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Inadvertent Resurrection of the Equitable Parentage Doctrine in Missouri? An Evaluation of Motions for Third Party Custody and Defining a "Natural Father"

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NOTE

Inadvertent Resurrection of the Equitable Parentage Doctrine in Missouri? An Evaluation of Motions for Third Party Custody and Defining a "Natural Father"

Bowers v. Bowers, 543 S.W.3d 608 (Mo. 2018) (en banc)

Bailey M. Schamel[*]

I. INTRODUCTION

One of the fundamental tenets of family law is that parents have constitutionally protected rights to their children.[1] The oldest protected fundamental right for parents is that of care, custody, and control of their own children.[2] Despite this parental right being established and unquestioned, courts are making surprising decisions as the rise in non-marital childbearing and non-traditional families muddles the question of which adults are best vested with legal rights to children.[3]

This Note discusses the 2018 Supreme Court of Missouri decision of *Bowers v. Bowers*, which awarded full custody of a child to her stepfather.[4] The facts in *Bowers* are discussed in Part II. Part III analyzes the Missouri Uniform Parentage Act and the approaches the Supreme Court of Missouri and Missouri appellate courts have taken when a child's non-biological parent seeks full custody. Part IV explains the Supreme Court of Missouri's rationale in granting full custody to the stepfather through a motion for third party custody and the dissent's disagreement. Finally, Part V discusses why the *Bowers* court should not have awarded the stepparent custody as a third party and instead should have considered the stepparent to be the "natural father." Part V

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1. Joanna L. Grossman, *Constitutional Parentage*, 32 CONST. COMMENT. 307, 309 (2017).

2. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

3. *See* Grossman, *supra* note 1, at 307.

4. Bowers v. Bowers, 543 S.W.3d 608 (Mo. 2018) (en banc).

explores the consequences the decision to award third party custody in this instance could entail.

II. FACTS AND HOLDING

This case arises out of a divorce between the birth mother of a child and the man she married, who has no biological relation to the child, and the custody battle over the child that ensued.[5] In May of 2013, Jason Bowers filed for divorce from Jessica Bowers as well as for Determination of Physical and Legal Custody and for Order of Child Support.[6] Jason alleged that J.B. was "born of the marriage," which means he and Jessica were J.B.'s legal parents, and asked for joint legal and physical custody of J.B. with Jessica.[7] Jessica filed two pleadings in response, denying the allegation that J.B. was "born of the marriage" and claiming she was born prior to the marriage; however, she designated Jason as the "legal father" of J.B., which put him on equal legal footing as Jessica, and asked for sole legal and physical custody[8] of J.B. with rights of visitation to Jason.[9]

Jason and Jessica Bower's romantic relationship began in October of 2007, and it is undisputed that Jessica was pregnant with a child conceived with a different man named Stephen Nugent when the relationship with Jason began.[10] It was agreed during Jessica's pregnancy that Jason, rather than Stephen, should be the father of J.B.[11] Stephen agreed to this decision and voluntarily permitted Jason to act as J.B.'s father.[12]

Jason attended prenatal medical appointments with Jessica and was present in the delivery room when she gave birth to J.B. on April 28, 2008.[13] Shortly after J.B. was born, Jessica and Jason executed a Missouri Affidavit Acknowledging Paternity ("Acknowledgement").[14] This resulted in the State of Missouri issuing a birth certificate naming Jason as the "father" of J.B.[15] In

5. Bowers v. Bowers, No. ED 103176, 2017 WL 2822506, at *1–2 (Mo. Ct. App. June 30, 2017), *transferred en banc to* 543 S.W.3d 608 (Mo. 2018).

6. *Id.* at *2.

7. *Id.*

8. When a parent has sole custody, he or she has exclusive physical (i.e., the child lives with them) and legal (i.e., the "the right and responsibility to make major decisions regarding the child's welfare, including matters of education, medical care and emotional, moral and religious development") custody rights concerning the child. The other parent has visitation rights and can visit with the child. *See Sole Custody*, FINDLAW, http://family.findlaw.com/child-custody/sole-custody.html (last visited May 29, 2018).

9. *Bowers*, 2017 WL 2822506, at *2.

10. *Id.* at *1.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

April of 2010, about two years after J.B.'s birth, Jason and Jessica got married.[16] Jessica, Jason, and J.B. resided together as a family until Jason and Jessica split in August of 2012.[17] Throughout J.B.'s life, Jason had fulfilled the role of J.B.'s father. He taught her how to walk and how to ride a bike, attended her medical appointments, and provided financial support.[18] During the first five years of J.B.'s life, she did not have any contact or interaction with Stephen, nor did Stephen provide any financial support for J.B.[19] Stephen also had a tendency to leave children he fathered with other women and was not involved in providing emotional or financial support for his children, even the child involved in this custody dispute.[20]

In January of 2014, Stephen Nugent filed a Motion to Intervene and a Third Party Respondent's Petition for Determination of Father-Child Relationship and Order of Custody ("Motion to Intervene").[21] Stephen sought to establish his paternity rights and an award of joint legal and physical custody of J.B., pursuant to the Missouri Uniform Parentage Act.[22] Genetic testing was performed, and it was determined there was a 99.9% probability Stephen was the biological father of J.B.[23] As a result, Jessica filed a motion to dismiss Jason's request for custody and support; Jason then filed an Alternative Motion for Third Party Custody pursuant to Missouri Revised Statutes section 452.375.5(5), seeking sole legal and physical custody of J.B.[24]

The trial court held that Stephen was unfit, unsuitable, and unable to have custody of J.B.[25] The court also found Jessica's contravention of numerous court orders demonstrated she was unlikely to obey future court orders requiring her to allow J.B. to have meaningful contact with Jason.[26] Jessica and Jason's inability to co-parent rendered joint custody impossible, and the court awarded sole legal and physical custody of J.B. to Jason as a third party custodian, with rights of visitation to Jessica and no rights to Stephen (although the court did order J.B.'s birth certificate to be amended to show Stephen, not Jason, as the father).[27] Jessica appealed this decision, claiming the finding that she was unfit or unsuitable to have custody was not based on sufficient evidence and that granting Jason sole legal and physical custody through a third party motion was inappropriate because he was already a party to the dissolution proceeding.[28]

