manners, assignment and supervision of chores, and other tasks that attend to the child’s needs for behavioral control and self-restraint;

(d) arrangements for the child’s education, including remedial or special services appropriate to the child’s needs and interests, communication with teachers and counselors, and supervision of homework;

(e) the developmental and maintenance of appropriate interpersonal relationships with peers, siblings, and adults;

(f) arrangements for health care, including making appointments, communication with health-care providers, medical follow-up, and home health care;

(g) moral guidance; and

(h) arrangement of alternative care by a family member, baby-sitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision.

*Id.*

43. *See id.*

44. *See generally id.* (providing no such inclusion in the definition of “caretaking functions.”).

by the performance of *caretaking* rather than parenting functions. In order to be a de facto parent, a person must perform a share of the *caretaking* functions at least as great<sup>45</sup> as those performed by the parent with whom the child has primarily lived.<sup>46</sup>

This requirement will systematically and dramatically disadvantage many nonlegal parents. Egalitarian ideology notwithstanding, many households, especially those with children, still divide labor between a primary breadwinner and a primary homemaker.<sup>47</sup> For couples who employ this arrangement, the primary breadwinner will be unable to claim de facto parenthood. Although the overall work of running a household may be divided equally and the breadwinner may do an equal, or even greater, share of the *parenting* functions as well as a substantial portion of the *caretaking* tasks, she or he will not have performed a share of the *caretaking* functions at least as great as the primary homemaker. Thus, she or he will not qualify as a de facto parent and will not benefit from the section allocating custodial responsibility.<sup>48</sup>

The consequences that follow in the event of separation will be dramatic. It is not simply that she or he will be allotted less time with the child. The child's time, post-separation, is to be divided between *parents*. As used in the *Principles*, this means legal parents and de facto parents. If the breadwinner is not a legal parent and does not qualify as a de facto parent, then she

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45. *Id.* § 2.03(1)(b)(ii)(ii). Interestingly, the commentary to this provision states that "to be a de facto parent, the adult must have performed a *substantial share* of the caretaking functions for the child." *Id.* § 2.03 cmt. b(v) at 46 (emphasis added). As discussed below, there is a crucial difference between the standard presented in the model provisions and the standard presented in the commentary.

46. Section 2.03(1)(b)(ii) of the *Principles* specifies two routes to de facto parenthood. A person may perform either the majority of the caretaking functions, § 2.03(1)(b)(ii)(i), or a share at least as great as the parent with whom the child has primarily lived, § 2.03(1)(b)(ii)(ii). Any person who meets the standard set forth in (i) necessarily meets the standard in (ii). Therefore, practically speaking, any person who can satisfy (ii) will qualify as a de facto parent, and the discussion will be shaped accordingly.

47. The primary breadwinner may do a significant amount of household labor, and the primary homemaker may engage in significant amounts of paid labor outside the home. But powerful economic incentives lead many families to have one member be the primary income earner and another be primarily responsible for the home. The roles of parent and ideal worker are not easily merged. While "family friendly" employers may feature prominently in the media, they are hardly the rule.

48. See *PRINCIPLES*, *supra* note 1, § 2.09.

or he is not a parent in the ALI's meaning and will not be entitled to *any* share of custodial responsibility for the child. Indeed, under section 2.04, the nonlegal parent who fails to meet the de facto parent standard is not entitled to notice or to party status and does not have standing to initiate an action seeking contact with the child.<sup>49</sup>

Given the common gendered pattern of the division of labor and childcare, the de facto parent definition has the potential to exclude many, if not most, stepparents. While patterns may be changing, it is still common for men to play the role of primary breadwinner and women to play the role of primary caretaker. A stepfather who is a primary wage-earner will not qualify as a de facto parent because he will not perform a share of the caretaking functions at least as great as that performed by his wife, the child's legal mother. Thus, even if the child lives most of the time in the mother's and stepfather's home, the stepfather will fail the *Principles'* de facto parent test.<sup>50</sup>

A stepmother, even though she may care for the child the majority of the time the child is in her home (which is also the home of the legal father), may also fail to qualify as a de facto parent. If the child resides a majority of the time in the home of her or his legal mother, that mother may perform a greater share of the caretaking functions than the stepmother does. In this case, the stepmother will fail the de facto parent test.<sup>51</sup> This may be so even though the stepmother may perform a share of the caretaking function far greater than that of the father. While the father, who may perform no caretaking functions at all, will retain legal entitlement vis-a-vis the child, the stepmother will have no such claim.