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *17.
21. *Id.* at *2.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*

The Missouri Court of Appeals, Eastern District, agreed with the trial court's decision.[29] The court held Jessica's disregard of J.B.'s medical needs and inability to follow court orders, in addition to other evidence, constituted sufficient indication of her inability to co-parent and supported the trial court's finding that she was unfit or unsuitable to have custody.[30] Additionally, the court held that awarding Jason sole legal and physical custody as a third party custodian was appropriate, despite his current party status in the dissolution proceeding, because all matters regarding custody or visitation of J.B., including paternity determinations, were heard in the same proceeding and all interested parties were given a full and fair opportunity to present evidence and to be heard by the trial court.[31] The dissent in the Missouri Court of Appeals, Eastern District, case disagreed with how custody was awarded to Jason.[32] Judge Lisa P. Page wrote the dissent and concurred in the decision granting Jason sole legal and physical custody but disagreed with the fact that it was granted with a third party custodian motion and argued that Jason – not Stephen – was J.B.'s "natural father."[33] The dissenting opinion began by assuming the majority opinion was correct in finding Jason was a third party and analyzed the holding as if Stephen were the natural father of J.B.[34] Even if this were the case, the dissent argued third party custody was wholly inappropriate.[35] Judge Page cited *D.S.K. ex rel. J.J.K.* and stated the custody of J.B. could not procedurally be decided within the dissolution of Jessica and Jason if Stephen is J.B.'s natural father.[36] Accordingly, the dissent believed the proceedings in which Jason's claim might possibly have correctly been adjudicated were within Stephen's paternity action or independent cause of action.[37] However, even though the majority held Jason's motion for third party custody was correct procedurally, the dissent still raised substantive issues.[38]

Despite this confusion regarding the procedural requirements, the dissent argued the substantive law governing the adjudication of third party custody was not confusing.[39] The dissent argued that in order for a third party to be granted custody, according to Missouri common law, the third party needs to show that both parents are unfit *or* the welfare of the child requires and it is in

29. *Id.*
30. *Id.* at *3–4.
31. *Id.* at *4.
32. *Id.* at *5 (Page, J., dissenting).
33. *Id*
34. *Id.*
35. *Id*.
36. *Id*. (citing D.S.K. *ex rel*. J.J.K., 428 S.W.3d 655, 659 (Mo. Ct. App. 2013) ("[T]he court does not have the authority in a dissolution proceeding to determine the custody of children not born of the marriage or adopted by the parties.")).
37. *Id.*
38. *Id.*
39. *Id.*

the best interest of the child for the petitioner to be the custodian of the child.[40] The dissent agreed with Stephen's unfitness but argued that the trial court's determination of Jessica as unfit was tied to her inability to co-parent with Jason.[41] After determining that Jessica was unfit, the trial court awarded Jessica physical custody five of fourteen nights, so the dissent argued she was apparently not an unfit parent outside her inability to co-parent with Jason.[42] After disagreeing with the trial court's holding of Jessica as unfit, the dissent also argued that affirming this award pursuant to the third-party provision in section 453.375.5(5) based on the "welfare of the child" was wholly inappropriate because in the few cases where trial courts have divested a biological parent of custodial rights premised upon the "welfare of the child," the facts are much more egregious than in the Bowers' case, and custody in those cases is often awarded to a biological relative, not a former stepparent.[43] The dissent cited both *Giesler v. Giesler* and *K.S.H. ex rel. M.S.H. v. C.K.* in support of this statement.[44] The dissent believed that an award of third party custody should not be premised on a natural parent and former stepparent's inability to get along.[45]

The dissent stated that a Missouri requirement for awarding third party custody is the unfitness of *both* parents.[46] Jessica was not unfit because her conduct, while reprehensible, was not comparable to the cases in which Missouri has awarded third party custody like *Giesler* and *K.S.H.*, and Jason should not be awarded third party custody, assuming Stephen is the natural father.[47] Jason did not provide enough evidence to rebut the presumption of fitness of Jessica as a parent.[48] By granting third party custody to Jason, the dissent argued the majority opinion inadvertently resurrected the concept of "equitable parentage," which the Supreme Court of Missouri rejected.[49]

The dissent further stated the majority avoided the question of law as to whether Jason could actually be designated as a third party and either (1) presupposed the designation was appropriate as a matter of law or (2) conflated three possible separate causes of action – dissolutions, paternity, and an independent third party custody petition – and failed to clarify to which action Jason

40. *Id*. (citing Jones v. Jones, 10 S.W.3d 528, 535 (Mo. Ct. App. 1999)); *see also* MO. REV. STAT. § 452.375.5 (Cum. Supp. 2017).

41. *Bowers*, 2017 WL 2822506, at *5 (Page, J., dissenting).

42. *Id.* at *6.

43. *Id.*

44. *Id.* (citing Giesler v. Giesler, 800 S.W.2d 59 (Mo. Ct. App. 1990) (affirming third party custodial rights to aunt and uncle of children); K.S.H. *ex rel*. M.S.H. v. C.K., 355 S.W.3d 515 (Mo. Ct. App. 2011) (affirming third party custody because there was evidence of abuse)).

45. *Id.*

46. *Id.* at *7.

47. *Id.*

48. *Id.*

49. *Id.*

was a third party.[50] This affirmation of the third party custody award did not address the point on appeal and inappropriately focused on procedural issues, rather than substantive issues, and the dissent stated it was inappropriate to designate Jason as a third party as he should be considered J.B.'s "natural father."[51]

The dissent based its opinion that Jason should be considered the "natural father" on statutory interpretation of four statutes: sections 210.834.4, 210.823, 210.822.1, and 210.822.2 of the Missouri Uniform Parentage Act.[52] It initially seemed problematic that section 210.834.4 states whenever the blood tests show a person presumed or alleged to be the father of a child is not the father of a child, it is conclusive of non-paternity.[53] However, the dissent argued that even though in most cases Stephen's genetic test results would guarantee him the ability to rebut by clear and convincing evidence all other "presumed natural fathers," that was not true in this case.[54] The dissent argued this is because the execution of an Acknowledgment of Paternity seven years before Stephen's cause of action constituted a legal finding of paternity and established Jason as J.B.'s natural father.[55]

The dissent argued that this is a matter of statutory interpretation and quoted a Missouri case that stated, "[W]e presume that the legislature did not insert superfluous language or idle verbiage in a statute."[56] Therefore, the dissent argued that because these two statutes both create legal findings of paternity, the court was required to move to the second step of section 210.822.2 and resolve the conflict of presumed fatherhood between Jason and Stephen.[57] The dissent argued that sections 210.832 and 210.822.2 provided a basis for Jason to be considered the "natural father" because the Paternity Acknowledgment affidavit resulted in Jason's name being listed on J.B.'s birth certificate.[58] This Acknowledgement creates conflicting presumptions of who the "natural father" is between Jason and Stephen, and the dissent believed it should be resolved in Jason's favor using the "weightier considerations of policy and logic."[59]

The dissent believed determining whom the trial court should select as the father based on "weightier considerations of policy and logic" between a man who is the biological father of a child and a man who has successfully completed an Acknowledgement of Paternity for the same child was an issue

50. *Id.* at *9.

51. *Id.*

52. *Id.* at *13–16.

53. *See id.* at *16; *see also* MO. REV. STAT. § 210.834.4 (2016).

54. *Bowers*, 2017 WL 2822506, at *16 (Page, J., dissenting).

55. *Id.*

56. *Id*. (quoting Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126, 130 (Mo. Ct. App. 2007)).

57. *Id.*

58. *Id.*

59. *Id.* at *17.

of first impression in Missouri courts and the court was without guidance.[60] The dissent examined cases from other jurisdictions and found that the Wyoming Supreme Court interpreted the standard of "weightier considerations of policy and logic" to allow courts to consider both the sociological and psychological consequences of its decision as to which man should be considered the natural father.[61] Other states, like Colorado and California, also allow for fact-intensive inquiries and consider the child's well-being.[62] According to the dissent, based upon the decisions of other states, Stephen's inability to present any evidence as to why he should prevail in consideration of policy and logic, and Jason's consistent presence in J.B.'s life as well as J.B's attachment to Jason, Jason should be deemed the "natural father" of J.B.[63]

Lastly, the dissent discussed its agreement with the trial court in awarding Jason sole physical and legal custody of J.B. with visitation rights to Jessica.[64] The dissent's support of this decision was based on the determination that J.B. is a "child of the marriage" because of the execution of the Paternity Acknowledgment and the subsequent marriage.[65] Because Jason, in the dissent's mind, was considered the "natural father" of J.B., the trial court's award of full custody to him over Jessica was not against the great weight of the evidence, and deference to the trial court's decision would be appropriate.[66]

The Supreme Court of Missouri affirmed the trial court and the appeals court, holding the trial court correctly designated Jason "a third-party solely for the purpose of determining custody" and determined awarding custody to Jason as a third-party "was not against the weight of the evidence."[67]

III. LEGAL BACKGROUND

Two important areas of Missouri law inform the analysis of the *Bowers* decision: the "equitable parentage" doctrine in relation to awards for third party custody and the Missouri Uniform Parentage Act ("MoUPA").

A. "Equitable Parentage" Doctrine and Awards for Third Party Custody

Because the ideas of past awards for third party custody and the equitable parentage doctrine are so interrelated, they are discussed together below.

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60. *Id.*

61. *Id.* (citing GDK v. State, Dep't of Family Servs., 92 P.3d 834, 839 (Wyo. 2004)).

62. *Id.* (citing N.A.H. v. S.L.S., 9 P.3d 354, 362 (Colo. 2000) (en banc); Craig L. v. Sandy S., 22 Cal. Rptr. 3d 606 (Cal. Ct. App. 2004)).

63. *Id.* at *18.

64. *Id.*

65. *Id.*

66. *Id.* at *20.

67. Bowers v. Bowers, 543 S.W.3d 608, 615, 617 (Mo. 2018) (en banc).

1. Past Awards for and Against Third Party Custody in Missouri

Section 452.375.5 of the Missouri statutory code describes the situations in which third party custody may be awarded.[68] The statute provides two grounds for which third party custody, temporary custody, or visitation may be granted: 1) when the court finds that the welfare of a child requires third party custody and such custody is in the best interest of the child, or 2) when the court finds that each parent is unfit, unsuitable, or unable to be a custodian.[69] In addition, the courts must find the third parties "to be suitable and able to provide an adequate and stable environment for the child."[70] The following cases have interpreted parental fitness and the situations in which the welfare of the child requires an award of third party custody.

The Missouri Court of Appeals, Eastern District, affirmed the trial court's award of third party custody to the children's paternal aunt and uncle in *Giesler*.[71] In *Giesler*, the father was absent, and the court concluded the mother "was unable to cope with the demands of parenthood."[72] The mother failed to take the children to school, failed to pick them up from school, failed to demonstrate any interest in the children's school progress, failed to timely obtain the children's immunizations, failed to obtain child-care for the children while she was at work, and failed to provide a stable home.[73] The evidence also indicated that the mother moved into the home of her boyfriend while still married and that the boyfriend directed vile language toward the children and physically abused the mother.[74] The aunt and uncle were granted custody as third parties because the court determined they were best suited to care for the child.[75]

The Missouri Court of Appeals, Southern District, affirmed the trial court's grant of third party custody in *K.S.H.* in 2011.[76] In this case, custody was awarded to the child's grandmother rather than to the natural parents because "there was evidence of physical abuse, emotional abuse, a chaotic home environment, neglect of health needs, the lack of a healthy parent-child relationship, emotional manipulation, and consistent poor judgment by [the m]other."[77] A school nurse noticed bruises and red welts on the child's arms and made a hotline call to Family Services.[78] The living situation was unsafe for the child, and the court awarded custody to the grandmother because the welfare of the child required it.[79]

68. MO. REV. STAT. § 452.375.5 (Cum. Supp. 2017).
69. *Id.*
70. *Id.* § 452.375.5(5)(a).
71. Giesler v. Giesler, 800 S.W.2d 59, 60 (Mo. Ct. App. 1990).
72. *Id.*
73. *Id.* at 60–61.
74. *Id.* at 61.
75. *Id.* at 62.
76. K.S.H. *ex rel*. M.S.H. v. C.K., 355 S.W.3d 515, 516 (Mo. Ct. App. 2011).
77. *Id.* at 521.
78. *Id.* at 517.
79. *Id.* at 521.