Lesbian and gay parents face similar concerns with regard to the de facto parent definition. While lesbian and gay parents do not employ a division of labor based on gender, they nonetheless may mirror the common breadwinner/homemaker form, particularly in a family with children. The same economic pressures that lead heterosexual couples to divide labor into those two roles exert force on lesbian and gay couples. In cases where the breadwinner is also the legal parent, this would not create

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49. See *id.* § 2.04 ("Parties to an Action Under This Chapter").

50. See *id.* § 2.03(1)(b)(ii)(ii).

51. See *PRINCIPLES, supra* note 1, § 2.03(1)(b)(ii)(ii).

any problems because the homemaker would qualify as a de facto parent. In contrast, in families where the homemaker is the legal parent, the breadwinner will be left without legal recognition by virtue of the majority share requirement.<sup>52</sup> If the caretaker is the legal mother, she will be entitled to parental leave to care for her child, while the other parent will not. If she has given birth, she is able to nurse the child while the other mother is not. And the same economic forces that support a division of labor in the first place support the choice of the person producing less income as the person to become pregnant or adopt a child.<sup>53</sup>

While it may be appropriate to assign primary residential responsibility to the parent who has spent the most amount of time with a child and to allocate a child's time in the approximate proportion it has been spent in the past, that is not the issue here. Rather, the question is whether a parent who performs thirty percent of the caretaking functions and half of the parenting functions is entitled to participate in the proceedings regarding the child's future residence and to claim some continuing time with the child. Had the ALI drafters chosen the language of the commentary,<sup>54</sup> this parent would have an entitlement. Thirty percent most likely would constitute "a substantial share" of the caretaking function. But under the "at least as great a share" rule of the draft itself,<sup>55</sup> the nonlegal parent who does thirty, forty, or even forty-five percent of the caretaking functions as well as a majority of the parenting functions may be no more than a legal stranger.

The commentary to the *Principles* clarifies that this choice was influenced by the enduring concerns about family autonomy. The drafters intended that very few people will be able to claim de facto parent status.<sup>56</sup> Yet this narrow approach robs the

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52. Where one member of a lesbian couple gives birth to a child (thereby establishing legal parenthood), the same forces that might lead to a division of labor would tend to lead to the homemaker role being assigned to the biological mother.

53. Of course, these are not the only factors. Other considerations will come into play, including personal inclinations of the parties. Still, there may well be a greater tendency for the legal mother to stay at home.

54. See PRINCIPLES, *supra* note 1, § 2.03 cmt. b(v).

55. *Id.* § 2.03(1)(b)(ii)(ii).

56. See *id.* § 2.03 cmt. b at 40 ("To avoid unnecessary and inappropriate intrusion into the relationships between legal parents and their children, the definition of a de

de facto parent provision of much of its apparent utility. Were the language "a substantial share," would it allow neighbors and childcare workers to rush to court to claim custody? Given the other restrictions (that the care be provided for reasons other than monetary incentive),<sup>57</sup> this seems unlikely.

The remaining provision of importance to nonlegal parents is section 2.21. This provision restricts allocation of responsibility under section 2.09 to a de facto parent and restricts the court's ability to allocate primary custodial responsibility to a de facto parent.<sup>58</sup> It also permits a court to deny an allocation of responsibility to a de facto parent "if, in light of the number of other adults to be allocated responsibility, the allocation would be impractical."<sup>59</sup>

While these restrictions may be of limited practical importance, they undercut the promise of section 2.03 that de facto parents are equal to legal parents. Instead, de facto parents are parents until it is time to make some very difficult choices.<sup>60</sup> When that happens, under the *Principles*, de facto parents will inevitably lose out to those who can claim legal recognition of parenthood.

In some important respects, the *Principles* are a step forward for nonlegal parents. At the same time, this step, as are perhaps most steps in the law, is a small step, one that will leave many problems unresolved.

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facto parent is a narrow one that few individuals who are not legal parents will be able to satisfy.").

57. See *id.* § 2.03(1)(b)(ii).

58. PRINCIPLES, *supra* note 1, § 2.21(1)(a). That section states:

(a) [The court] should allocate primary custodial responsibility to a de facto parent over the objection of a legal parent who is fit and willing to assume primary custodial responsibility only if

(i) the legal parent has not been performing a reasonable share of parenting functions, as defined in § 2.03(7), or

(ii) the alternative would be harmful to the child . . . .

59. *Id.* § 2.21(1)(b).

60. Section 2.21 of the *Principles* also makes it clear that persons who are neither legal parents nor de facto parents should not be allocated responsibility for a child unless they are grandparents and meet certain other qualifications. Thus, a nonlegal parent who fails to qualify as a de facto parent should not be allocated responsibility. *Id.* § 2.21(2)(a).