Alternatively, Missouri courts have rejected third party custody, albeit in earlier cases. A Missouri court has held section 452.375.5, the statute that governs motions for third party custody, "creat[es] a rebuttable presumption that parents are fit, suitable, and able custodians of their children and that their welfare is best served by awarding their custody to their parents."[80] The Missouri Court of Appeals, Southern District, reversed the trial court's ruling in *In re Marriage of Horinek* in 2001.[81] In *Horinek*, the court reversed an award of third party custody to paternal grandparents because they failed to sufficiently rebut this presumption of fitness of the child's mother.[82] The trial court cited several reasons for finding the mother unfit, including: the mother's proposal to remove the child to Florida and leave the child in the care of the maternal grandmother a majority of the time while the mother went to school, the fact that the mother's proposed move would sever the child's relationship with her father and father's family, the mother's lack of maturity, the child's strong relationship with the paternal grandparents, and the fact that the child's primary home was the residence of the paternal grandparents.[83] The court also cited that the mother received a discharge from the Navy based on a personality disorder, that she frequently lied to health providers, and that she may have attempted to commit suicide.[84] The trial court noted a history of domestic violence between the parents but found no substantial evidence that this abuse involved the child.[85]

The Missouri Court of Appeals, Southern District, stated that while the mother had made many mistakes in her young life – including smoking marijuana three times, snorting methamphetamine twice, and drinking beer while pregnant – the mother's mistakes seemed directly tied to the father.[86] The mother claimed she never used drugs prior to moving to Missouri with the father.[87] The father had a history of violence with the mother, and the two had several arguments and at least two physical altercations.[88] The evidence also showed the father was much more involved in illegal drugs than was the mother.[89] However, the marriage was over and the mother then lived with the child's maternal grandmother in a stable, peaceful home.[90] The court overturned the trial court's decision and held the mother to be fit.[91]

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80. Flathers v. Flathers, 948 S.W.2d 463, 466 (Mo. Ct. App. 1997).
81. *In re* Marriage of Horinek, 41 S.W.3d 897, 908 (Mo. Ct. App. 2001).
82. *Id.* at 901, 908.
83. *Id.* at 903.
84. *Id.*
85. *Id.*
86. *Id.* at 904.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 908.

2. "Equitable Parentage" Doctrine

The equitable parentage doctrine awards custody to a "better" parent instead of the natural parent because that substitution is in the best interests of the children.[92] Additionally, the doctrine implies the third party, a non-parent, is equivalent to a natural parent and legally on equal footing.[93] This doctrine was expressly rejected by the Supreme Court of Missouri in the 1998 case *Cotton v. Wise*, a decision in which the court reversed an award of custody to the children's older sister instead of the father because Missouri's guardianship statute provided sufficient statutory protection over the interests of the children.[94] The guardianship statute states that guardianship may be granted in three situations: when the minor child has no living parent, when the parent or parents of a minor are "unwilling, unable, or . . . unfit" to be a guardian, or when the minor's parents have had their parental rights terminated.[95]

The *Cotton* trial court awarded the sister custody of the minor children even though the father had not been deemed unfit because placement with the father and elimination of contact with their older sister would have negatively affected the children's growth and development.[96] The Supreme Court of Missouri held that the trial court erred and stated the award of custody to the older sister "must be premised upon a finding that the natural parent is unfit, unable, or unwilling to care for his children."[97]

The court may consider several factors listed in a Missouri statute when determining the fitness of a parent, including but not limited to: any felony violations, any history of physical and mental abuse, the willingness to actively perform his or her functions as a parent for the needs of the child, and the interaction and interrelationship of the child with the parent.[98] What may not be considered, however, is whether the child would be "better off" with a third party.[99]

Missouri courts have continued to reject the equitable parentage doctrine. A recent example of this rejection is *In re L.M.*[100] The *In re L.M.* court reversed a grant of guardianship to the great-uncle and great-aunt of a child because "the determination of parental unfitness may not be made by comparing the relative merits of the parent with those of a third party seeking the guardianship over

92. Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. 1998) (en banc).
93. *Id.*
94. *Id.*
95. MO. REV. STAT. § 475.030 (2016).
96. *Cotton*, 977 S.W.2d at 264.
97. *Id.*
98. MO. REV. STAT. § 452.375 (Cum. Supp. 2017).
99. *See id.*; *see also Cotton*, 977 S.W.2d at 264–65.
100. *In re* L.M., 488 S.W.3d 210, 216 (Mo. Ct. App. 2016); *see also* C.L. v. M.T., 335 S.W.3d 19, 26 (Mo. Ct. App. 2011) ("[T]o the extent that the circuit court established a guardianship over the child . . . based solely upon the best interests of the child, it was in error.").

the child."[101] The Missouri Court of Appeals, Eastern District, reversed the trial court because it considered the best interests of the child in deciding custody between the father, great-uncle, and great-aunt before first determining whether the father was fit to have custody.[102] The trial court should have first determined whether the father was fit using the statutory considerations before awarding guardianship to a third party in light of the presumption the father was the child's appropriate custodian.[103] The court must focus on the parent's ability to provide for the child on his or her own – it cannot compare the merits of the parent to the third party.[104]

B. Missouri Uniform Parentage Act (MoUPA) and Other Relevant Statutes

Section 210 of the Missouri statutory code includes the MoUPA.[105] It was first enacted in 1987, encompassing sections 210.817 to 210.854, and its purpose "was to establish a uniform means for deciding paternity that would protect the rights of all parties involved, especially children."[106] This act has several provisions that are relevant to *Bowers*, including sections 210.834.4, 210.823, 210.822.1, and 210.822.2.

Section 210.834 generally covers the law of blood tests in regard to custody battles.[107] Specifically, section 210.834.4 states, "Whenever the court finds . . . the results of the blood tests show that a person presumed or alleged to be the father of the child is not the father of such child, such evidence shall be conclusive of nonpaternity and the court shall dismiss the action as to that party."[108] The plain language of this statute shows Missouri's tendency to favor the biological father in custody decisions in that a blood test indicating paternity trumps all other findings of fatherhood.[109] The Revised Uniform Parentage Act, promulgated by the Uniform Law Commission for states to use as a model, has replaced blood tests with genetic testing, but Missouri's Uniform Parentage Act does not reflect this replacement and relies strictly on blood tests.[110]

Section 210.823 details that an acknowledgement of paternity is considered a legal finding of paternity.[111] It states that a signed acknowledgment

101. *In re L.M.*, 488 S.W.3d at 216.
102. *Id.* at 216–17.
103. *Id.* at 217.
104. *See id.*
105. MO. REV. STAT. §§ 210.817–210.854 (2016).
106. State v. Dodd, 961 S.W.2d 865, 867 (Mo. Ct. App. 1998).
107. § 210.834.
108. *Id.* § 210.834.4.
109. *See id.*
110. *See generally* UNIFORM PARENTAGE ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).
111. MO. REV. STAT. § 210.823.1 (2016).

"shall be considered a legal finding of paternity subject to the right of either signatory to rescind the acknowledgment."[112] This rescission must be filed within the earlier of "sixty days from the date of the last signature" or "[t]he date of an administrative or judicial proceeding to establish a support order in which the signatory is a party."[113] The acknowledgment can be challenged in court on the basis of fraud, duress, or material mistake.[114] However, if the acknowledgement of paternity is unchallenged, a judicial or administrative proceeding is not required to ratify it.[115]

Sections 210.822.1 and 210.822.2 discuss when a man shall be presumed to be the natural father of a child and when that presumption can be rebutted.[116] Several classes of men are presumed to be the natural father, including men who "[a]n expert concludes that the blood tests show that the alleged parent is not excluded and that the probability of paternity is ninety-eight percent or higher."[117] Section 210.822.2 discusses that "[a] presumption pursuant to [section 210.822] may be rebutted in an appropriate action only by clear and convincing evidence."[118] It also provides that "[i]f two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls."[119] Missouri courts have held the correct analysis under section 210.822.2 is to first determine whether clear and convincing evidence rebuts the presumption that a presumed natural father is actually the natural father.[120] If the first step leaves more than one presumed natural father, the trial court then must determine which of the remaining presumed natural fathers is founded on the "weightier considerations of policy and logic."[121] The dissent in the Missouri Court of Appeals, Eastern District, opinion in *Bowers* claimed that these considerations were an issue of first impression for the court.[122]

The Missouri Court of Appeals, Western District, applied sections 210.832 and 210.822.2 in *Courtney v. Roggy*.[123] In *Roggy*, the six-year-old child over which custody was being determined was born during the husband and wife's marriage, and both the husband and the wife were named on the child's birth certificate.[124] The husband and wife were both aware the husband

112. *Id.*
113. *Id.*
114. *Id.* § 210.823.1(2).
115. *Id.*
116. MO. REV. STAT. §§ 210.822.1, 210.822.2 (2016).
117. *Id.* § 210.822.1.
118. *Id.* § 210.822.2.
119. *Id.*
120. Courtney v. Roggy, 302 S.W.3d 141, 146 (Mo. Ct. App. 2009).
121. *Id.*
122. Bowers v. Bowers, No. ED 103176, 2017 WL 2822506, at *9 (Mo. Ct. App. June 30, 2017) (Page, J., dissenting), *transferred en banc to* 543 S.W.3d 608 (Mo. 2018).
123. *Roggy*, 302 S.W.3d at 146–48.
124. *Id.* at 144.

was not the child's biological father.[125] While the husband and wife were still married, the biological father of the child filed an action to determine paternity and wanted to be declared the father of the child.[126] The biological father had several contacts with the child, including trips out of town and holidays.[127] The trial court granted the petition and determined that the biological father's blood test was clear and convincing evidence that rebutted the husband's presumption as the child's natural father.[128] The *Roggy* court did not touch the "weightier considerations of policy and logic" issue because no conflicting presumptions existed; the DNA test trumped all other findings of paternity.[129]

Another relevant statute to consider, which is not within the Uniform Parentage Act, is section 452.375 of Missouri's statutory code.[130] This statute provides information regarding the determination of custody within a dissolution of marriage and the relevant factors a court may consider when awarding custody of a child.[131] These factors include but are not limited to: the wishes of the child's parents, the need of the child for a meaningful relationship with both parents, the ability and willingness of the child's parents to perform their functions as parents for the needs of the child, which parent is going to allow the child contact with the other parent, and any history of abuse.[132]

IV. INSTANT DECISION

Judge George W. Draper wrote the majority opinion, holding that the evidence relied upon by the trial court supported the finding that Jessica was unfit to have custody of J.B. and that Jason was entitled to sole physical and legal custody advanced by his third party custody motion with visitation rights to Jessica.[133] Judge Zel M. Fischer concurred in the result but filed a separate opinion holding that Jessica's first point relied on, which argued the finding she was unfit was not supported by substantial evidence, preserved nothing for appellate review.[134] Judge Fischer's opinion, while important, is not relevant to the argument made by this Note and is therefore not discussed below – only Judge Draper's opinion is discussed.

The court first addressed the procedural issues and discussed Jessica's reliance on a Missouri Court of Appeals, Southern District, case entitled *In re Marriage of Said* to support her argument that "because Jason already was a

125. *Id.*
126. *Id.* at 145.
127. *Id.*
128. *Id.* at 146.
129. *Id.* at 145–47.
130. MO. REV. STAT. § 452.375 (Cum. Supp. 2017).
131. *Id.* § 452.375.2.
132. *Id.*
133. Bowers v. Bowers, 543 S.W.3d 608, 610, 616–17 (Mo. 2018) (en banc).
134. *Id.* at 617–18 (Fischer, C.J., concurring).

party to the dissolution, he. . .could not be designated as a third party for purposes of custody."[135] Jessica argued *In re Marriage of Said* supported her position because the Southern District dismissed a stepfather's claim of custody during a dissolution proceeding.[136] However, the majority stated Jason's motion for third-party custody was different from *In re Marriage of Said* because the Southern District's holding was limited to the "extraordinary facts" of the case.[137]

The majority held Jason's case was factually different in that Jason did not assert his position as the stepparent as a ground for custody, as the stepparent incorrectly did in *In re Marriage of Said*.[138] The majority also argued another factual difference was that Jason alleged both Jessica and Stephen were unfit to be J.B.'s custodians, something that was not done in *In re Marriage of Said*.[139] Additionally, the majority stated that the record showed after the dissolution was filed by Jason, "Jessica actively sought out Stephen" and encouraged him "to assert his paternity rights."[140] The record also showed Jessica helped Stephen get an attorney to file his claim for custody.[141] The majority stated that the court was "disinclined to grant Jessica relief based on error she actively invited" and found the trial court "did not err" when it designated Jason as a third party to determine custody.[142]

Next, the majority discussed Jessica's argument that the trial court's finding of her unfitness was in error.[143] The majority listed seven reasons that supported the trial court's finding, four of which were about her inability to coparent with Jason and her unwillingness to let Jason see the child.[144] The other three were: her disregard for J.B.'s medical needs, intending to remove J.B. from her current school, and placing her own interests ahead of J.B.'s.[145] While the majority recognized the presumption "that the best interest of a child is best served by vesting custody of the child with" a biological parent, it argued this presumption can be rebutted.[146] In order to rebut this presumption, a third party that seeks custody has to show that each parent is unfit or the welfare of the child requires third party custody.[147]

The court also noted that Jason is not just any third party, but rather his third-party claim "is being asserted by an individual . . . specifically invited by a biological parent to act as a parent of the [child] at issue, and in fact acted in

135. *Id.* at 613 (majority opinion).
136. *Id.* at 614.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 614–15.
142. *Id.* at 615.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 615–16.
147. *Id.* at 616.

that capacity for an extended period of time."[148] The majority stated that it would not reweigh the evidence, and it believed that Jessica did not present any evidence that demonstrated the circuit court's judgment was in error.[149] The majority also stated that while it was not required to find the child's welfare required the award of third-party custody, Jessica's intention to destroy the relationship between the child and Jason could support the trial court's finding that the welfare of J.B. required Jason to have custody.[150] The Supreme Court of Missouri affirmed the circuit court and the appellate court.[151]

V. COMMENT

The Supreme Court of Missouri's decision in this case operationally alters the standard for grants of third party custody in Missouri. The dissenting opinion of the Missouri Court of Appeals has the better legal analysis both procedurally and substantively in regard to the motion for third party custody and would have denied the motion and written a much deeper discussion on the substantive issues. The Supreme Court of Missouri's failure to follow the dissenting opinion of the Missouri Court of Appeals has inadvertently resurrected the "equitable parentage" doctrine. This Part concludes by discussing why Jason should have been considered the "natural father" and awarded custody or, in the alternative, Jessica should have been awarded custody.

A. The Supreme Court of Missouri's Misapplication of the Legal Standard for Third Party Custody Awards

Awarding custody of a child to the stepfather in this case through a motion for third custody is wholly inappropriate. While some confusion surrounds the procedural legal authority that governs awards of third party custody, it is clear that a child's custody cannot be decided within the proceedings for dissolution of marriage if both parties are not the natural parents.[152] Missouri courts have held that "the court does not have the authority in a dissolution proceeding to determine the custody of children not born of the marriage or adopted by the parties."[153] Although the procedural issues are important, this Note primarily focuses on the substantive issue in *Bowers* regarding third party custody motions, which is in stark contrast with Missouri law. In order to award third

148. *Id.* (quoting McGaw v. McGaw, 468 S.W.3d 435, 447–48 (Mo. Ct. App. 2015)) (alteration in original).

149. *Id.* at 616–17.

150. *Id.* at 617.

151. *Id.*

152. *See* D.S.K. *ex rel*. J.J.K. v. D.L.T., 428 S.W.3d 655, 659 (Mo. Ct. App. 2013); *see also In re* Marriage of Said, 26 S.W.3d 839, 843 (Mo. Ct. App. 2000) (stating a custody action was "foreign to the dissolution action" and that it should have been a "separate action" and not adjudicated in the dissolution proceeding).

153. *D.S.K*., 428 S.W.3d at 659.

party custody over the child's natural parents, Missouri law is clear that the third party must first show that *each* parent is unfit, unsuitable, or unable to be a custodian *or* that the welfare of the child requires third party custody *and* that it is the best interest of the child.[154]

The trial court and Supreme Court of Missouri's finding of Jessica's unfitness is focused almost solely on the hostility between herself and the child's former stepfather, Jason.[155] In particular, the Supreme Court of Missouri focused its finding of unfitness on Jessica's failure to follow court orders and her attempts to destroy the bond between the child and Jason.[156] While this behavior is reprehensible, this consideration is inappropriate.[157] Prior decisions focus the finding of a parent's unfitness in motions for third party custody on the parent's behavior alone and not on whether the parent will allow the third party to see the child.[158]

After finding her to be unfit, the trial court awarded Jessica five out of fourteen nights of physical custody.[159] The majority in the Missouri Court of Appeals seemed to confirm this contradictory finding, supporting its reasoning by quoting section 452.375.2 and stating that one of the relevant factors in determining parental fitness is "[w]hich parent is more likely to allow the child frequent, continuing, and meaningful contact with the other parent."[160] The Supreme Court of Missouri also seemed to confirm this contradictory finding by affirming the trial court.[161] However, under a third party motion for custody, Jason is not a *parent.* Jason is a third party and legally a non-parent. Outside of this inability to co-parent, the court did not mention another finding supporting the determination that Jessica was unfit, aside from her disregard of the child's medical needs, sometimes placing her own interests before the child's, and intending to remove the child from her current school.[162] While these issues are important considerations, it does not rise to the same level of conduct as the parents in the previous cases in which third party custody was awarded.

Section 452.375.5 includes the statutory requirements for third-party custody that have been read to "creat[e] a rebuttable presumption that parents are fit, suitable, and able custodians of their children and that their welfare is best

154. MO. REV. STAT. § 452.375.5(5)(a) (Cum. Supp. 2017).

155. *See Bowers*, 543 S.W.3d at 615.

156. *See id.*

157. *See* Cotton v. Wise, 977 S.W.2d 263, 264–65 (Mo. 1998) (en banc).

158. *See* Giesler v. Giesler, 800 S.W.2d 59 (Mo. Ct. App. 1990) (affirming third party custodial rights to aunt and uncle of children); *see also* K.S.H. *ex rel*. M.S.H. v. C.K., 355 S.W.3d 515 (Mo. Ct. App. 2011) (affirming third party custody because there was evidence of abuse).

159. Bowers v. Bowers, No. ED 103176, 2017 WL 2822506, at *6 (Mo. Ct. App. June 30, 2017) (Page, J., dissenting), *transferred en banc to* 543 S.W.3d 608 (Mo. 2018).

160. *Id*. at *3 (majority opinion) (quoting MO. REV. STAT. § 452.375.2 (2016)).

161. *See Bowers*, 543 S.W.3d at 616–17.

162. *See id.*

served by awarding their custody to their parents."[163] The inability to co-parent with a third party is arguably not enough evidence to overcome this presumption. In the few cases where Missouri courts have awarded custody to a third party over a biological parent, the behavior at issue is much more egregious.[164] In *Giesler*, third party custody rights were granted to the aunt and uncle of minor children because the father was absent and the mother did several things to show she could not cope with the demands of parenthood.[165] The mother failed to take the children to and from school, failed to timely obtain their immunizations, and lived with a physically abusive boyfriend who often caused discord in the custody matters between the parties.[166] In *K.S.H.*, custody of a child was granted to the grandmother because "there was evidence of physical abuse, emotional abuse, a chaotic home environment, neglect of health needs, the lack of a healthy parent-child relationship, emotional manipulation, and consistent poor judgment by [the m]other."[167]

No facts as weighty as those seen in *K.S.H.* and *Giesler* support the unfitness finding in this case. Jessica did not fail to take the child to school, and she did not expose the child to abuse. Instead, the court found her to be unfit mostly due to her potential to destroy the bond between the child and Jason. It should be reiterated that Jason is, in this case, a non-genetic parent.

The facts in *Bowers* more closely align with the facts in cases in which third party custody was denied. In *Horinek*, the court held an award of third party custody to the child's paternal grandparents was inappropriate despite the mother's illegal drug use and other problematic behavior because the behavior was tied to her ex-husband whom she would no longer have to parent with.[168] Simply removing Jason, the third party, from Jessica's and the child's life would eliminate the reasons for Jessica's unfitness. The court recognized this as a course of action in *Horinek*.[169] Jessica may not be the perfect parent; however, her actions do not rise to a level justifying an award of third party custody to Jason. While she seemingly does not want her child to have a relationship with Jason, she still provides for J.B., gives J.B. what she needs, and does not put J.B. in dangerous situations.[170] In ruling this way, the court has inadvertently resurrected the equitable parentage doctrine.

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163. Flathers v. Flathers, 948 S.W.2d 463, 466 (Mo. Ct. App. 1997).

164. *See Bowers*, 2017 WL 2822506, at *6 (Page, J., dissenting); *see also* Giesler v. Giesler, 800 S.W.2d 59 (Mo. Ct. App. 1990) (affirming third party custodial rights to aunt and uncle of children); K.S.H. *ex rel*. M.S.H. v. C.K., 355 S.W.3d 515 (Mo. Ct. App. 2011) (affirming third party custody because there was evidence of abuse).

165. *Giesler*, 800 S.W.2d at 60–61.

166. *Id.*

167. *K.S.H.*, 355 S.W.3d at 521.

168. *In re* Marriage of Horinek, 41 S.W.3d 897, 904 (Mo. Ct. App. 2001).

169. *Id.*

170. *See* Bowers v. Bowers, No. ED 103176, 2017 WL 2822506, at *6 (Mo. Ct. App. June 30, 2017) (Page., J., dissenting), *transferred en banc to* 543 S.W.3d 608 (Mo. 2018).

B. Resurrection of the "Equitable Parentage" Doctrine

Although the majority in the Missouri Court of Appeals explicitly denied addressing equitable parenting, its award of third party custody to Jason, and the Supreme Court of Missouri's affirmance, arguably resurrects the equitable parentage doctrine, which the Supreme Court of Missouri disavowed.[171] The equitable parentage doctrine, as described above,[172] awards custody to the "better" parent instead of the natural parent when that substitution seems to be in the best interests of the children.[173] Missouri courts have held "the determination of parental unfitness may not be made by comparing the relative merits of the parent with those of a third party seeking the guardianship over the child."[174] Guardianship and custody are similar concepts but differ slightly in the courts in which they are determined and the nature of the relationship between the child and the adult.[175] A guardianship is a court-ordered relationship where the adult makes decisions about aspects like the child's education.[176] A guardian can be appointed even when a biological parent has custody and provides care for the child.[177] However, an important similarity between guardianship and custody is that both statutes governing third party awards require a finding of unfitness of the parents before an award of custody to a third party.[178]

Bowers is factually similar to *Cotton*, in which an award of custody to the sister of minor children was reversed, despite the strong relationship between the children and their sister, because the award of custody "must be premised upon a finding that the natural parent is unfit, unable, or unwilling to care for his children."[179] While the Supreme Court of Missouri in *Bowers* claimed to have found Jessica unfit, this finding is insufficient and appears to be related to what the court believed is within the best interests of the child.[180] The thorough discussion in the Supreme Court of Missouri's opinion of the strong relationship between the child and Jason and the potential for significant harm if

171. *See id.* at *7; *see also* Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. 1998) (en banc).

172. *See* discussion *supra* at Part III.A.2.

173. *Cotton*, 977 S.W.2d at 264.

174. *In re* L.M., 488 S.W.3d 210, 216 (Mo. Ct. App. 2016).

175. *See generally Difference Between Custody and Guardianship*, 7TH JUD. CIR. CT., http://www.circuit7.net/familycourt/parentplan/custody-guardianship.aspx (last visited May 29, 2018).

176. *Id.*

177. *Id.*

178. *See id.*; *see also* MO. REV. STAT. § 475.030 (2016); MO. REV. STAT. § 452.375.5(5)(a) (Cum. Supp. 2017).

179. Cotton v. Wise, 977 S.W.2d 263, 264 (Mo. 1998) (en banc).

180. *See* Bowers v. Bowers, 543 S.W.3d 608, 616–17 (Mo. 2018) (en banc).

this relationship were destroyed underscores the relationship between this analysis and the court's holding.[181] The focus of Jessica's "unfitness" was on her potential to destroy J.B. and Jason's relationship.[182]

The Supreme Court of Missouri compared the relative merits of Jessica, the child's natural mother, with those of Jason, a third party, by discussing her unwillingness to co-parent with him.[183] Comparing the merits of a natural parent to a third party when determining fitness and putting a third party on equal footing with a natural parent has been expressly disallowed.[184] Finding Jessica as unfit should make no mention of comparing her abilities to that of a third party. The majority did this by emphasizing that Jessica attempted to eliminate Jason's role in J.B.'s life.[185] Without explicitly stating it, the Supreme Court of Missouri held that it is in the child's best interest to maintain a relationship with Jason, a third party and a non-parent, and put him on equal footing with Jessica, the child's natural mother. The Supreme Court of Missouri treated the child's relationship with Jason, who the court had ruled is a third party, as equally important to the child's relationship with the child's natural mother and therefore inadvertently resurrected the equitable parentage doctrine by extending the constitutional rights to a non-genetic parent third party. This could have unfortunate, unintended consequences, which are described below.

The court in *Bowers* did not follow legally-binding precedent, which is a grave legal error. The Supreme Court should have upheld its disallowance of the equitable parentage doctrine because enacting it could lead to dire consequences. Setting this precedent with such a low standard for motions for third party custody will likely open the floodgates and is easily subject to abuse. Stepparents will likely now file for third party custody during marriage dissolution proceedings in order to obtain unfair bargaining power over their spouses. This is especially troubling in domestic violence cases; an abusive husband whose abuse has not been revealed to the court and who is the stepfather of a child could easily exert control over the child's birth mother and gain custody. Additionally, parents are awarded certain constitutional rights; to extend these constitutional rights to every stepparent without specific justification seems inherently wrong. Because of this case, it is going to be easier for stepparents and other third parties to gain custody of a child, which is something Missouri has been and should be opposed to.

C. Awarding Custody to the Correct Person

In order to avoid the precedent set by awarding Jason third party custody, the Supreme Court of Missouri should have awarded him custody by ruling

181. *See id.* at 617.

182. *See id.*

183. *Id.* at 615–17.

184. *In re* L.M., 488 S.W.3d 210, 216 (Mo. Ct. App. 2016); *Cotton*, 977 S.W.2d at 264.

185. *See Bowers*, 543 S.W.3d at 617.

him to be the "natural father" of the child. Section 210.834.4 states that whenever the blood tests show a person presumed or alleged to be the father of a child is not the father of a child, it is conclusive of non-paternity.[186] Because Stephen's DNA test showed that he was the biological father, this seems to show that Stephen is, in fact, the natural father. However, Jason and Jessica executed an Acknowledgment of Paternity seven years before the blood test showed Stephen was the biological father.[187] Section 210.823 states that an Acknowledgment of Paternity constitutes a legal finding of paternity "subject to the right of either signatory to rescind the acknowledgment."[188] This legally established Jason as the child's "natural father," creating conflicting presumptions of natural fatherhood between Stephen and Jason, and the court is required to evaluate under section 210.822.2 which man should be presumed the natural father under "weightier considerations of policy and logic."[189] This is an issue of first impression for Missouri courts, but other states have allowed for the consideration of the child's best interests and the sociological and psychological effects of the decision.[190]

Stephen has not been in the child's life since birth and has had no contact with the child until he filed his motion to intervene.[191] He also had a tendency to leave children he fathered with other women and was not involved in providing emotional or financial support for his children, even the child involved in this custody dispute.[192] Jason, on the other hand, has been in the child's life since birth and raised the child.[193] He also provided financial support and is the only father the child has ever known.[194] It only makes sense to resolve the weightier considerations of policy and logic in his favor. If Jason were legally considered to be the "natural father" as he should have been through the execution of the Paternity Acknowledgement, the court's consideration of Jessica's inability to co-parent under section 452.375(2) would have been legally justified and the award of custody to Jason would have been appropriate.

Even if this argument is unsuccessful, the award of custody to Jason through the third-party motion was inappropriate because the finding of Jessica as unfit was based on the comparison of her actions to Jason's, instead of on her actions alone. If Jason is not considered the "natural father," Jessica should be awarded sole physical and legal custody.

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186. MO. REV. STAT. § 210.834.4 (2016).

187. *See Bowers*, 543 S.W.3d at 610.

188. MO. REV. STAT. § 210.823.1 (2016).

189. MO. REV. STAT. § 210.822.2 (2016).

190. *See, e.g.*, GDK v. State, Dep't of Family Servs., 92 P.3d 834, 839 (Wyo. 2004); N.A.H. v. S.L.S., 9 P.3d 354, 362 (Colo. 2000) (en banc).

191. Bowers v. Bowers, No. ED 103176, 2017 WL 2822506, at *17 (Mo. Ct. App. June 30, 2017) (Page, J., dissenting), *transferred en banc to* 543 S.W.3d 608.

192. *Id.*

193. *Id.* at *18.

194. *Id.*

VI. CONCLUSION

Parental rights are constitutionally protected.[195] Allotting these constitutional rights to non-parents of children without holding them to the correct standards could have dire consequences. In *Bowers*, the court dealt with a custody battle between a mother, a stepfather, and the child's biological father. The court incorrectly applied the standard for third party custody and, in doing so, inadvertently resurrected the equitable parentage doctrine, which has been expressly rejected by the Supreme Court of Missouri. The court improperly compared the merits of a parent and non-parent in this determination of custody.[196] The Supreme Court of Missouri should not have confirmed the award of third party custody to Jason and instead should have held Jason to be the child's "natural father." Because it did not do so, this decision could have unfortunate consequences on motions for third party custody in the state of Missouri and will likely affect parents' rights, the protection of which is vital to upholding constitutional rights – one of the fundamental purposes of courts in the United States.

195. Grossman, *supra* note 1, at 309.
196. *See id.*; *Bowers*, 543 S.W.3d at 615–17.